



The impact of the MAPUTO PROTOCOL  
in selected African states

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**Edited by**  
Susan Mutambasere  
Ashwanee Budoo-Scholtz  
Davina Murden

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**PULP**

This book assesses the impact and effectiveness of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 16 state parties. These countries are: Burkina Faso, Cameroon, Côte d'Ivoire, the Democratic Republic of Congo, Ethiopia, Eswatini, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, Tanzania, and Zimbabwe. Each of the chapters traces the impact that the Protocol has had on the policies, laws, court decisions, civil society activism, and legal education in the particular state. Each chapter also discusses the relationship of the state with the African human rights mechanisms.

The book is an update of two prior volumes of essays, titled *The impact of the African Charter and the Maputo Protocol in selected African states*, published by PULP in 2012 and 2016, and edited by the Centre for Human Rights, University of Pretoria (Centre) and Victor Ayeni, respectively. The third edition, focused more narrowly on the Maputo Protocol, appears as the continent marks 20 years since the adoption of the Protocol on 11 July 2003. By 11 July 2023, 54 out of 55 African Union member states (with the exception of Morocco) have become party to the African Charter, and 44 of them have accepted the Maputo Protocol.

The book is edited by and contains several chapters by alumni of the Master's in Human Rights and Democratisation in Africa programme of the Centre. The Centre intends to use this research as the basis for a continuously updated database on the impact of the African Charter and Maputo Protocol.

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## Sixteen countries covered in this book





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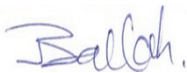
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# FOREWORD

On 11 July 2023, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) turned 20 years old. This marked 20 years of the valiant efforts by the African Commission on Human and Peoples' Rights, member states, women's rights organisations, academia, and women across the continent to improve the lives of women. In the 20 years that it has been in existence, the Maputo Protocol has managed to garner 44 member states. While this is quite commendable, as the Special Rapporteur on the Rights of Women in Africa, it is my singular mission to ensure universal ratification of the treaty and take this opportunity to call upon the remaining 11 African states to ratify and domesticate the Maputo Protocol. At its 20<sup>th</sup> anniversary, it is an opportune time to reflect upon the progress that has been made and the impact that the protocol has had on the laws, court decisions, activism, academia, and lives of the women in the member states. I therefore welcome this publication by the Centre for Human Rights at the University of Pretoria, which traces the impact of the Maputo Protocol in 16 member states. Through the meticulous research done by the country researchers, the book discusses the ways in which the Maputo Protocol has influenced policies in member states and alerts us to the gaps that still exist in the domestication of the treaty. I hope that this publication will assist researchers, activists, and academics to have a deeper understanding of the objectives of the Maputo Protocol and that policy makers in the member states might use it as a reference for reforms based on the gaps highlighted by the authors.



**Commissioner Janet Ramatoulie Sallah-Njie**  
Special Rapporteur on the Rights of Women in Africa  
African Commission on Human and Peoples' Rights  
27 April 2023

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# LIST OF ABBREVIATIONS

ACDHRS	African Centre for Democracy and Human Rights Studies
ACERWC	African Committee of Experts on the Rights and Welfare of Child
AEJCI	<i>Association des Etudiants Juristes de Côte d'Ivoire</i>
AEPB	Abuja Environmental Protection Board
AFJCI	<i>Association des Femmes Juristes de Côte d'Ivoire</i>
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AG	Attorney-General's Department
AGMoJ	Attorney General and Minister of Justice
AGPO	Access to Government Procurement Opportunities
AIDS	acquired immunodeficiency syndrome
ANC	antenatal care
APDH	<i>Action pour la Protection des Droits de l'Homme</i>
APDHAC	<i>Association pour la Défence des Droits de l'Homme en Afrique Centrale</i>
AWLN	African Women Leadership Network
BAFROW	Foundation for Research on Women's Health, Productivity and the Environment
BOR	Bill of Rights
CAMES	<i>Conseil Africain et Malgache pour l'Enseignement Supérieur</i>
CAMMAC	Coalition to Address Maternal Mortality due to Unsafe Abortion and its Complications
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCJPA	Child Care Justice and Protection Act
CDF	Child Dignity Forum
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEDEP	Centre for the Development of People
CEGENSA	Centre for Gender Studies and Advocacy
CEI	Independent Electoral Commission
CERD	International Covenant on the Elimination of all Forms of Racial Discrimination



CGG	Campaign for Good Governance
CHRAGG	Commission for Human Rights and Good Governance
CHRAJ	Commission on Human Rights and Administrative Justice
CHREAA	Centre for Human Rights Education Advice and Assistance
CHRR	Centre for Human Rights and Rehabilitation
CIDOC	Information and Documentation Centre
CIMDIH	<i>Comité Interministériel de Droits Humains et du Droit International Humanitaire</i>
CLDO	Customary Law Declaration Order
CLE	Council of Legal Education
CLE	Continuing Legal Education
CMEF	<i>Clubs mères d'élèves filles</i>
CNDH	National Human Rights Commission
CNDHCI	<i>Conseil National des Droits de l'Homme de Côte d'Ivoire</i>
CGND	<i>Coalition grossesse non désirée</i>
COCOFCI	<i>Compendium des Compétences Féminines de Côte d'Ivoire</i>
CP&EC	Criminal Procedure and Evidence Code
CRA	Child's Right Act
CRC	Convention on the Rights of the Child
CRC-OP-AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
CREAW	Centre for Rights Education and Awareness
CRPD	Convention on the Rights of Persons with Disabilities
CSM	Superior Council of the Magistracy
CSOs	civil society organisations
DCEO	Directorate of Corruption and Economic Offences
DCP	Deputy Commissioner of Police
DESS	<i>Diplôme d'Etudes Supérieures Spécialisées</i>
DEWIPA	Deceased Estates Wills, Inheritance and Protection Act
DOVVSU	Domestic Violence and Victim Support Unit
DRC	Democratic Republic of Congo
DV	domestic violence
ECOWAS	Economic Community of West African States
EHRC	Human Rights Commission
ENA	National School of Administration
ENAM	<i>Ecole Nationale d'Administration et de Magistrature/National School of Administration and Magistracy</i>
EOC	Equal Opportunities Commission
EPRDF	Ethiopian People's Revolutionary Democratic Front
EWLA	Equality Now and Ethiopian Women Lawyers Association
EWLA	Ethiopian Women Lawyers Associations
Family Code	Revised Federal Family Code
FAWEGAM	Forum for African Women Educationalist The Gambia
FBC	Fourah Bay College
FGM	Female Genital Mutilation
FIDA-Lesotho	Lesotho Federation of Women Lawyers
FLAG	Female Lawyers Association of The Gambia
FPI	<i>Front Populaire Ivoirien</i>

FSU	Family Support Unit
FYDP	Five Year Development Plan
GAMCOTRAP	Gambian Committee on Traditional Practices
GBV	Gender-Based Violence
GEA	Gender Equality Act
GenCED	Gender Centre for Empowering Development
GEWE	Gender Equality and Women's Empowerment Policy
GIMPA	Ghana Institute of Management and Public Administration
GJA	Ghana Journalists Association
GNFS	Ghana National Fire Service
GPF	Gambia Police Force
GPI	Girls' Power Initiative
HIV	Human Immunodeficiency Virus
HIV-AIDS	Human Immunodeficiency Virus, Acquired Immunodeficiency Syndrome
HoPR	House of Peoples' Representatives
HRCSL	Human Rights Commission of Sierra Leone
HTPs	Harmful cultural and traditional practices
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICT	Information and Communications Technology
IDEG	Institute for Democratic Governance
IG	Inspector General of Police
IHRDA	Institute for Human Rights and Development in Africa
IJLS	Institute for Judicial and Legal Studies
ILO	International Labour Organisation
IMC	Inter-ministerial Committee on Human Rights and Humanitarian Law
IMLU	Independent Medical Legal Unit
IRCSL	Inter Religious Council of Sierra Leone
IRIC	Institute of International Relations of Cameroon
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
LAWYERS	Legal Access through Women Yearning for Equal Rights and Social Justice
LBTQ	lesbian, bisexual, transgender and queer
LCMPA	Legal Capacity of Married Persons Act
LCN	Lesotho Council of NGOs
LDF	Lesotho Defence Force
LECIAD	Legon Centre for International Affairs and Diplomacy
LGAs	Local Government Authorities
LHRC	Legal and Human Rights Centre
LI	legal instrument
LIDHO	<i>Ligue Ivoirienne des Droits de l'Homme</i>
LMA	Law of Marriage Act
LSZ	Law Society of Zimbabwe

Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MBDHP	<i>Mouvement Burkinabè des Droits de l'Homme et des Peuples</i>
MBSSE	Ministry of Basic and Senior Secondary Education
MDAs	Ministries Departments and Agencies
MDFRA	Marriage Divorce and Family Relations Act
MDG	Millennium Development Goals
MDHPC	<i>Ministère des Droits Humains et de la Promotion Civique</i>
MDHS	Malawi Demographic and Health
MFA	Ministry of Foreign Affairs
MFA	Ministry of Foreign Affairs, Regional Integration, and International Trade
MFAIC	Ministry of Foreign Affairs and International Corporation
MGDS	Malawi Growth and Development Strategy
MGEFW	Ministry of Gender Equality and Family Welfare
MGYSR	Ministry of Gender and Youth, Sports and Recreation
MHRC	Malawi Human Rights Commission
MIDH	<i>Mouvement Ivoirien des Droits Humains</i>
MoCLA	Ministry for Constitutional and Legal Affairs
MoFA	Minister of Foreign Affairs
MoGCSP	Ministry of Gender, Children and Social Protection
MOHS	Ministry of Health and Sanitation
MOPA	Maintenance of Peace and Order Act
MOU	Memorandum of Understanding
MoWSA	Ministry of Women and Social Affairs
MP	Members of Parliament
MPA	Matrimonial Property Act
MPS	Malawi Police Service
MSWGCA	Ministry of Social Welfare Gender and Children's Affairs
NAP	National Action Plan
NAPTIP	National Agency for the Prohibition of Trafficking in Persons
NBS	National Bureau of Statistics
NCAA	National Coalition on Affirmative Action
NCCE	National Commission for Civic Education
NCHRF	National Commission on Human Rights and Freedom
NDSP	National Development Strategic Plan
NEEP	National Economic Empowerment Policy
NEPAD	New Partnership for Africa's Development
NGEC	National Gender and Equality Commission
NGOs	Non-governmental organisations
NGP	National Gender Policy
NGPF	National Gender Policy Framework
NHP	National Health Policy
NHRC	National Human Rights Commission
NMRF	National Mechanism for Report Writing and Follow-up
NPA-VAWC	National Plan of Action to end Violence against Women and Children
NPAGW	National Policy for the Advancement of Gambian Women



NPRC	National Peace and Reconciliation Commission
NRA	National Reforms Act
OAU	Organisation of African Unity
ONEG	<i>Observatoire National de l'Équité et du Genre</i>
ONUCI	<i>Opération des Nations Unies en Côte d'Ivoire</i>
PAAC	Public Agreements Advisory Committee
PALAJ	<i>Projet d'appui à l'Amélioration de l'Accès aux droits et à la Justice</i>
PASI	Paralegal Advisory Service Institute
PCA	Police Complaints Authority
PDA	Persons with Disabilities Act
PDCI-RDA	<i>Parti Démocratique de Côte d'Ivoire-Rassemblement Démocratique Africain</i>
PDVA	Prevention of Domestic Violence Act
PEP	Post-Exposure Prophylaxis
PLHIV	Protection of the Rights of People Living with HIV
PNAPF	National Plan for Accelerating Family Planning
PNDES	National Economic and Social Development Plan
PNDS	National Health Development Plan
Protocol to the African Court	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
PSAEF	<i>Plan Stratégique d'Accélération de l'Éducation des Filles</i>
REDHAC	Central African Network of Human Rights Defenders
RHDP	<i>Rassemblement des Houphouëtistes pour la Démocratie et la Paix</i>
RMNCAH	Reproductive, Maternal, Newborn, Child and Adolescent Health
SADC	South African Development Community
SAFPAC	Supporting Access to Family Planning Post Abortion Care
SALC	Southern African Litigation Centre
SDGs	Sustainable Development Goals
SDMR	<i>Comité National de Surveillance des Décès Maternels et de Riposte</i>
SEARCWL	Southern and Eastern African Regional Centre for Women's Law
SGBV	sexual gender-based violence
SODV	sexual offences and domestic violence
SOMILES	SADC Observer Mission in Lesotho
SRHR Policy	Sexual and Reproductive Health Rights Policy
SRPDC	Special Rapporteur for Prisons and Detention Conditions of the African Commission
STI	sexually transmitted infections
TAMWA	Tanzania Media Women's Association
TANGO	The Association of Non-Governmental Organisations
TAWLA	Tanzania Women Lawyers Association
The Constitution	Cameroon's 1996 Constitution
The Forum	Zimbabwe Human Rights NGO Forum
TLS	Tanganyika Law Society
TRC	Transformation Resource Centre
TRC	Truth and Reconciliation Commission
TYW	Think Young Women

UCAC	Catholic University of Central Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNIMAK	University of Makeni
UNOWAS	United Nations Office for West Africa and the Sahel
UNSCR	United Nations Security Council Resolution
UPR	Universal Periodic Review
VAPP	Violence Against Persons (Prohibition) Act
VAWC	Violence against women and children
VVF	vesicovaginal fistula
WACOL	Women's Aid Collective
WAVES	Women Against Violence and Exploitation in Society
WELA	Women Empowerment and Legal Aid Initiative
WGEI	Working Group on Extractive Industries, Environment and Human Rights Violations in Africa of the African Commission
WGIP	Working Group on the Rights of Indigenous Peoples/Communities
WHARC	Women Health and Action Research Centre
WiLDAF	Women in Law and Development Africa
WILSA	Women and Law in Southern Africa
WLAC	Women's Legal Aid Centre
WRAPA	Women's Rights Advancement and Protection Alternative
ZHRC	Zimbabwe Human Rights Commission
ZLHR	Zimbabwe Lawyers for Human Rights
ZWLA	Zimbabwe Women Lawyers Association

# INTRODUCTION

*Susan C Mutambasere\* and Ashwanee Budoo-Scholtz\*\**

## 1 Background

The protection of the rights of women on the African continent is a constant and ever evolving task in which states are engaged. Through domestic laws and policies, African states in varying degrees promote equality for women and provide opportunities for women to exercise their rights and thrive. However, states across the world, including on the African continent, have latched onto the concept of regional or global treaties that provide universal rights for the citizens of member states. The debate on whether or not international instruments effectively improve the human rights of member states continues, with some scholars arguing that they are only effective in democratic countries with a strong active civil society.<sup>1</sup> It is argued that some countries will likely ratify

international instruments as a show of good-will for international development cooperation with little intention to improve the human rights situation on the ground.<sup>2</sup> It is certainly true of a number of African states, with an added component of many African states using African traditions and customs as an excuse not to comply with what they consider to be western notions found in international human rights treaties.<sup>3</sup>

Therefore, having an instrument like the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which is founded on African principles, and acknowledges African culture, is a step in the right direction to get member states to comply with their obligations. In Africa, in particular, continued efforts to enforce human rights principles to the protection of women are necessary. This is because violations of women's rights and inequalities continue to be rampant, and some of these are reinforced by the domestic policies within African states. Inequalities are also reinforced by the

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1 E Neumayer 'Do international human rights treaties improve respect for human rights' (2005) 49(6) *LSE Research Online* 925-953.

2 As above.

3 F Banda 'Blazing the trail: The African Protocol on Women's Rights comes into force' (2006) 50(1) *Journal of African Law* 72-84.

prevalence of young girls getting married prior to attaining adulthood, a practice that is rampant in Africa. It is estimated that 23 million women and girls in Nigeria were married during their childhood.<sup>4</sup> In Chad, 29 per cent of girls are married by the age of 15.<sup>5</sup> This results in girls dropping out of school and losing their right to education, increased risks of sexual and reproductive health challenges and poor outcomes, as well as unequal power dynamics in marriages as most of the girls are married to a partner at least 10 years older than them.<sup>6</sup>

Violence against women also remains a major challenge in many African states. In South Africa, the staggering statistics are that 40 per cent of men have perpetrated violence against their intimate partners, and one in four have perpetrated sexual crimes.<sup>7</sup> In fact, it is reported that every six hours, a woman is violated in South Africa.<sup>8</sup> The COVID-19 pandemic also exacerbated violence against women across the continent, with a marked increase of reported cases in many countries.<sup>9</sup> The situation was compounded by the drastically reduced access to services for victims, as well as continuous confinement with perpetrators as a result of the lockdown rules in almost every country across the world.

In the context of the myriad of issues faced by African women, this publication seeks to assess the extent to which the Maputo Protocol has made a difference in the lives of the women it seeks to protect. It is a follow up to two earlier collections of essays, spearheaded by the Centre for Human Rights and published by PULP, titled *The impact of the African Charter and the Maputo Protocol in selected African states*.<sup>10</sup> This edition narrows the focus to specifically monitor the progress of the Maputo Protocol as a living instrument reflecting on the progress made in the various countries since the last publication. The countries included in the three editions make up a total of 25 countries. Of these 25 countries, 10 countries feature in all the publications (Burkina Faso, Cameroon, Côte d'Ivoire, The Gambia, Kenya, Lesotho, Mauritius, Nigeria, Sierra Leone, and Zimbabwe). Eight countries only appear in the first edition (Benin, Chad, Congo, Eritrea, Mozambique, Niger, Rwanda and Senegal). There are five countries that only appear in the last two editions (Ethiopia, Ghana, Malawi, Eswatini and Tanzania). South Africa appears in the first and second edition only but not in the third. Uganda only appears in the second edition. What this means is that the impact of the Maputo Protocol is covered in at least 10 countries over the last decade. The first edition reflected on the impact of the Maputo Protocol up to 2011/2012. The second edition looked at the period between 2012 and 2016 and this current edition assessed the impact between 2016 and 2021. It should be noted at this point that most of the research and data for this current edition

4 UNICEF 'A profile of child marriage in Africa' file:///UNICEF-Child-Marriage-Brochure-High-Single\_246.pdf (accessed 23 June 2022).

5 As above.

6 As above.

7 CESVI 'South Africa, against violence on women and children' <https://www.cesvi.eu/what-we-do/protection-of-infancy/south-africa-against-violence-women-and-children> (accessed 23 June 2022).

8 As above.

9 In 2020, Liberia reported a 50 per cent increase in the cases reported in the first half of the year, Nigeria also recorded higher numbers. <https://www.dw.com/en/africa-pandemic-violence-rape-women/a-55174136> (accessed 1 July 2022).

10 Centre for Human Rights (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2012); and VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016).

was collected between 2020 and 2021, therefore any developments in the states considered after August 2021 may not be reflected in the publication.

## 2 The Maputo Protocol

As a standard by which African states can measure their commitment to the rights of women, the African Union adopted the Maputo Protocol on 11 July 2003 and it later came into force on 25 November 2005. It is a treaty that seeks to comprehensively cover the protection of the rights women in African, which was sorely lacking in the African Charter.<sup>11</sup> To date, 44 African states are parties to the Maputo Protocol.<sup>12</sup>

The development of the Maputo Protocol was a result of lobbying by various women's movements and international non-governmental organisations. This came about after it was clear that despite almost universal ratification of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) by African states, the situation of African women was not improving.<sup>13</sup> Additionally, the African Charter had been in force since 1986 as an African instrument protecting human rights in Africa. Despite providing for non-discrimination on the basis of sex and gender, the African Charter was sorely lacking regarding the protection

of the specific rights of women. By then, the concept of specific thematic human rights treaties in Africa had already emerged as the African Charter on the Rights and Welfare of the Child had already been adopted and in force since 1999.

The Maputo Protocol brought with it novel provisions that were lacking even in CEDAW. One of its key features which makes it specific to the African continent is that it acknowledges its context. It recognizes the importance of culture and tradition on the continent but at the same time prohibiting elements of culture that have a harmful effect on women's rights.<sup>14</sup> Further, it provides for the right to a positive cultural context, in which women should participate and contribute to the establishment of cultural policies.<sup>15</sup>

The Maputo Protocol also specifically prohibits violence against women,<sup>16</sup> a feature that is missing from the provisions of CEDAW. It goes a step further by acknowledging the prohibition of violence and forced sex even within private spaces, which can be read to include the prohibition of marital rape.<sup>17</sup> The most talked about innovation that the Maputo Protocol brings is the manner in which article 14 on the protection of sexual and reproductive rights is designed. It is the first international human rights instrument to explicitly provide for the right to medical abortion in certain circumstances and has been the cause of much contro-

11 Women's rights in the African Charter are only vaguely mentioned in article 18, within the context of family and lumped in together with children.

12 The most recent ratification/accession are Sahrawi Arab Democratic Republic in April 2022 <https://au.int/en/pressreleases/20220504/saharawi-arab-democratic-republic-becomes-43rd-african-union-member-state> (accessed 1 June 2023) and South Sudan in February 2023 <https://achpr.au.int/en/news/press-releases/2023-02-26/african-commission-welcomes-accession-south-sudan-various-regional> (accessed 1 June 2023) making the total 44.

13 Banda (n 3) 50.

14 Articles 2, 4 and 5 speak to the prohibition of harmful traditional practices.

15 Article 17.

16 Article 4.

17 Centre for reproductive rights 'The Protocol on the Rights of women in Africa: an instrument for advancing reproductive and sexual rights' (2006) Briefing Paper.

versy on the African continent.<sup>18</sup> Article 14 is also the first provision to provide for the protection of women from human immunodeficiency virus (HIV) which disproportionately affects women in Africa.<sup>19</sup> Overall, the Maputo Protocol seeks to bring comprehensive and nuanced protection of women's rights on the continent.

### 3 Overview of findings

Since this publication is an update of previous research done in the first and second editions, the summary of findings will focus only on select changes that have taken place since the last edition in 2016. The general impression gathered from the chapters indicates that women in African states continue to face a myriad of challenges in their private and public life. These include limited participation in political activities, female genital mutilation, early marriages and unacceptable levels of maternal mortality and morbidity.<sup>20</sup> This status of women is pervasive in the different jurisdictions even though all the countries featured in this edition have ratified the Maputo Protocol. However, it can still be noted that progress has been made since the last edition, particularly in legislative and policy reform, which leaves the major hurdle as the effective implementation of these reforms.

A number of states have either amended or enacted laws that give life to the spirit and objectives of the Maputo Protocol. Simangele Mavundla writes about the Sexual Offences and Domestic Violence Act of 2018 in Eswatini, which has innovative provisions. It criminalises sexual harassment and stalking, offences that are often left out of the criminal legislation of most countries but are important as they are often a prelude to violence and constitute violations in their own right. The new Act, while not explicitly criminalizing marital rape, removes the common law defence that a woman gives irrevocable sexual consent by getting married. Relatedly, Finh Monique Carine Traoré, when writing about Burkina Faso, indicates that the country now outlaws marital rape through the new Penal Code of 2018. Further, the Penal Code also criminalises female genital mutilation (FGM) including sanctions for those encouraging FGM through public speeches, words or writings. An interesting feature of this new penal code is the outlawing of some harmful cultural practices, like the mistreatment of a woman who has given birth to a child which is not the expected sex by the husband, or when a woman is infertile. The outlawing of FGM is also reported by Pierre Olivier Lobe as he writes about the new Penal Code of 2019 in Côte d'Ivoire. The new law represses several forms of violence, FGM as well as early and forced marriages. An exciting development is noted coming out of DRC where through lobbying by civil society organisations and much debates, the country managed to make use of General Comment 1 issued by the African Commission on article 14 of the Maputo Protocol. This resulted in an amendment to the existing law which now includes a reasonable time that an HIV

18 See for example A Guillaume et al 'Abortion around the world: An overview of legislation, measures, trends and consequences' (2018) 73(2) *Population* 217-306.

19 African Union 'Gender equality, women's empowerment and HIV in Africa: The impact of intersecting issues and key continental priorities' (2021) Advocacy Brief [https://au.int/sites/default/files/documents/41625doc-AU\\_GEW\\_E\\_Advocacy\\_Brief\\_ENGLISH\\_Final.pdf](https://au.int/sites/default/files/documents/41625doc-AU_GEW_E_Advocacy_Brief_ENGLISH_Final.pdf) (accessed 7 July 2022).

20 In addition, in some countries like Burkina Faso and Malawi, some women battle with accusations of witchcraft and being punished for these.



positive spouse must observe before they inform the other spouse about their status. One of the most tangible examples of the impact of the Maputo Protocol is reported by Basiru Bah in The Gambia. The country enacted the Women's Act of 2010 for the sole purpose of domesticating the provisions of both CEDAW and the Maputo Protocol. This demonstrates a tangible positive impact of the Maputo Protocol on the domestic laws and policies of member states. These laws are an encouraging indication of the efforts that states are making to improve the situation of women in the African continent.

A general trend that is noted in the different countries is the reluctance, or lack of use of the Maputo Protocol in the domestic courts. This is caused by various factors one of which is the lack of awareness of the provisions of the instrument by lawyers and judges, resulting in them not being raised in the arguments brought before the court. Trésor Makunya et al argue that in the DRC and in civil jurisdictions in general, there is a lack of appreciation of the internationalization of various legal issues through international instruments. In the Eswatini case of *Sacolo v Sacolo*, the lawyers raised the Maputo Protocol and other international instruments in their heads of argument, but the court concluded that there was no need to resort to international instruments when the domestic laws are sufficient in resolving the matter at hand.<sup>21</sup>

It is generally noted that legal teaching at tertiary level on the continent is continuously evolving human rights

education starting from undergraduate programmes. For example, Henok Ashagrey indicates that Ethiopia has a harmonized legal education curriculum that is taught at all the 32 laws schools in the country. This curriculum includes comprehensive coverage of the African human rights system, including the Maputo Protocol. The participation of law students in international human rights moot competitions, such as those run by the Centre for Human Rights, has also assisted in enhancing their depth of knowledge as writes Basiruh Bah on the law students at the University of The Gambia.

There is still a challenge with state reporting on the Maputo Protocol with a number of state parties that have not yet submitted a report to the African Commission. For example, despite having ratified the Maputo Protocol in 2011, Côte d'Ivoire is yet to submit a report on the Maputo Protocol. This is also the case with Ghana, as Ady Coulibaly writes, who also cites various challenges including lack of resources. However, Ghana has still managed to timely submit reports to the United Nations Human Rights Council in terms of the Universal Period Review process as well as report on Beijing+25. This indicates a lack of prioritization of the African human rights system but could also be a result of the poor funding status of the African state reporting process. The United Nations (UN) processes are often funded by the United Nations Development Programme (UNDP) in most African countries, hence making it easier for the states to report. This, however, should not be used as an excuse to discard reporting to the African Commission altogether, as the same information gathered for the UN reports can be used to report to the African Commission.

21 *Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law – Eswatini v Jukhi Justice Sacolo and Others* Unreported: (1403/16) 2019 SZHC (166).

## 4 Challenges and opportunities

A pervasive problem noted in the effectiveness of the Maputo Protocol is the lack of domestication of the instrument. This is especially evident in dualist states, and thus leaves the excellent provisions of the Maputo Protocol to lie fallow. For example, Ashwanee Budoo-Scholtz indicates that Mauritius has not domesticated the Maputo Protocol. It is negotiating a Gender Equality Bill but it is premised on the provisions of the CEDAW instead of the Maputo Protocol. The lack of political will to domesticate the Maputo Protocol cascades down to the reluctance by courts to make use of its provisions. This point is noted by Anthonia Dickson on Nigeria where the lack of domestication results in lawyers finding it difficult to authoritatively rely on the provisions of the Maputo Protocol.

The lack of awareness on the Maputo Protocol also creates a challenge with regard to its impact and effectiveness. There is an opportunity for civil society organisations and national human rights institutions to increase knowledge levels on the Maputo Protocol for important stakeholders like state officials, parliament, judiciary and women generally. These stakeholders include the media who in turn have an even bigger audience that can benefit from awareness raising campaigns on the Maputo Protocol.

There is also a need for member states to be deliberate about budget allocations for the implementation of programmes that promote the rights of women in line with the Maputo Protocol. The enactment of robust laws on its own does not amount to progress if such laws are not backed up by funding to adequately implement them. For exam-

ple, laws on protection of women from domestic violence are rendered ineffective if the state does not have funding to prosecute offenders and to provide safe shelters for women who have been subjected to domestic violence. Similarly, without funding for forensic investigation of sexual violence, it is difficult to effectively prosecute and convict offenders.

## 5 Conclusion

The Maputo Protocol is an excellent innovative instrument which has the potential to vastly improve the lives of African women. If properly implemented, it can empower women on the continent and give them the means to equally participate in society and increase their productivity. There is need to address societal impediments and stereotypes that render women inferior to men.

# THE IMPACT OF THE MAPUTO PROTOCOL IN BURKINA FASO

*Finh Monique Carine Traoré\**



## 1 Introduction

The year 2020 marked the end of Burkina Faso's first democratic regime after a transitional period that lasted one year. This followed the popular uprising of October 2014,<sup>1</sup> during which the power of the street was on a winning path against a 27-year regime of oppression, violation of human rights and the rule of law. It has now been about seven years since the Burkinabè<sup>2</sup> began to hope for a real democracy and the implementation of a system of accountability that would bring justice to the victims of the many violations that took place during the former regime. The questions that arise are what is then the human rights record after the first term of what was supposed to be a new era in the country? Have people seen their hopes come true?

It should be noted that some efforts have been made in accessing justice and establishing a system of trust between the State and the people about the realisation of the rights of the latter. Complex cases such as that of the assassination of former President Thomas Sankara and Norbert Zongo in which the younger brother of the President of the former regime, Blaise Compaoré, is allegedly involved have seen significant progress. The case of the murder of former investigative journalist Norbert Zongo had become cold as a result of the political connections of the prime suspect, François Compaoré, the brother of the then President.<sup>3</sup> Eventually, the case reopened in 2015 and the procedure is underway to prosecute those involved. Similarly, the case of the attempted putsch of 15 and 16 September 2015<sup>4</sup> has been adjudicated by the

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1 L Chouli 'L'insurrection populaire et la Transition au Burkina Faso' (2015) [https://www.researchgate.net/publication/273517690\\_L'insurrection\\_populaire\\_et\\_la\\_Transition\\_au\\_Burkina\\_Faso](https://www.researchgate.net/publication/273517690_L'insurrection_populaire_et_la_Transition_au_Burkina_Faso) (accessed 31 October 2020).

2 Official name of the inhabitants or natives of Burkina Faso. It should be noted that this name as well as the name of the country is taken from the national tongues and was instituted by President Thomas Sankara in his desire to break with imperialism on 4 August 1984.

3 B Jaffret 'Les affaires Sankara et François Compaoré suivies de près avant le voyage de Macron' *Mediapart* November 2017 <https://blogs.mediapart.fr/bruno-jaffre/blog/081117/les-affaires-sankara-et-francois-compaore-suivies-de-pres-avant-le-voyage-de-macron> (accessed 12 November 2020).

4 B Roger 'Procès du putsch manqué au Burkina Faso: Gilbert Diendéré et Djibrill Bassolé condamnés à 20 ans et 10 ans de prison' *Jeune Afrique* 2019 <https://www.jeuneafrique.com/823052/politique/procès-du-putsch-manqué-au-burkina-faso-gilbert-diendéré-et-djibrill-bassolé-condamnés-respectivement-a-20-ans-et-10-ans-de-prison/> (accessed 1 November 2020).

national courts and the guilty parties were sentenced to substantial sentences in September 2019.<sup>5</sup>

Some institutional reforms have also taken place, such as the reform of the justice system that took place during the transition, which was aimed at giving the judicial system more freedom, and generally to build a system of accountability for the violations of the rule of law, and human rights. Some of these efforts, initiated by the transitional regime and continued by the current regime, augured promising achievements for the future of human rights in the country. However, this was without counting on the occurrence of an unpredictable element, which is the security crisis that started unfolding in the country. The country started experiencing a serious security crisis due to increased terrorist attacks, which commenced in 2015 in Ouagadougou, the capital city of the country, when a restaurant and a hotel were attacked few days after the inauguration of the President of the current regime.<sup>6</sup> From then, the country became disrupted by attacks in many other forms but with the same consequences of the loss of human lives. The crisis led to a major humanitarian crisis, as more than a million people were displaced in the country.<sup>7</sup>

Besides this, it should be noted that some issues that deserved to be settled could not be. One case in point is the popular uprising which, according to the *Mouvement Burkinabè des Droits de l'Homme et des Peuples* (MBDHP), result-

ed in about 34 deaths across the country, and about 400 injured in October 2014.<sup>8</sup> Those allegedly involved in that case could not be tried, thus violating the victims' right to have access to justice and to remedies. The trial did not take place because of procedural legal issues. Other problems persisted such as strikes and social discontent, sometimes due to frustrations resulting from the actions of the old regime.

However, despite all these challenges, the state has always committed to the ratification of international human rights instruments although the implementation leaves much to be desired. For example, the country was among the first countries in July 1998, to make the declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of June 1998, giving direct access to individuals and non-governmental organisations (NGOs) to the African Court. Moreover, Burkina Faso ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in June 2006.

With regard to the status of women in the country, Burkina Faso is a state party to both the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Maputo Protocol. The two instruments provide obligations for the state to take necessary steps towards the full enjoyment of the rights of women. However, this is not the case due to the state's unwillingness to adhere totally to

5 As above.

6 'Le Burkina Faso face au djihadiste' *L'express* 2017 [https://www.lexpress.fr/actualite/mon-de/afrique/le-burkina-faso-face-au-djihadisme\\_1754263.html](https://www.lexpress.fr/actualite/mon-de/afrique/le-burkina-faso-face-au-djihadisme_1754263.html) (accessed 9 November 2021).

7 Conseil National de Secours d'Urgence et de Rehabilitation 'Statistics on the registration of IDPs in Burkina Faso' 8 August 2020.

8 Report of the Burkinabè Movement on Human and Peoples' Rights (MBDHP) on the Population Uprising of 30 and 31 October 2014.

its treaty obligations. Although the state has made remarkable progress in terms of policy and legislative reforms<sup>9</sup> to align with its obligations under the Maputo Protocol, many other efforts are expected from the state. Women across the country continue to experience many violations of their rights. Women continue to encounter gender-based violations and discrimination. They are still victims of harmful traditional practices. Some of those harmful traditional practices include accusations of witchcraft and punishment in the form of banishment from home and families.<sup>10</sup> The girl child equally continues to face harmful traditional practices such as female genital mutilation (FGM), as well as early and forced marriages.<sup>11</sup> Women are still victims of maternal mortality and face challenges with regards to the realisation of their sexual and reproductive rights.<sup>12</sup> Similarly, the level of participation of women in politics is not satisfactory. Despite the continuing improvement on the status of women in Burkina Faso, these are among other challenges that show that the implementation of the Maputo Protocol is still limited.

## 2 Ratification of the Maputo Protocol

As mentioned above, Burkina Faso ratified the Maputo Protocol on 9 June 2006 after signing it on 26 February 2004. The instruments of ratification were deposited on 9 August 2006.<sup>13</sup> The

country was therefore among the first to ratify the Maputo Protocol. It ratified the Protocol without entering any reservation.

With regards to the ratification process in Burkina Faso, it has to be noted that article 148 of the Constitution of Burkina Faso<sup>14</sup> gives power to the President to negotiate, sign and ratify international treaties.<sup>15</sup> However, the Constitution specifies that the authorisation of ratification of peace agreement, trade treaties, treaties that involve the finance of the State, those modifying legislative provisions and treaties that have to do with the status of persons have to be approved by an Act of Parliament.<sup>16</sup> The procedure is as follows: the relevant ministry or department has to present a draft request for ratification to the concerned ministry cabinet. When the cabinet approves the draft request, it is forwarded to the parliament which must adopt a law giving the authorisation to ratify the treaty.

The ratification of the Maputo Protocol followed the above-mentioned Constitutional procedure. The Ministry for the Promotion of Human Rights submitted the draft request for ratification to the Cabinet of the Ministry. The draft was approved and sent to the parliament. The parliament then adopted the law authorising the ratification<sup>17</sup> and the government proceeded to the

9 See the sections on policy and legislative reform below.

10 Japan International Cooperation Agency, Mitsubishi UFJ Research and Consulting Co., Ltd. *Country Gender Profile: Burkina Faso* (2013) at 6 [https://www.jica.go.jp/english/our\\_work/thematic\\_issues/gender/background/c8h0vm0000anjq6-att/burkina\\_faso\\_2013.pdf](https://www.jica.go.jp/english/our_work/thematic_issues/gender/background/c8h0vm0000anjq6-att/burkina_faso_2013.pdf) (accessed 9 November 2021).

11 As above, 14.

12 As above.

13 See the ratification status: <https://www.achpr.org/states> (accessed 1 November 2020).

14 The Constitution of Burkina Faso of 2 June 1991 up to date of the 2012 amendments.

15 As above, article 148.

16 As above, article 149.

17 *Loi no 021-2005/AN du 19 mai 2005 portant autorisation de ratification du protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union africaine, le 11 juillet 2003 à Maputo.*

ratification. After the law was adopted on 19 May 2005, it was promulgated through presidential decree and published in the Official Journal for its entry into force. The instruments of ratification were then sent to the Secretariat of the African Commission on Human and Peoples' Rights, through the Ministry of Foreign Affairs.

Before the parliament approves the draft request, it is debated in a parliamentary debate. At the debate on the ratification of the Maputo Protocol, the Ministry for the Promotion of Women in defending the draft had to give arguments for the ratification. During the debate, it was argued that the relevance of the issues addressed in the Maputo Protocol made the instrument a pertinent one for the situation of African women. It was also argued that in the context of Burkina Faso, the ratification of the Maputo Protocol will ensure the state's commitment to the promotion and protection of human rights and also enhance its commitment towards women's rights protection.<sup>18</sup> Some specificities of the Maputo Protocol were presented and it was argued that it will help fill the gaps in the national framework, and also in the already existing global framework of women's rights protection.<sup>19</sup>

### 3 Identification of the government focal point

The focal point of the government on its response and responsibilities under the African Charter on Human and Peoples' Rights (African Charter) and its supplementary instruments, such as the Maputo Protocol, is the *Ministère des*

*Droits Humains et de la Promotion Civique* (MDHPC) (Ministry of Human Rights and Civic Promotion). This Ministry is supplied with information by the *Ministère de la Femme, de la Solidarité Nationale, de la Famille et de l'Action humanitaire* (Ministry of Women, National Solidarity, the Family and Humanitarian Action) when it comes to the response and responsibilities of the state regarding the Maputo Protocol. The MDHPC is equipped with a structure in charge of monitoring the implementation of international treaties, which is the *Direction de Suivi des Accords Internationaux* (Directorate in charge of following up international agreements).

The MDHPC also has the *Comité Interministériel de Droits Humains et du Droit International Humanitaire* (CIMDIH) (Inter-Ministerial Committee for Human Rights and International Humanitarian Law).<sup>20</sup> The CIMDIH is tasked with supporting and advising the government, to devise policies and strategies, and to host activities directed towards the full realisation of human rights and international humanitarian law principles. It also supports the government in drafting its different reports to both the United Nations (UN) and the African Union (AU) treaty monitoring bodies.

With regard to the Ministry in Charge of Women, it is equipped with the *Direction de la Promotion du Genre* (Directorate for the Promotion of Women and Gender). This department provides support and assistance to the government in terms of making policies

18 *Exposé des motifs* presented before parliament by the Minister for the Promotion of Women.

19 As above.

20 See the *décret 2005-100/PRES/PM/MPDH du 23 février 2005 portant création, attributions, composition et fonctionnement du Comité interministériel des droits humains et du droit international humanitaire* amended by the *décret 2008-740/PRES/PM/MPDH du 17 novembre 2008*.

for the promotion of the rights of women. It also contributes to the state reporting process on the Maputo Protocol.

To sum up, the focal points of the government concerning its response and responsibilities on the Maputo Protocol are the MDHPC through the Directorate in charge of following up international agreements, the CIMDIH, the Ministry in Charge of Women, National Solidarity and the Family through the Directorate for the Promotion of Women and Gender.

With regards to communications with the African Commission, it is done through diplomatic channel. In that sense, the Ministry of Foreign Affairs is the key channel through which every other focus point communicates with the African Commission. Embassies are sometimes involved in the process. Generally, the institutionalisation of the state's responsibilities lacks focus on the Maputo protocol. The focus is often on the African Charter. This also translates into the availability of information about the contents and usefulness of the Maputo Protocol in the sense that most of the interviewees did not have very advanced levels of information on aspects of the Maputo Protocol. Some of them that had very brief information on the Maputo Protocol, the African Charter and the African system in general, argued that the African system generally lacks an institutional framework that is sufficiently organised and equipped with a mechanism that specifically focuses on accountability. They stated that human rights instruments need capacity in terms of budgetary and operational support and involvement with donors for their effectiveness. This is what sometimes makes States to feel more bound by UN instruments.

#### 4 Domestication or incorporation

The Preamble of the Constitution of Burkina Faso, which is an integral part of the document and which has the same value as its provisions, solemnly reaffirms the commitment of Burkina Faso to respect the African Charter in its entirety.<sup>21</sup> The bill of rights contained in Burkina Faso's Constitution is also in accordance with the rights recognised under the African Charter in general, and the Maputo Protocol since it was drafted and adopted after the ratification of the African Charter, thereby, drawing inspiration from the latter. This bill of rights provides for civil and political rights, as well as economic, social and cultural rights. While civil and political rights are all justiciable, some economic, social, and cultural rights are not justiciable.

Even if the Constitution does not specifically mention the Maputo Protocol, since the latter was adopted under article 66 of the African Charter, the Constitution also includes women's rights as protected by the Maputo Protocol. The principle of supremacy of international treaties and agreements is also clearly stated in the Constitution which states that ratified and approved treaties have superior authority over domestic laws.<sup>22</sup> International agreements therefore have a higher value than the Constitution, which is the supreme norm and by ricochet, they have a higher value than all the norms of the legal system. The Maputo Protocol has thus prevailed upon the Constitution and all the other norms and in case of conflict between them, the Maputo Protocol is considered superior.

21 Preamble of the Constitution of Burkina Faso, para 8.

22 As above, art 151; own translation.



Burkina Faso is a monist state. There is therefore no special process of domestication of treaties. As soon as they enter into force and they have been ratified by the country, they automatically form part of the national legal system and their provisions can be directly invoked before national courts. Hence, the rights in the Maputo Protocol are directly invocable before the national courts.

## 5 Legislative reform or adoption

The Constitution of Burkina Faso provides that before the promulgation and the implementation of an organic law, it should first be submitted before the Constitutional Council.<sup>23</sup> This is also required for the ratification of international agreements since they will form part of the national legal system. In that sense, the Maputo Protocol was submitted to the Constitutional Council to find out whether it was compatible with the Constitution. The Constitutional Council found that the Maputo Protocol's provisions were compatible with the Constitution.<sup>24</sup> After this advisory decision, the government then proceeded with the ratification process.

There have been several legislative reforms in the form of the enactment of laws to give effect to the Maputo Protocol. First, the Constitution of 2 June 1991 was amended in 2012 by the Law 033-2012/AN of 11 June 2012. The Constitution already laid down the principle of equality of birth for all Burkina-bè, but introduced through this

amendment, the issue of gender promotion as a factor in the achievement of gender equality of rights between men and women in Burkina Faso.<sup>25</sup>

Similarly, a law on Agrarian and Land Reorganisation<sup>26</sup> was adopted on 2 July 2012. According to this law, the planning and sustainable development of the territory, the management of land and other natural resources as well as the regulation of real property rights are governed, among other things, by the principles of gender, respect for human rights and equity.<sup>27</sup> In the same vein, the law 0034-2009/AN of 24 July 2009 on rural land tenure<sup>28</sup> was adopted, and gives men and women the same rights of access to and enjoyment of land.

Also, the law 010-2009/AN of 16 April 2009 establishing quotas for legislative and municipal elections<sup>29</sup> was adopted. The adoption of this law is a normative step forward, given the social environment which is not conducive to the acceptance of women in politics.

Other general legislative reforms were also adopted, with particular provisions to protect women. Among those is the law 029-2008/AN of 15 May 2008 on the fight against trafficking in persons and similar practices.<sup>30</sup> This law provides for particularly severe penalties when the victim is a vulnerable person (pregnant woman, child) or when this has resulted in mutilation or

23 As above, art 155.

24 *Avis juridique no 2006-001/CC du 24 février 2006 sur la conformité à la Constitution du 2 juin 1991, au Protocole à la Charte africaine des droits de l'homme et des peuples relative aux droits de la femme en Afrique, adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union Africaine le 11 juillet 2003 à Maputo.*

25 Preamble of the Constitution of Burkina Faso (n 14) para 5.

26 *Loi no 034-2012/AN du 2 juillet 2012 portant Réorganisation agraire et foncière.*

27 The Constitution of Burkina Faso, art 3.

28 *Loi no 0034-2009/AN du 24 juillet 2009 portant régime foncier rural.*

29 *Loi no 010-2009/AN du 16 avril 2009 portant fixation de quotas aux élections législatives et aux élections municipales.*

30 *Loi no 029-2008/AN du 15 mai 2008 portant lutte contre la traite des personnes et les pratiques assimilées.*

permanent disability. Similarly, the country also adopted law 030-2008/AN on the fight against HIV/acquired immunodeficiency syndrome (AIDS) and the protection of the rights of persons living with HIV/AIDS.<sup>31</sup>

Furthermore, law 028-2008/AN of 13 May 2008 on Labour Code in Burkina Faso grants equal opportunities to men and women in terms of access to employment. It gives special protection to pregnant women who are given a necessary period of maternity leave for their well-being.

There were also many legislative reforms under the transitional government. The most relevant one for women is law 061-2015/CNT of 2015 on the prevention, repression of and reparation for violence against women and girls and care for victims of such violence.<sup>32</sup> This law deals extensively with cases of violations of the rights of women and girls, especially violence against them. It also addresses the issue of the punishment of these violations.

In 2018, Burkina Faso adopted a new Penal Code,<sup>33</sup> replacing the Penal Code of 13 November 1996 which contained a number of deficiencies. For instance, many instances of violence and abuse such as sexual harassment, marital rape and accusations of witchcraft were not considered in the previous Penal Code. The new Penal Code increased the penalties for offences such as rape and FGM,<sup>34</sup> and went further to provide for sanctions for those who encourage FGM through public speech-

es, words or writings.<sup>35</sup> It also introduced offences such as abduction,<sup>36</sup> sexual slavery<sup>37</sup> and sexual abuse or torture<sup>38</sup> and accusation of witchcraft.<sup>39</sup> On the issue of abortion, the Penal Code brings a breakthrough although the practice is still prohibited upon choice. Voluntary termination of pregnancy can be carried out at any time if a doctor (the previous Penal Code required the authorisation of at least two doctors) certifies that maintaining the pregnancy endangers the woman's health or that there is a strong probability that the unborn child will suffer from a particularly serious illness or infirmity.<sup>40</sup> In cases of rape or incest, if the materiality of the distress is established by the public prosecutor, voluntary interruption of pregnancy can be carried out in the first 14 weeks of the pregnancy<sup>41</sup> (the previous Penal Code was limited to the first 10 weeks of the pregnancy).

The new Penal Code punishes moral violence such as the violation of the sexual and reproductive health rights of women and girls, the restriction of the enjoyment of these rights by means of coercion, extortion, corruption or manipulation, including the prohibition of the use of contraceptive methods.<sup>42</sup> It also punishes the repudiation or mistreatment of a woman who gives birth to a child whose gender was not expected by the husband, and also infer-

31 *Loi no 030-2008/AN du 20 mai 2008 portant lutte contre le VIH/sida et protection des droits des personnes vivant avec le VIH/sida.*

32 *Loi no 061-2015/CNT portant prévention, répression et réparation des violences à l'égard des femmes et des filles et prise en charge des victimes.*

33 *Loi no 025-2018/AN Portant Code Pénal.*

34 As above, art 517-7.

35 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-9.

36 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-2.

37 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-4.

38 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-3.

39 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-6.

40 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-13.

41 *Loi no 025-2018/AN Portant Code Pénal* (n 33) arts 513-14 and arts 514-3.

42 *Loi no 025-2018/AN Portant Code Pénal* (n 33) art 513-5.

tile women.<sup>43</sup> The same applies to the prohibition of women from income-generating activities, associative and political activity and the differential treatment of wives in the context of polygamous marriage.<sup>44</sup> Similarly, the definition of marriage has evolved. It now considers religious and customary marriage.<sup>45</sup> This helps in the repression of forced marriages since the Personal and Family Code only gave legal effect to civil marriage, which made it difficult to repress a forced marriage as long as it was not civil. With this new document, anyone who imposes a marriage on anyone, whether civil, customary or religious, falls under the offence of forced marriage. Also, moral, material or emotional abandonment in violation of conjugal obligations and the duties of rescue and assistance is now punished.<sup>46</sup> This implies that if a husband or cohabitee abandons a woman who is pregnant, postmenopausal, or vulnerable due to her age, illness, infirmity, physical or mental deficiency apparent or known, he is punishable.

From all the reforms mentioned, the reform of the Penal Code is the one that most takes into account the issues addressed in the Maputo Protocol. The new Penal Code contains many innovations that are in line with the spirit of the Maputo Protocol and brings forward the protection of women's rights in general. It made up for many of the shortcomings that existed in the system, although some issues still need to be addressed.

With regard to the existence of specific budget for the implementation

of the Maputo Protocol, an interviewee affirmed that the budget allocated for the African Charter is aimed at implementing the Charter as a whole. They stated that there is no different budget for the Maputo Protocol specifically.

## 6 Policy reform or formulation

In general, policies and strategies do not mention that they are adopted to give effect to the Maputo Protocol. However, they can be considered to give effect to the Maputo Protocol. Some of them are worthy of mention such as the National Human Rights and Civic Promotion Policy.<sup>47</sup> This policy was adopted in 2013 and covers the period 2013-2022. The policy explains the foundations of the government's intervention in the area of human rights and civic promotion, and presents the related missions. It aims to contribute to the respect for human rights and rule of law for the construction of a society of peace, civic-mindedness and sustainable development by 2020.

The second one is the National Gender Policy<sup>48</sup> which was adopted in July 2009. This document is a frame of reference and guidance for all actors involved in promoting gender equity and equality. It aims to contribute to a harmonious, balanced and integral development of all Burkinabè, by eliminating inequalities and disparities between men and women in all areas, and by promoting their fundamental rights.<sup>49</sup>

43 As above.

44 As above.

45 *Loi no 025-2018/AN Portant Code Pénal* (n 57) art 531-1.

46 As above, art 531-2.

47 *Politique Nationale des Droits humains et de la Promotion civique, Journal officiel*, 2013-06-06, no 23.

48 *Document de la Politique Nationale Genre du Burkina Faso* (2009) [http://www.africanchildforum.org/cfr/policy%20per%20country/burkina%20faso/bfaso\\_gender\\_2009\\_fr.pdf](http://www.africanchildforum.org/cfr/policy%20per%20country/burkina%20faso/bfaso_gender_2009_fr.pdf) (accessed 3 November 2020).

49 The Constitution of Burkina Faso preface, para 3.

Third, the National Health Policy,<sup>50</sup> adopted in 2000 and implemented through the National Health Development Plan (PNDS) 2001-2010, was revised in 2011 with the aim of improving the well-being and health of the population by 2020. The implementation of the PNDS 2001-2010 has produced results in terms of improving health coverage, the quality and use of services, the supply of health services in terms of assisted childbirth, the management of obstetric emergencies, the fight against epidemics, immunisation with the introduction of new vaccines and the management of endemic-epidemic diseases. The PNDS 2011-2020, is based on primary health care principles and values of equity, social justice, solidarity, accountability, ethics, probity, respect for the cultural identity of communities and patients' rights, as well as a gender approach and good governance. The PNDS pays particular attention to the health of vulnerable groups such as women, children, the elderly, affected by communicable and non-communicable diseases and characterised by high morbidity and mortality.<sup>51</sup>

Fourth, the National Employment Policy,<sup>52</sup> adopted on 15 May 2008, is in line with the Government's efforts to combat poverty and promote economic

development and social progress. The policy provides for actions through projects supported by technical and financial partners. The State has gradually set up an operational mechanism to combat poverty and unemployment, including the fund to support women's income-generating activities, the Youth Initiatives Support Fund, the Informal Sector Support Fund and the Special Job Creation Programme 2012-2014.

Fifth, the National Plan for Accelerating Family Planning (PNAPF),<sup>53</sup> adopted for the period 2016-2020, is the second strategic axis of the National Economic and Social Development Plan (PNDES) which aims to act rapidly on the quantity and quality of human capital, as well as the opportunities and conditions of the full valorisation of the said capital. It aims at maintaining the health and well-being of women and their families through family planning, given that women face challenges due to risks to the health of the mother and the child in close-in-range pregnancies, early pregnancies, unsafe abortions, late care seeking, difficulties of access and lack of adequate obstetrical and neonatal care.

Finally, the policy of free health care for children under five and pregnant women was launched on 2 April 2016 and includes free childbirth and caesarean deliveries, free care for pregnant women and after childbirth for up to 42 days, free care for obstetric fistulas and free screening for cervical and

50 Ministère de la santé *Politique nationale de santé* (2011) <https://www.prb.org/wp-content/uploads/2018/05/Politique-Nationale-de-Sante%CC%81-2011.-Burkina-Faso.pdf> (accessed 4 November 2020).

51 Ministère de la Santé et de l'Hygiène Publique 'Plan national de développement sanitaire (PNDS) 2011-2020' 4 December 2020 [https://www.sante.gov.bf/detail?tx\\_news\\_pi1%5Baction%5D=detail&tx\\_news\\_pi1%5Bcontrol%5D=News&tx\\_news\\_pi1%5Bnews%5D=347&cHash=3c72178a7d4bfe1d0dd371ea2d933389](https://www.sante.gov.bf/detail?tx_news_pi1%5Baction%5D=detail&tx_news_pi1%5Bcontrol%5D=News&tx_news_pi1%5Bnews%5D=347&cHash=3c72178a7d4bfe1d0dd371ea2d933389) (accessed 4 November 2020).

52 Ministère de la Jeunesse et de l'emploi *Politique nationale de l'Emploi* (2008) <http://www.onef.gov.bf/download/politique-nationale-emploi.pdf> (accessed 4 November 2020).

53 Plan National d'Accélération de Planification Familiale [http://www.healthpolicyplus.com/ns/pubs/8212-8375\\_PNA\\_PF.pdf](http://www.healthpolicyplus.com/ns/pubs/8212-8375_PNA_PF.pdf) (accessed 4 November 2020).

breast cancer in women.<sup>54</sup> It is fully in line with Sustainable Development Goals.

## 7 Impact on the judiciary

In monist states, the mere ratification of an international treaty means that the provisions of that treaty become directly part of the judicial system. Therefore, individuals can invoke them in support of their claims before national courts, and judges can also invoke them in support of their arguments. However, the general tendency in civil law countries is to be attached to national instruments. It is in this sense that the Burkinabè judge is very attached to national laws and rarely refers to the instruments of the AU or the UN. For this reason, till now, no Burkinabè court has mentioned the provisions of the Maputo Protocol in its decision. The only time the Maputo Protocol was mentioned by a court in Burkina Faso is the legal opinion of the Constitutional Court in 2006, the *Avis juridique no 2006-001/CC du 24/02/2006 sur la conformité à la Constitution du 2 juin 1991, du Protocole à la Charte africaine des droits de l'homme et des peuples relative aux droits de la femme en Afrique, adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union Africaine le 11 juillet 2003 à Maputo* where it was declared the Maputo Protocol is in conformity with Burkina Faso's Constitution.

Interviewed stakeholders explain that the system is such that when an international agreement is ratified, there are legislative reforms to incorporate

these international instruments into the national system. As a result, direct use of the provisions of the treaty is no longer very necessary as national laws reflect it. With regard to the Maputo Protocol, it was explained that the new Penal Code takes into account all the issues dealt with therein and therefore the Burkinabè judge no longer needs to refer directly to its provisions. It was also explained that the Burkinabè judges are rarely trained on the use of international legal instruments. Hence, they are more oriented towards national instruments.

It was therefore suggested that judges and lawyers be trained on the use of international instruments that offer greater guarantees for the exercise of certain rights. It was also suggested that human rights organisations and other human rights associations should play their part in drawing the attention of judicial actors to the issue.

## 8 Awareness and use by civil society

The African Commission held an awareness-raising/promotion mission in Burkina Faso in 2001 and during this mission, it recalled the importance of civil society organisations (CSOs) and NGOs in the implementation process of the African Charter. The delegation of the African Commission called on CSOs and NGOs, in particular, to focus on advocacy and awareness-raising activities, in order to promote the African Charter and other African instruments.<sup>55</sup> Unfortunately, till date, very few CSOs in Burkina Faso, working in the field of human rights use the African

54 Réseau de Prévention des Crises Alimentaires 'Gratuité des soins au profit des femmes enceintes et des enfants de 5 ans' <https://www.food-security.net/bestpractice/gratuite-des-soins-au-profit-des-femmes-enceintes-et-des-enfants-de-5-ans/> (accessed 9 November 2021).

55 *Commission africaine des droits de l'homme et des peuples 'Burkina Faso : Mission de promotion, 2001'* [https://www.achpr.org/fr\\_states/misionreport?id=43](https://www.achpr.org/fr_states/misionreport?id=43) (accessed 31 March 2022).

Charter and the Maputo Protocol in their work.

Among them is the *Association des femmes juristes du Burkina Faso* (Association of Women Lawyers of Burkina Faso). The organisation's missions include raising awareness of and promoting all women's and family rights through information and sensitisation, studying national and international legislation on women and the family and suggesting various actions in favour of women to the political authorities. The association makes extensive use of the Maputo Protocol and other instruments in its advocacy work and training activities.

Similarly, the Information and Documentation Centre (CIDOC) which, among other things works to promote human rights, has trained CSOs on the rights contained in the Maputo Protocol and how to use it for advocacy and monitoring activities. Till now, no NGO with observer status has submitted a shadow report on the Maputo Protocol.

## **9 Awareness and use by lawyers and judicial officers (law societies and other practicing lawyers)**

The lack of awareness about international instruments also affects lawyers and judicial officers, with the result that lawyers have rarely invoked these instruments in their submissions to national courts. Some interviewed stakeholders confessed that there was a low tendency to use the Maputo Protocol in their submissions because there is very little awareness about the rights contained in the instrument, and about international instruments in general.

They state that there is a need to train actors in the use of these instruments.

Others explained that they do not really need to directly invoke the Maputo Protocol in support of their arguments because national laws take sufficiently into account international instruments. In the case of the Maputo Protocol, they believe that the new Penal Code is quite extensive in terms of protecting women's rights and therefore they do not necessarily need to directly invoke its provisions.

## **10 Higher education and academic writing**

Burkina Faso has public and private universities where basic law training is available. Although the contents of the programmes differ slightly from one university to another, the structure of the programme is such that it takes three years to obtain the first degree and two more years to obtain the master's degree. Public international law is taught from second year and human rights law forms part of the course. In the third year, human rights law is taught, and the different human rights protection systems, including the African system are discussed. When elaborating on the African system of human rights protection, mention is made of the African Charter and its different supplementary instruments. This is where the Maputo Protocol is introduced to the students. It is just mentioned that there is a specific instrument on the rights of women at the African level. However, there is no particular focus on the Maputo Protocol and its rights.

Besides the basic law training, there are specific trainings in the different legal professions. For example, the *Ecole*

*Nationale d'Administration et de Magistrature* (ENAM) (National School of Administration and Magistracy), the bar school, and the school of Diplomacy offer international public law courses in their programmes. Questions around human rights protection are discussed but just briefly. At this level too, the Maputo Protocol is not at the centre of discussions.

With regard to academics, to date, they have not shown interest in the Maputo Protocol in their writings. Few dissertations and thesis have sometimes mentioned it but without any particular focus. It is to be noted that academics do not generally show interest in human rights. Rather, they are tempted to lose interest because of the system. According to some interviewed stakeholders, the *Conseil Africain et Malgache pour l'Enseignement Supérieur* (CAMES) which is in charge of examining academicians for their promotional exams has the culture to disregard human rights papers. They strongly advice academics to rather write on public international law topics.

## 11 Impact on independent state institutions

There is a national human rights commission (CNDH) in Burkina Faso and the *Médiateur du Faso* (Ombudsman). The mandate of the latter is more general, and not only oriented towards human rights issues. In dealing with issues of citizens' rights, the *Médiateur du Faso* refers more to national instruments, particularly those provided for in administrative law. As a result, the institution does not have the African human rights protection system as a focus or interest and has not really used the Maputo Protocol in its activities.

The mandate of the CNDH is to promote, protect and defend human rights in general. Although this mission includes the issue of the protection of women's rights, the CNDH does not focus on the African human rights protection system. As a result, there has not been any activity of the CNDH that specifically relies on the Maputo Protocol.

These institutions are also not involved in any follow up of the implementation of the concluding observations of the African Commission, because the legislative acts establishing them and their mandate do not provide for this, which constitutes a limit in this respect. However, they participate in the national validation workshops before state reports are submitted.

## 12 State reporting

The MDHPC is the ministry that is responsible for state reporting under international human rights treaties. Its department in charge of following up international agreements is the body responsible for implementing this obligation. Depending on the area of concern of the treaty, other government departments are involved. In the case of the Maputo Protocol, the Ministry of Women, National Solidarity, the Family and Humanitarian Action is in charge of accompanying the MDHPC in the process. The CIMDIH also plays a key role in the process.

The state reporting process before the different human rights monitoring bodies can be described as follows. The MDHPC and the other concerned government ministries develop the first draft. This draft is generated by the technical departments of the ministries and they can seek for outsider expertise

when it is needed. This draft is presented during a workshop. The draft is discussed and amended where necessary before adoption. The workshop involves different stakeholders including government structures, independent institutions such as the Ombudsman, the CNDH as well as CSOs. The draft is transferred to the CIMDIH for review and after that, adopted in a cabinet meeting. Finally, the report is sent to the relevant human rights treaty monitoring body through the Ministry of Foreign Affairs and Regional Integration.

The most recent report on the African Charter, the report submitted in 2015 spanning the period 2011-2015 addressed issues related to the implementation of the Maputo Protocol.<sup>56</sup> The government delegations for the presentation constituted officials from the MDHPC and those in charge of women and gender promotion.<sup>57</sup> The delegation was quite considerate of gender representation and reflected an adequate representation of women (four women including the head of delegation).<sup>58</sup>

The African Commission made pertinent concluding observations following the presentation of the report such as recalling Burkina Faso to respect its reporting obligation under article 26 of the Maputo Protocol. Other recommendations have been made based on the issues that were found by the African Commission from the

report. The African Commission recommended the state to do the following:

- to guarantee the protection of women's reproductive health and ensure their access to adequate and affordable health services;
- to guarantee conditions of detention that take into account the specific needs of women, particularly pregnant women and those detained with their children;
- to eliminate the practice of excision clandestinely, including the establishment of severe penalties for all those involved, including parents and family members.<sup>59</sup>

The African Commission further recommended to the State to put in place:

- a unit to receive victims of sexual violence in police stations and hospitals authorised to collect evidence of the attack in order to enable the prosecution and effective conviction of the perpetrators of the violence;
- a compensation fund for victims;
- a psychological support department;
- include a budget line for the operationalization of the right to reparation for victims.<sup>60</sup>

The government does not have any official platform for dissemination of concluding observations. Although there is no national mechanism for the implementation and follow-up of concluding observations, the government has taken steps to implement these concluding observations. Most of the issues pointed out by the African Commission were settled with the adoption of the new Penal Code. In addition, some of the strategies and policies that were previously discussed are the result

56 African Commission 'Burkina Faso: Third and Fourth Periodic Report (2011-2013)' submitted on 7 August 2015 <https://www.achpr.org/states/statereport?id=101> (accessed 31 March 2022).

57 African Commission 'Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso, 2011-2013' <https://www.achpr.org/sessions/concludingobservation?id=120> (accessed 31 March 2022).

58 African Commission (n 56) para 3.

59 African Commission (n 56) paras 62-69.

60 African Commission (n 56) para 70.



of the implementations of these recommendations.

From the obligation that arises from the article 26 and 62 of the Maputo Protocol and the African Charter respectively, Burkina Faso is supposed to submit a report every two years. The country is yet to submit the 2017 and the 2019 Periodic Reports, if the 2015 report is considered to be the initial report.

### 13 Communications

Since the adoption of the African Charter, the African Commission has dealt with only two cases against Burkina Faso. The first communication was the communication *International PEN v Burkina Faso* of 1994. The file was closed during the procedure.<sup>61</sup> There was therefore no decision from the African Commission to be implemented. In the second communication, *Mouvement Burkinabè des Droits de l'Homme et des Peuple v Burkina Faso*, the African Commission in 2001 decided on merits that articles 3, 4, 5, 6, 7, 9(2), 10, 11, 12, 13(2) of the African Charter have been violated by Burkina Faso. The recommendations that were made by the Commission, were not properly implemented. However, these communications were considered before Burkina Faso ratified the Maputo Protocol. So far, no communication alleging that Burkina Faso has violated the provisions of the Maputo Protocol has been brought before the African Commission.

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

Burkina Faso has so far not hosted any fact-finding visits of the African Commission. Moreover, no special mechanism of the African Commission has visited the country to date. However, one promotional mission took place in the country in 2001. The mission was led by Commissioner Isaac Nguema with the objectives of:<sup>62</sup>

... strengthening the dissemination and implementation of the African Charter and bringing the African Commission's support and encouragement to Burkina Faso in its search for solutions to the deepening of the democratisation process.

The African Commission made some recommendations to the government. These are as follows:<sup>63</sup>

- To implement the reforms, especially in the area of Justice and ensure effective implementation of commitments made within the framework of the search for solution to problems of human rights violations;
- To make all the necessary arrangements to combat illiteracy and poverty, which hinders the enjoyment of human rights;
- To take necessary measures for the transformation of the Secretariat of State for the Promotion of Human Rights in Ministry and the creation of a National Commission for Human Rights in Burkina Faso;
- To accelerate the transmission of the next periodic report of Burkina to the Secretariat of the African Commission with a view to

61 Communication matrix, African Commission.

62 African Commission 'Burkina Faso: Promotion Mission, 2001' <https://www.achpr.org/states/missionreport?id=43> (accessed 12 November 2020).

63 As above.

scheduling it for submission to the Commission;

- To play fully its role as the key player in the promotion and protection of human rights in the country, especially through the diffusion of the African Charter, collaboration with the African Commission, NGOs and by creating the enabling environment for exercising fundamental rights and freedoms.

After this mission, the country created a separate ministry in charge of human rights. The ministry was merged with the ministry of justice at some point again, but currently, human rights fall under a separate ministry. Some aspects of the recommendations have been barely implemented. From the date of the ratification of the Maputo Protocol till now, no special mechanism of the African Commission has visited the country concerning women's rights.

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

From the findings of this study, there appears to be very little awareness of the Maputo Protocol and the African system in general in Burkina Faso. This is the first factor that may impede the impact of the Maputo Protocol. Law practitioners, academics and even the beneficiaries of the rights contained in the Maputo Protocol are not aware enough of the instrument, or do not use it. In addition, there is a lack of political will when it comes to the implementation of the rights therein. Another factor that may impede the impact of the Protocol is the mindset of the society. Subject to exceptions, mentalities are sometimes outdated to admit the exercise of certain rights contained in the Maputo Protocol. Questions relating to the decriminalisation or legalisation of

abortion, for example, are difficult to raise in Burkinabè society. The same applies to questions around polygamy. Factors like poverty and ignorance may also be an obstacle for the implementation of the Maputo Protocol. The persistence of FGM and other harmful traditional practices against women and girls is largely due to ignorance. Similarly, forced and early marriages are often due to ignorance and poverty.

However, with the glimmer of hope that the insurgency has given the population, human rights are becoming a matter of interest again. New CSOs that could take the African Commission's activities into account in their programme are emerging. That may help enhance the impact of the Maputo Protocol and the Commission.

The African Commission's missions in the country could also be a factor that will enhance the impact of the Maputo Protocol and the activities of the African Commission in Burkina Faso. For example, hosting the African Commission's sessions and promotional visits and mission will help raise awareness about the African Commission in the country as was the case when the country held the 19th ordinary session of the Commission from 26 March to 4 April 1986.<sup>64</sup>

Furthermore, a representation of Burkinabè Commissioners could help enhance its impact in the country, as the commissioners play a key role in advocating for the improvement of the human rights situation in their countries. It was so during the mandate of Ms Salamata Sawadogo as Chairperson

64 AfricanCommission 'State report and concluding observations' <https://www.achpr.org/state-reportsandconcludingobservations> (accessed 31 March 2021).

of the African Commission from 2003 to 2007.<sup>65</sup> During her mandate, people learnt more about the African Commission and its activities. She also advocated for the adoption of legislations that comply with the African Charter. She was also Commissioner for Political Affairs from 2016 to 2020 and played a key role in increasing awareness about the activities of the AU in Burkina Faso. This is ongoing because she was re-elected in 2021 as Commissioner for Health, Humanitarian Affairs and Social Development at the African Union Commission.

The media actors are also not familiar with the African Commission's activities and therefore, do not include information about the African Commission and the Maputo Protocol in their programme. Giving them information and training them on the African Commission's activities may also help enhance the impact as they will relay the information to people.

The general trend, from comparison with previous years, is that the influence of the Maputo Protocol is increasing. More women's rights NGOs are being created and NGOs that deal with human rights in general are starting to give focus to women's rights. For these reasons, the Maputo Protocol is becoming more and more known, although there is still much to be done

65 Ministère des Affaires Etrangères, de la Coopération et des Burkinabè de l'Extérieur 'Commissaire Santé, Affaires humanitaires et Développement social de l'UA: Min ata Samaté/Cessouma élue' [https://www.mae.gov.bf/detail?tx\\_news\\_pi1%5Baction%5D=detail&tx\\_news\\_pi1%5Bcontroller%5D=News&tx\\_news\\_pi1%5Bnews%5D=409&cHash=8410b3e660b0799c346acf4c982118e0](https://www.mae.gov.bf/detail?tx_news_pi1%5Baction%5D=detail&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Bnews%5D=409&cHash=8410b3e660b0799c346acf4c982118e0) (accessed 19 January 2022).

# THE IMPACT OF THE MAPUTO PROTOCOL IN CAMEROON



*Christèle Diwouta Ndongo\**

## 1 Introduction

While the majority of countries have ratified or acceded to the Maputo Protocol, its implementation and application are still far from becoming a reality.<sup>1</sup> Having said that, Cameroon has made noticeable strides towards the advancement of women's rights through its commitments to international and regional obligations. At national level, the Preamble of Cameroon's 1996 Constitution (the Constitution) states that 'the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights' and further that 'the state shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the Constitution'.<sup>2</sup> The principles of equality and non-discrimination are further guaranteed by article 16 of the Civil Code, article 1 of the Penal Code and article 84 of the Labour Code.

In Cameroon, there are several institutions that deal with human rights in general and women's rights specifically. These institutions include the Ministries of External Relations, Ministry of Women's Empowerment and the Family, Social Affairs and Justice, and the Cameroon National Commission on Human Rights and Freedoms (NCHRF). Under the decree establishing the Ministry of Women's Empowerment and the Family,<sup>3</sup> there is an entire directorate for the Promotion and the Protection of the Family and the Rights of the Child. Cameroon has acceded to the major international and regional human rights treaties, including the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and the Maputo Protocol.<sup>4</sup>

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1 Equality Now 'The Maputo Protocol turns 18 today. But what does this mean for women and girls in Africa?' [https://www.equalitynow.org/maputo\\_protocol\\_turns\\_18](https://www.equalitynow.org/maputo_protocol_turns_18) (accessed 9 September 2021).

2 Preamble of the Constitution of the Republic of Cameroon.

3 Decree 2012/0638 of 21 December 2012 on the Organisation of the Ministry of Women's Empowerment and the Family.

4 These include: International Covenant on Civil and Political Rights (Accession 27 June 1984); Optional Protocol to the International Covenant on Civil and Political Rights (Accession 27 June 1984); International Convention on the Elimination of All Forms of Racial Discrimination (Ratification 24 June 1971); Convention on the Elimination of All Forms of Discrimination against Women (Ratification 23 August 1994); Optional Protocol to the Convention on the Elimination of Discrimination against Women (Accession 7 January 2005); Supplementary Convention on the Abolition of

As far as policy is concerned, initiatives at the level of protecting women against female genital mutilation (FGM) and gender-based violence (GBV) include the draft Code of the Person and the Family, which contains favourable provisions on the rights of women, and provides a major opportunity for gender equality and equity. Moreover, the draft Bill on the Prevention and Punishment of Violence on Women and Gender based Discrimination protects women and establishes legal equality between men and women. Also worth mentioning is the update of the National Action Plan to fight Female Genital Mutilation which focuses mainly on sensitisation of both victims and actors of the phenomenon. Areas of concern for women's rights in Cameroon include the promotion of equal and equitable access of women and men, and girls and boys to education, training and information; the promotion of equal opportunities for women and men in the areas of economy and employment; and increasing the participation and representation of

women in the spheres of decision making and elective offices. In addition, draft bills remain for decades at parliament, which has an impact on the full enjoyment and implementation of women's rights in the country.

## 2 Ratification of the Maputo Protocol

Cameroon signed the Maputo Protocol on 25 July 2006, ratified on 13 September 2012 and the instrument of ratification was deposited on 28 December 2012, amidst uproar from the clergy, which called for withdrawal of signature of the instrument. Members of the clergy based their arguments against signature of the Maputo Protocol on article 14 on health and reproductive rights.<sup>5</sup> According to the clergy, the phrasing of article 14 and specifically 14(a), (b) and (c) encourages women to have abortions. General Comment 2 released in 2014 however brings clarity and states that article 14(a), (b) and (c) cover the rights to exercise control over one's fertility, to decide one's maternity, the number of children and the spacing of births, and to choose a contraception method are inextricably linked, interdependent and indivisible. General Comment 2 went further to lay down the conditions under which abortion can be done.<sup>6</sup>

In terms of the Constitution,<sup>7</sup> the executive, through the President of the

Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Accession 27 June 1984); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Accession 19 February 1982); Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment (Accession 19 December 1986); Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Signature 15 December 2009); Convention on the Rights of the Child (Ratification 11 January 1993); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (Ratification 4 February 2013); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Ratification 5 June 2002); Convention relating to the Status of Refugees (succession 23 October 1961); African Charter on Human and Peoples' Rights (Ratification 20 June 1989); and African Charter on the Rights and Welfare of the Child (Ratification 5 September 1997).

5 PM Djongo 'Avortement et homosexualité de Maputo: le rôle trouble de la France' *Le Messager* 1 July 2009 [https://www.bonaberi.com/ar,avortement\\_et\\_homosexualite\\_le\\_ro\\_le\\_trouble\\_de\\_la\\_france,6577.html](https://www.bonaberi.com/ar,avortement_et_homosexualite_le_ro_le_trouble_de_la_france,6577.html) (accessed 22 May 2022).

6 General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

7 Constitution of the Republic of Cameroon, Law 96-06 of 18 January 1996 amending the Constitution of 2 June 1972.

Republic, has the responsibility to ratify all international treaties. Article 43 provides as follows:

The President of the Republic shall negotiate and ratify treaties and international agreements. Treaties and international agreements falling within the area of competence of the Legislative Power as defined in article 26 above shall be submitted to Parliament for authorisation to ratify.

On its part, article 44 states the following:

Where the Constitutional Council finds a provision of a treaty or of an international agreement unconstitutional, authorisation to ratify and the ratification of the said treaty or agreement shall be deferred until the Constitution is amended.

Further still, article 45 suggests that Cameroon is a monist state as it stipulates that '[d]uly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement'.

The Minister of Women's Empowerment and the Family explained during a press conference at the time of the Maputo Protocol ratification, the reasons for this ratification. She stated the following:

The Maputo Protocol is in line with the head of state's vision in terms of women's rights. Its ratification stands in line with the national aspirations that match the international community's goodwill in terms of human development. It is furthermore in line with the national strategic plan of promotion and protection of women's rights. It is an instrument that enriches and strengthens the national legal arsenal, without in the least contradicting the legal framework in force. In this way, it increases the possibilities of eliminating the discrimination to which women are

victims and which are so many obstacles to the expression of their fundamental choices.<sup>8</sup>

As for the interpretations of some articles of the Maputo Protocol, the Minister lamented the fact that certain circles had denounced the fact that Cameroon had decriminalised abortion:

Some have taken conjecture and presumption so far as to see the text in question as a hymn to homosexuality. I would like to say solemnly that under the current state of national legislation, neither abortion nor homosexuality are allowed.<sup>9</sup>

Indeed, article 337 of the Penal Code which deals with abortion severely punishes this act which can only occur in the event of pregnancy resulting from rape and with the authorisation of the public prosecutor, for medical reasons, in accordance with the article 339 of the same code.

What had not been said, according to the Minister, is that the disputed text brings important innovations to the care of widows. Issued in 2020.<sup>10</sup>

It provides for concrete measures aimed at ensuring the widow's exercise of all human rights, by avoiding any form of degrading treatment as reinforced by General Comment 6 on women's rights to property in cases of separation, divorce or annulment of marriage on article 7(d).

Moreover, it should be noted that the ratification of the Maputo Protocol was carried out in accordance with the law, the text having been submitted to the National Assembly, which examined it in detail as required by the rules. It

8 Droits de la femme : Pourquoi le Cameroun a ratifié le protocole de Maputo' <http://www.camerooninfo.net/article/droits-de-la-femme-pourquoi-le-cameroun-a-ratifie-le-protocole-demaputo-120417.html> (accessed 2 October 2020) (own translation).

9 As above.

10 As above.

supports the existing legislation (fundamental law of Cameroon, Penal Code, Civil Code and various conventions) aimed at the full exercise of the citizen and human rights of women for a just, equal society and respectful of human dignity. 'Therefore, no one can invoke the Maputo Protocol to justify infanticide, or similar practices,' concluded the Minister.<sup>11</sup>

Cameroon ratified the Maputo protocol with the following reservation:<sup>12</sup>

The acceptance of the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa should in no way be construed as endorsement, encouragement or promotion of homosexuality, abortion (except therapeutic abortion), genital mutilation, prostitution or any other practice which is not consistent with universal or African ethical and moral values, and which could be wrongly understood as arising from the rights of women to respect as a person or the free development of her personality.

Any interpretation of the present protocol justifying such practices cannot be applied against the government of Cameroon.

### 3 Government focal point

There is no specific organ in charge of implementation of the Maputo Protocol in Cameroon. However, the government has created an institutional framework that protects and promotes the rights of women and girls. In 1975, the Ministry of Social Affairs was created, and this later became the Ministry of Women Affairs, and then the Ministry of Promotion of Women and the Family and today exists as the Ministry of Women Empowerment and the Family. The mandate of the Ministry is to put in place measures aimed at respect for the rights of women in Cameroon, the elimination of all forms of discrimination against women and the promotion of equality in political, economic, social and cultural life.<sup>13</sup>

The Ministry is mandated to study and propose strategies and measures aimed at reinforcing the promotion and protection of the rights of the child to take into account the definition of woman given by the Maputo Protocol which is child inclusive. In this context, girls are victims of, for example, forced marriages, sexual abuse and discrimination in educational opportunities.<sup>14</sup>

### 4 Domestication or incorporation

Domestication under the Cameroonian law may be assessed pursuant to article 45 of the Constitution which provides that: 'Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party

11 J Ndouyou-Mouliom 'Droits de la femme: Pourquoi le Cameroun a ratifié le protocole de Maputo' *Cameroon-Info.Net* 24 September 2009 <http://www.cameroon-info.net/article/droits-de-la-femme-pourquoi-le-cameroun-a-ratifie-le-protocole-de-maputo-120417.html> (accessed 2 October 2020).

12 JL Asuagbor (Commissioner, Special Rapporteur on the Rights of Women in Africa) 'Status of Women Status of Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (New York) 18 March 2016, 60th meeting <https://reliefweb.int/report/world/status-implementation-protocol-african-charter-human-and-peoples-rights-rights-women> (accessed 2 October 2020).

13 Decree 2011/408 of 9 December 2011 organising the government.

14 Report by the Ministry of Justice on Human Rights in Cameroon in 2012 (2013) 284 to the African Charter and the Maputo Protocol.

implements the said treaty or agreement'. Evaluation of the implementation of international Human Rights Conventions by courts revealed a dual tendency. Indeed, some judges consider that these Conventions are part of the block of constitutionality and can therefore only be applied by the constitutional judge. Others, however, consider that these conventions are part and parcel of the legal corpus and apply them depending on whether they are self-executing or not.<sup>15</sup> There is no separate section in the Constitution that could be referred to as a bill of rights. The revised Constitution of 1996 (1996 Constitution) gives full effect to the fundamental rights and freedoms spelt out in the Universal Declaration of Human Rights (Universal Declaration), the African Charter on Human and Peoples' Rights (African Charter) and other ratified international treaties. The 1996 Constitution limits itself to, in the Preamble, enumerating human rights such as the rights to life, physical and moral integrity and to humane treatment; the right to freedom and security; the right to education; the protection of minorities; the rights of indigenous populations in accordance with the law; freedom of movement; privacy; the right not to be unduly prosecuted, arrested or detained; the right to a fair hearing before the courts; the right to presumption of innocence; the right not to be harassed on grounds of one's origin, religious, philosophical or political opinions or beliefs, freedom of religion and worship; freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike; the right to a healthy environment; and the obligation to work.

Article 65 clearly states that the Preamble shall be part and parcel of the Constitution. Therefore, fundamental rights mentioned in the Preamble as per article 45 have primacy over every domestic law. It is the duty of lawmakers to ensure that, prior to ratification, no provisions of an international convention conflict with existing national laws.

However, the adoption in 2010 of a National Plan of Action for the Elimination of Female Genital Mutilation in Cameroon is a genuine example of an explicit measure adopted to give effect to the Maputo Protocol.

## 5 Legislative reform or adoption

There is no available information about a compatibility study of domestic law with the Maputo Protocol that was undertaken before its ratification. Though a monist state, Cameroon does not have a real problem in matters of domestication as treaty ratification cannot occur without Parliament's authorisation,<sup>16</sup> which process should ensure that there is no conflict between a treaty proposed for ratification and the Constitution. To comply with national laws, the proposed international instrument is presented to the Foreign Affairs Committee of the National Assembly which has the duty to control the constitutionality of international treaties and agreements. There is no particular law that was adopted to facilitate implementation of the Maputo Protocol.

However, the government says that in keeping with international human rights law, the Maputo Protocol is in conformity with the national law in

15 African Commission 'Cameroon: 4th-6th Periodic Report, 2015-2019'.

16 The 1996 Constitution of the Republic of Cameroon, art 43.



force by reaffirming the traditional civil, political, economic, social and cultural rights of women. Some of the rights have been consolidated while others have been reinforced with the aim of wiping out gender inequality in family management, institutionalisation of political equality, greater involvement of women in decision-making processes and the drawing up and implementation of development programmes.<sup>17</sup>

Some noticeable strides have been made by the government of Cameroon towards the implementation of the Maputo Protocol. On budget allocation, Cameroon allocated successive budgets to the Ministry of Women's Empowerment and the Family to enable it to effectively fulfil its missions. These allocations have varied slightly over the years. The overall budget allocated to the Ministry stood at 6.888.000.000 FCFA in 2016, 5.643.000.000 FCFA in 2017 and 6.072.000.000 FCFA in 2018.<sup>18</sup>

The government is striving to uphold its international obligations under CEDAW and Maputo Protocol through equality and non-discrimination constitutional norms set by the constitution and implemented through the internal regulatory and institutional framework. For instance, the amendment of the section on adultery by a woman in the Penal Code. Section 361 of the new Penal Code now provides for the same punishment for adultery for both men and women. More so, marriage between a rapist and their

victim is no longer an exemption from prosecution as it used to be in the past (Penal Code, section 297).<sup>19</sup>

The draft Code of the Person and the Family, which contains favourable provisions on the rights and aspirations of women, provides a major opportunity for gender equality and equity. The draft code provides amongst other things that: 'dowry and gifts cannot be returned';<sup>20</sup> 'spouses owe each other mutual love, respect, fidelity, help and assistance', and in the 'case of polygamy, each wife has the right to equal treatment in relation to the other wives';<sup>21</sup> each spouse has freedom to work without obtaining the consent of the other;<sup>22</sup> in case of dissolution of a marriage, the wife is entitled to her share of the marriage property before the husband;<sup>23</sup> and in cases of polygamy, 'all the widows have the right to inheritance shared between them in proportion to the number of years in marriage with the deceased'.<sup>24</sup>

The content of the right to health has been updated as per the Maputo Protocol by highlighting the right of women to control reproductive functions and more specifically through recognition of a legal right to medical abortion.<sup>25</sup>

Finally, of importance, is the creation by Order 081/CAB/PMd of 15 April 2011 of an inter-ministerial

17 U Kouokam *Report by the Ministry of Justice on Human Rights in Cameroon in 2009* LEGALIS Cameroon (2018) available at <http://www.minjustice.gov.cm/index.php/en/publications/reports/271-report-of-the-ministry-of-justice-on-human-rights-in-cameroon-in-2009>

18 1 USD is more or less 500 CFAF.

19 Law no 2016/007 of 12 July 2016 relating to the Penal Code.

20 Draft Code of the Person and the Family sec 215.

21 Draft Code of the Person and the Family (n 20) sec 234(3).

22 Draft Code of the Person and the Family (n 20) sec 240.

23 Draft Code of the Person and the Family (n 20) sec 459(2).

24 Draft Code of the Person and the Family (n 20) sec 545(2).

25 Penal Code of Cameroon sec 339.

monitoring committee for the implementation of international and regional human rights promotion and protection mechanisms including the African Commission on Human and Peoples' Rights (African Commission).

This inter-ministerial Committee, which reports to the Prime Minister, is vested with the power to draw up a list of the different cases before these bodies, propose ways of addressing the recommendations and decisions of these bodies, ensure the implementation of validated proposals, brainstorm on the possibility of reducing or avoiding situations where the government is blamed in cases investigated by these bodies, and encourage and oversee training schemes relating to the promotion and protection of human rights.<sup>26</sup>

## 6 Policy reform or formulation

Prior to 2016, FGM was dealt with by soft laws through the National action Plan to fight Female Genital Mutilation. The revised Penal Code has introduced section 277-1 which criminalises FGM as read together with section 350 ('Assault on Children') of the same Penal Code which specifically addresses genital mutilation committed on children and provides a more severe punishment if the offence is committed against a person under the age of 15. These legal dispositions are being followed up by a series of activities and events. For instance, every 6th February, Cameroon joins the international community to observe the International Day of Zero Tolerance for FGM. Moreover, the Ministry of Women Empowerment and

the Family has issued a brochure explaining the aim, goal and articles of the Maputo Protocol.<sup>27</sup>

The government admits that the promotion and protection of the rights of women according to the norms established under the Maputo Protocol is a progressive process that calls on all stakeholders to ensure their effective implementation. Significant progress has been made towards the promotion and protection of the rights of vulnerable classes although much is still to be done.<sup>28</sup>

Also worth mentioning is a national action plan for resolution 1325 and companion resolutions of the United Nations Security Council on women, peace and security (2018-2020). In its introduction, the plan stresses that the resurgence of crises in society and the emergence of new forms of conflict constitute a major challenge for governments in the world. The insecurity of life, the feeling of exclusion, the weakness of job opportunities and poor governance provoke enormous frustrations within populations. Moreover, most countries in the world are progressively confronted with different forms of claims which, if insufficiently catered for, progressively lead to radicalisation. In general, the world is facing an unprecedented cycle of violence with numerous consequences such as looting, atrocities, war lords, child soldiers, women and girls who are victims of all sorts of violence and despair. Abiding to its international and regional obligations, Cameroon through this action plan, recalls its commitment to the right

26 Fifty-third ordinary session of the African Commission Third Periodic Report of Cameroon within the framework of the African Charter on Human and Peoples' Rights Banjul, 9 to 24 April 2013.

27 <http://www.minproff.cm/wp-content/uploads/2015/05/PROTOCOL-DE-MAPUTO-Brochure.pdf> (accessed 2 October 2020).

28 Report of the Ministry of Justice, 287.

to peace underscored in article 10 of the Maputo Protocol.

The Electoral Code states that for the election of parliamentarians to the National Assembly, municipal counselors and senators, 'each list shall take into consideration the various sociological components of the constituency concerned. It shall also take into consideration gender aspects'.<sup>29</sup>

Currently in Cameroon, at the National Assembly, out of 180 members of parliament, 61 are women. At the Senate, out of 100 senators, only 26 are females and out of 58 division offices, we count only two females. Numbers speak for themselves as far as gender equality and positions of leadership are concerned.

Generally, to ensure better incorporation of the recommendation on the need to take measures for the total and effective implementation of the African Union Solemn Declaration on Gender Equality on the one hand, and the need to formulate a policy on gender representation in positions of responsibility on the other, it must be underscored that though the 50 per cent quota prescribed by the African Commission has not yet been achieved, initiatives taken by the government in this regard must be noted. These initiatives include, amongst others, an overall brainstorming on the status of the woman in Cameroon. Thus, a National Gender Policy (NGP) has been formulated, the vision of which is consistent with the general vision of Cameroon for 2035. It seeks to guarantee the enjoyment of the same rights by men and women including equitable and equal participation in the development of the country.<sup>30</sup>

29 Electoral Code art 151(3).

30 Third Periodic Report of Cameroon para 32.

## 7 Impact on the judiciary

There is a great awareness among the legal profession on the Maputo Protocol and it has been invoked in a number of proceedings recently. The Maputo Protocol has enhanced the body of legislation on women's matters in Cameroon. It comes very handy in matters of female detainees and issues of succession and land inheritance for female children.

Moreover, in a bid to harmonise the practice, awareness-raising and capacity-building sessions were held with legal actors on the applicability of international human rights instruments. Increasingly, there is proof of mastery of the provisions of the Maputo Protocol as seen in court decisions. For example, the matter between *The People and 'Crédit du Sahel SA', Mora Branch v Mrs Apsatou Salki Bouba Bebe*<sup>31</sup> rendered by the Mora High Court can be cited. To order the release of the accused who was pregnant, the Judge evoked both article 24 and article 14 of the Protocol, recalling the obligation of the State to protect

the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.<sup>32</sup>

and to guarantee that

the right to health of women, including sexual and reproductive health is respected and promoted by establishing and strengthening existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.<sup>33</sup>

31 *The People and 'Crédit du Sahel SA', Mora Branch v Mrs Apsatou Salki Bouba Bebe* (19 November 2015) Judgement No 36/ADD/CRIM, Mora High Court.

32 Maputo Protocol art 24(b).

33 African Commission (n 15).

In the Cameroonian case of *Immaculate Vefonge v Samuel Lyonga Yukpe*,<sup>34</sup> the Court of Appeal of Buea ruled to sustain a Bakweri custom whereby a husband is forbidden to send away a nursing mother from the matrimonial home or contemplating divorce proceedings against her.<sup>35</sup>

Furthermore, the NCHRF registered some cases in which the Maputo Protocol was violated.<sup>36</sup> For example:

- *Nzecke Marie v Ngo Etogo Apollinaire* in which on 23 January 2012, the NCHRF received a report by the Ngo Etogo family denouncing the violation of physical integrity suffered by Ms Nzecke Marie, on the part of Mr Etogo Appollinaire, her father, who inflicted burns on her.
- Ms Otteh Ernestine Ndam, in which a teacher in a government primary school in Yaoundé filed a report to the NCHRF to denounce the physical, moral and psychological abuse she suffered regularly at the hands of her husband, alongside his failure to contribute in any way to running of the household.
- Ms Ewane Njombo Dora Claire, widow of late Ewane Nnoko who died in a road accident in 2002 in Lagos (Nigeria), filed a report to the NCHRF to denounce the violation of her right to compensation by the management of African Reinsurance Corporation (AFRICA-RE), which had not fulfilled its contractual obligations relative to the case of her late husband's fatal accident.

The NCHRF having a quasi-judicial status settled these matters by reconcil-

ing the parties with reference to the African Charter and the Maputo Protocol.

## 8 Awareness and use by civil society

Non-governmental organisations (NGOs) and Civil society organisations (CSOs) in Cameroon are governed by law N099/014 of 22 December 1999 and law N090/053 of 19 December 1990 on freedom of association. They are organised around specific thematic areas such as human rights, child rights, health-care, charity. They are usually funded by donors and run by volunteers.

CSOs in Cameroon are well-aware of the Maputo Protocol. As is illustrated below, the Maputo Protocol has been used in NGOs' work and its provisions mentioned as well. As stated above, ratification of the Maputo Protocol in Cameroon has been met with stiffness on the part of the Catholic Church with respect to article 14 of the Protocol on health and reproductive rights. Following the Bishops' Resolution opposing the Maputo Protocol, a protest was held in the Douala Archdiocese by CSOs.<sup>37</sup>

In recent years, the Maputo Protocol has gained more popularity within civil society. It has been evoked in a parallel report to the UN Committee on Economic, Social and Cultural Rights by the Women's International League for Peace and Freedom (Cameroon chapter) during its 65th session in 2019. The NGO, based on the provisions of the Maputo Protocol, highlighted the subordinate position of women in Cameroon exacerbated by the unrest in South-West and North-West region and in the North. The NGO further noted that Cameroon is not upholding its obli-

34 *Immaculate Vefonge v Samuel Lyonga Yukpe*, Appeal CASWP/CC/21/81 (unreported).

35 National Commission on Human Rights and Freedoms, 104.

36 National Commission on Human Rights and Freedoms, 67-69.

37 Report of the Ministry of Justice (n 28) 252.

gations to provide the right to peace as enshrined in article 10 of the Maputo Protocol.<sup>38</sup>

More recently, in a shadow report by Human Rights Watch to the African Commission<sup>39</sup> in response to the 6th periodic report of Cameroon pertaining to the implementation of the African Charter, the Maputo Protocol and the Kampala Convention, the NGO observed that Cameroon's 6th periodic report states that

from 2013 to 2017, 313 elements of defence forces were prosecuted before the courts for different offences including rape and attempted rape and notes that 30 of the 313 were convicted and sentenced.<sup>40</sup>

The report however fails to provide evidence of any efforts on the part of the government of Cameroon to prosecute those implicated in human rights violations, including sexual violence, committed in the Anglophone regions since late 2017, or any details of cases brought against security forces which were tried before courts.

The report states that sections 295 and 296 of the Penal Code introduced new penalties for offences of rape and sections 346 and 347 include punishments for 'offences on minors accompanied by sexual intercourse or rape'. The

report affirms that 264 cases of rape were prosecuted in 2016 and 309 were prosecuted in 2017. However, the report fails to provide evidence of any investigations or prosecutions of cases of sexual violence. Human Rights Watch documented four cases of sexual violence by security forces members. Two women and one girl from a locality in the Northwest region each said that the *Bataillon d'Intervention Rapide* (BIR) soldiers raped them in January 2019. In another case in June 2019, a soldier reportedly raped a woman in Kumbo, Northwest region, Human Rights Watch expressed concerns that there are many more cases of sexual violence by security forces which go unreported due to survivors' fear of social stigma.<sup>41</sup>

The shadow report went further to recommend the Commission to pose questions to Cameroon on sexual violence (articles 3 and 4 of the Maputo Protocol). Cameroon's 6th periodic report states that 'from 2013 to 2017, 313 elements of defense forces were prosecuted before courts for different offences' including rape and attempted rape and notes that 30 of the 313 were convicted and sentenced. The Cameroon report however fails to provide evidence of any efforts on the part of Cameroon to prosecute those implicated in the human rights violations, including sexual violence committed in English speaking regions since late 2017 or any details of cases brought against security forces which were tried before courts.

38 Women's International League for Peace & Freedom Cameroon 'Women's Economic, Social and Cultural Rights in Cameroon: Parallel Report to the UN Committee on Economic, Social and Cultural Rights' (65th Session, Feb-Mar 2019) available at [https://www.wilpf.org/wp-content/uploads/2019/11/Cameroon-CESCR\\_EN.pdf](https://www.wilpf.org/wp-content/uploads/2019/11/Cameroon-CESCR_EN.pdf) (accessed 9 September 2021).

39 'Shadow report to the African commission on human and peoples' rights in response to the 6th Periodic Report of Cameroon' Human Rights Watch (30 March 2020) available at <https://www.hrw.org/news/2020/03/30/shadow-report-african-commission-human-and-peoples-rights-response-6th-periodic> (accessed 6 November 2020).

40 As above.

41 Human Rights Watch (n 39).

## **9 Awareness and use by lawyers and judicial officers (law societies and other practising lawyers)**

As alluded to earlier in this report, since its ratification by Cameroon, the Maputo Protocol has known an increasing level of awareness among the public but also within the legal profession. The Maputo Protocol has been explicitly evoked in a court case.

Fute, a lawyer at the Cameroon Bar, emphasised that although there has been advances in the position of women in Cameroon, the Maputo Protocol has further enhanced the legal system as far as women's rights are concerned. She says that:

We have come a long way before Beijing and Maputo and much ground has been covered since then. There was a time in this country whereby a married woman had to get the written authorisation from her husband before traveling outside the country until as recently as 1987. The Maputo Protocol came to further improve the position of women in general and specifically of women in matters of succession. The law clearly stipulates that all children are equal when it comes to inheritance. But in reality, there is still a lot of abuse and discrimination with the girl child often left out in inheritance especially in land inheritance. The Maputo Protocol has been increasingly invoked in the past few years in our courts of law.

From what the researcher gathered during this interview, the Maputo Protocol is beneficial to Cameroon's legal system and lawyers and magistrates are becoming more and more aware of its strengths. Once all available local remedies have been exhausted, the Maputo Protocol comes as an extra cover, filling in the gaps and silences in domestic laws.

In summary, as far as the legal profession is concerned, the Maputo Protocol helps in succession matters, and management of marital wealth. The Maputo Protocol brings about balance between spouses. Recommendation is therefore made for an increase in awareness-campaigns on the existence and importance of the Maputo Protocol. This goes to show that lawyers and judicial officers are ready to use the provisions of the Maputo Protocol in their arguments. This level of engagement is encouraging and should be emulated in more courts of law in the country.

## **10 Higher education and academic writing**

The Maputo Protocol is steadily taking its place in institutions of higher learning in Cameroon. At the department of Law of the University of Buea, Southwest Cameroon, the human rights curriculum has a fully-fledged module on international human rights comprising gender studies and women rights.

According to an interview with JJ Ndjekinda, State Prosecutor at the 1st instance Court in Nkongsamba Littoral region, the Law Faculty at the University of Yaounde 2, Soa Campus offers a two-year Masters in human rights and state of law including gender and minorities. The Maputo Protocol is included in this curriculum. The National School of Administration and Magistracy (ENAM) offers a module in human rights and fundamental freedoms and international humanitarian law, whereby the Maputo Protocol is very often evoked. According to the prosecutor, the Maputo Protocol should be seen as a model law to be reflected in all our institutions and this is very well on its way. This goes without saying that the coun-

try is making progress, reinforced by the advent of the Maputo Protocol.

The Law Faculty of the University of Dschang conducts training on human rights. Before 2009, the programme was a *Diplôme d'Etudes Supérieures Spécialisées* (DESS) in human rights and humanitarian action. Since the University Reform in 2009, this programme is the equivalent of a masters' degree and has a module in African human rights law which draws content from the African Charter as well as the Maputo Protocol.

The *Association pour la Défense des Droits de l'Homme en Afrique Centrale* (APDHAC), an NGO based at the Catholic University of Central Africa (UCAC), has a fully-fledged programme on human rights in Africa. This institution, through UCAC, offers master's degree and doctorate programmes in human rights. The institution also offers yearlong short courses on different aspects of human rights, including women's rights in the African human rights system and beyond. The Maputo Protocol is integral to the UCAC human rights curriculum.

Since the passing of Law *no 2009/003 du 14 avril 2009*, authorising the Head of State to ratify the Maputo Protocol, the latter has been the subject of awareness by way of academic articles and bulletins issued by academic institutions. For instance, APDHAC has issued a bulletin explaining in detail what the protocol is all about, how it came into force, the strife caused by its ratification and the positive impact it could have for women advancement.<sup>42</sup>

42 Bulletin de l'APDHAC 'EX cathedra' N°32 (October 2009) available at [https://dial.uclouvain.be/pr/boreal/object/boreal%3A194792/datastream/PDF\\_01/view](https://dial.uclouvain.be/pr/boreal/object/boreal%3A194792/datastream/PDF_01/view) (accessed 6 November 2020).

The National Advanced Police School, Yaoundé, has human rights as a subject and human rights is also mainstreamed into other subjects. In classroom lectures, especially on gender and policing, reference is made to the provisions of the Maputo Protocol. Recently, some students in their dissertation for the fulfilment of the requirements of the diploma of Superintendent of Police, included in their writing ideas which drew on the provisions of the Maputo Protocol in assessing whether police efficiency might be enhanced if gender concerns are more expressly considered during recruitment, training, deployment and promotion. Such thoughts are often regarded as contrary to views that more women in the police academy will make the service less efficient.

## 11 Impact on independent state institutions

The National Commission on Human Rights and Freedoms (NCHRF) frequently refers to Cameroon's ratification of the African Charter and the Maputo Protocol amongst other international conventions relating to the rights of women in its work. However, it regrets that the social and cultural context in which the Cameroonian woman lives is characterised by long lasting challenges that largely emanate from customs and religious precepts that encourage or justify distinction, exclusions or gender-based restrictions, and uphold the primacy of men at all levels.<sup>43</sup>

In addition to the above, the NCHRF occasionally organises awareness sessions with a range of CSOs

43 National Commission on Human Rights and Freedoms Report on the state of Human Rights in Cameroon 2007-2008 (2008) 39.

including women's rights organisations. Regarding the use of the Maputo Protocol, it has been used in preparing the latest periodic report to the African Commission. Their role is to facilitate consultations with CSOs which are requested to share their actions as far as the implementation of the Maputo Protocol is concerned on the one side. And on the other side, they must suggest recommendations to the state for its implementation. In 2020, the Cameroon report was examined by the Commission and the report was available at the NCHRF on request. The NCHRF also makes follow-ups of the concluding observations that arise from the Cameroon periodic reports consideration by the Commission.

## 12 State reporting

According to article 62 of the African Charter and article 26(1) of the Maputo Protocol, state parties are required to submit every two years a report on legislative and other measures taken in relation to their protection of these rights recognised and guaranteed by the African Charter and the Maputo Protocol. A state report in Cameroon is prepared by inter-ministerial collaboration between the Ministry of Foreign Affairs and the Ministry of Justice. More specifically, periodic reports are prepared by the Division of International Cooperation and the Division of Human Rights in the Ministry of Justice. The African Affairs Division at the Ministry of Foreign Affairs also takes part in this process.

Cameroon presented its initial report on 5 May 2002 in Pretoria, South Africa at the 31st session of the African Commission. The 1st, 2nd, and 3rd periodic reports of Cameroon were presented in Banjul, The Gambia, respectively

at the 39th session of the African Commission, held from 9 to 23 May 2006, the 47th session, held from 12 to 26 May 2010, and at the 54th session, held from 22 October to 5 November 2013.

Most recently, the government organised a workshop for the external validation of Cameroon combined 4th, 5th and 6th Periodic Report under the African Charter and the 1st report under the Maputo Protocol and the Kampala Convention from 4 to 5 December 2018 at the Ministry of Justice in Yaoundé. At the concluding session, the representative of the Minister of Justice mentioned that the document would serve as a yardstick by which the general situation of human rights and the rights of women and the those of displaced persons in Cameroon would be assessed. He further noted that the report witnessed the participation of civil society in the validation session indicating government commitment to involve all stakeholders in its vision on the collaborative management of public affairs as recommended in the previous state report consideration.<sup>44</sup>

In January 2020, in a combined document, Cameroon submitted its 4th, 5th and 6th Periodic Reports covering the period of 2016 to 2019 to the African Commission and its initial report on the Maputo Protocol and Kampala Convention, which were considered at the 66th session of the Commission.<sup>45</sup>

44 E Amabo 'Human rights situation in Cameroon: government to submit report before continental commission' *Cameroon Tribune* 7 December 2018 available at <https://www.cameroon-tribune.cm/article.html/22833/fr.html/human-rights-situation-in-cameroon-govt-submit-report-before-continental-commission> (accessed 6 November 2020).

45 Human Rights Watch (n 39).



The goal of periodic reports is to present the progress and difficulties in implementing human rights in a country. In the case of Cameroon, periodic reports have been cited as a means to show that international conventions constitute domestic legislation and could be invoked in a court of law in Cameroon.<sup>46</sup>

The Commission noted that Cameroon is the first African country to submit a report covering three conventions. Cameroon was encouraged to look closely at the crisis in English-speaking regions of the country and work with the Commission to find an end to the crisis.<sup>47</sup> The commissioners noted that the situation of human rights defenders is still worrisome in the country and are not mentioned in the combined report.

In addition to recommending that Cameroon 'harmonize the national legislation with the regional and international standards on the rights of indigenous populations or communities' and 'work towards the consideration of their cultural peculiarities', the African Commission also expressly urged Cameroon to 'take special measures to guarantee the protection and implementation of indigenous women's rights due to their extreme vulnerability and the discrimination to which they are subject'. These recommendations constitute important legal standards and a significant step for indigenous peoples

and women. They can now be used at the national level for the recognition and realisation of rights.<sup>48</sup>

### 13 Communications

While there have been a few communications filed against Cameroon with respect to the violations of the African Charter, to date, there are no reported communications related to the Maputo Protocol submitted to the African Commission.

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

The first promotional visit to Cameroon was conducted in 1998 by the then Commissioner EVO Dankwa.<sup>49</sup> A subsequent visit was made in 2002, which was specific to prisons and places of detention. The most recent promotional visit was conducted in 2012. It was a joint mission by the Special Rapporteur on the rights of women and the Chairperson of the Committee on the rights of persons living with HIV.<sup>50</sup> The visit met with various women's rights groups and examined the situation of women in Cameroon.

46 BR Guimdo Dongmo 'Le droit d'accès à la justice administrative au Cameroun: Contribution à l'étude d'un droit fondamental' (2008) 33(121) *Revue de la recherche juridique-droit prospectif* 463.

47 African Commission 67 'Periodic review of the Republic of Cameroon' International Service for Human Rights <https://ishr.ch/latest-updates/achpr67-periodic-review-republic-cameroon/> (accessed 6 September 2021).

48 See Forest Peoples Programme 'Advocacy efforts lead to African Commission's increased consideration of indigenous women's rights' (3 June 2011) <http://www.forestpeoples.org/topics/gender-issues/news/2011/06/advocacy-efforts-lead-african-commission-s-increased-consideration> (accessed 8 November 2020).

49 African Commission Report on Promotional visit to Cameroon 1998 <https://achpr.au.int/en/node/551>.

50 African Commission Report on Promotional Visit to Cameroon 2012 <https://achpr.au.int/en/mission-reports/cameroon-promotion-mission-2012>.

Although Cameroon has not yet hosted a session of the African Commission, Chief Justice Lucy Asuagbor, a native of Cameroon, was appointed as the African Commission Special Rapporteur on Human Rights Defenders in Africa and the Special Rapporteur on the Rights of Women in Africa 2010 till 2020. Her appointment helped to create more awareness about the Maputo Protocol. Her end-of-mandate report reflects the need for African countries to ratify the Maputo Protocol without reservation in order to allow women to fully enjoy their rights.<sup>51</sup> From 19 to 20 November 2019, the Special Rapporteur was invited to participate in the 10th anniversary of Network of Human Rights Defenders in Central Africa (REDHAC) in Yaoundé, Cameroon under the theme 'Protecting and supporting Human Rights Defenders: our engagement for durable peace'. During this meeting, she participated in a panel on 'Protection, effective security of Women Human Rights Defenders in the context of Violent Extremism in Africa: what specific protection'. In her presentation, she applauded the important role played by women human rights defenders in the protection of human rights in general and women's rights in particular. She highlighted the challenges faced by women human rights defenders and the legal framework protecting them at the global and regional levels including the soft law instruments adopted by the African Commission. She concluded by explaining the impact of violent extremism on

women as victim, perpetrator and agent of peace. The Special Rapporteur received an award for her relentless work in the protection and promotion of human rights defenders in Africa, and in particular, the rights of women human rights defenders.

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

There are indeed factors that play in favour or against implementation of the Maputo Protocol in Cameroon. In the past five years, progress has been noted following the ratification of the Maputo Protocol by Cameroon. The Penal Procedure Code (*Code de Procédure Pénal*) which was revised and was supposed to be published in 2005, took another year for the legislator to ensure that provisions of the Maputo Protocol are adequately reflected in the Code, which was publicised in 2007. There is a clear will of the government to comply with regional and international standards as far as women's rights are concerned in Cameroon. We also note the creation of call centres in the past few years in four out of the ten regions of the country. These call centres are meant for victims of domestic violence. There is a need, however, to put them in all the ten regions of the country.

Concerning the Penal Code (2016), new provisions have been introduced and old ones have been revised. The Penal Code has introduced FGM as a crime punishable under section 277-1. Expulsion of the matrimonial house by one spouse has also been introduced under section 356-1 as well as punishment of violence on a pregnant woman

51 End of mandate activity report of hon. Commissioner Lucy Asuagbor Presented to the 66th Ordinary Session of the African Commission on Human and Peoples' Rights 13th July to 7 August 2020 ZOOM WEBINAR [https://www.achpr.org/public/Document/file/English/Com\\_Lucy%20Asuagbor\\_SRRW\\_IntersessionReport%2066OS\\_ENG.pdf](https://www.achpr.org/public/Document/file/English/Com_Lucy%20Asuagbor_SRRW_IntersessionReport%2066OS_ENG.pdf) (accessed 9 September 2021).

under section 338. These sections not only give more protection to women but are also inspired by the Maputo Protocol.

Moreover, we note the persistence of customary and religious practices that impede the full enjoyment of rights by women, especially those that deny women and girls their rights to inheritance; the practice of inhuman and degrading widowhood rites; FGM; and the primacy of masculinity, disproportionate access to education for the girl child and the patriarchal system.

The lack of a fully-fledged bill of rights in the Constitution added to the long-awaited passing of draft codes and bills. For instance, the civil code reform has been tabled for over 20 years and so is the case for the Draft of the Persons and the Family, the draft Bill on the Prevention and Punishment of Violence on Women and Gender-based Discrimination.

Cameroon has made key strides toward gender equality and women's empowerment through major international commitments, including the CEDAW, the Beijing Declaration and Platform for Action, the Declaration of Heads of State and Government of the African Union on Equality Between Women and Men, and the Sustainable Development Goals. However, though these international and regional commitments take precedence over Cameroon's national laws, customs, and traditions, the preference for customary laws remains, and means that discrimination against women continues in Cameroon, especially in rural areas.<sup>52</sup>

Other challenges include ignorance of their rights, poverty and conflicts in

certain parts of the country namely the North with the Boko Haram and the English-speaking regions with the so-called Anglophone crisis. In such environments, women often bear the brunt of violence as a weapon of war, insecurity and dropout of school.

The impact of the COVID-19 pandemic cannot be underestimated. On 6 May 2020, the Special Rapporteur on women's rights in Africa made a press statement on violations of women's rights during the COVID-19 pandemic. She expressed concern over the high level of complaints of violence against women, including GBV and domestic violence in African countries occasioned by lockdown measures imposed as a response to the COVID-19 pandemic. She noted that calls have tripled from women trapped in their homes with abusive partners. She said the pandemic has given rise to economic consequences; limited access to sexual and reproductive health care services; closure of schools, with millions of girls out of school, leading to increased risk of sexual exploitation, early pregnancies, rape, as well as early and forced marriages. She highlighted gains registered so far in the protection of women's rights over the years and urged state parties not to lose sight of these gains and adopt the principle of equality in all COVID-19 related responses. She further urged states to provide special protection to women and girls through access to sexual and reproductive health services; alternative accommodation to victims of GBV, as well as counselling services for women and girls who are victims of GBV support to women who

52 'Ending inequality against women in Cameroon' *United Nations Foundation* 7 December 2017, available at <https://unfoundation.org/blog/post/ending-inequality-women-cameroon/> (accessed 9 September 2021).

have lost their sources of income and involving women in all plans and actions aimed at protecting their rights during and after the pandemic.



# THE IMPACT OF THE MAPUTO PROTOCOL IN CÔTE D'IVOIRE

Pierre Olivier Lobé\*



## 1 Introduction

Côte d'Ivoire is a West African country that gained independence in 1960. Since it acceded to independence, Côte d'Ivoire has shown its commitment to promoting and protecting human rights by ratifying a range of instruments, including the African Charter on Human and Peoples' Rights (African Charter) in 1992. However, over a long period, the ratification of these conventions had not really influenced the promotion and protection of human rights as it could have been expected at the national level. This situation gave rise to the birth of new human rights organisations, such as *Mouvement Ivoirien des Droits Humains* (MIDH)<sup>1</sup> and

*Action pour la Protection des Droits de l'Homme* (APDH),<sup>2</sup> as well as *Ligue Ivoirienne des Droits de l'Homme* (LIDHO),<sup>3</sup> created in 1987, and the Ivorian section of Amnesty International. The 2000s ushered in a new era of mainstreaming human rights as efforts have been on course by successive governments, which adopted national legislation, and national policies aligning more with the international commitments of the state. The legislation emphasised the rights of vulnerable people including children, people with disabilities, and women.

The situation of human rights in Côte d'Ivoire and especially that of women witnessed a positive development, particularly post the year 2010. After the post-electoral crisis of 2011, the socio-political situation was more or less stable, and the state took advantage to catch up as far as the gaps, loopholes,

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1 The *Mouvement Ivoirien des Droits Humains* (MIDH) was created on 8 October 2000. The MIDH aims to provide new support and strengthen the promotion and defense of human rights. It carried out many major projects since 2001 focusing on observing the various national electoral processes, providing aid and assistance to victims of human rights violations, promoting non-violence, campaigns conciliation, mediation, and conflict resolution.

2 *Action pour la Protection des Droits de l'Homme* (APDH) was created in 2003. It has set itself the following missions: Fight against all violations of human rights and the abuse of power; provide legal, or even psychosocial aid and assistance to any needy person with a view to the recognition of their rights.

3 The LIDHO is the pioneer of ONGs acting in the field of human protection in Côte d'Ivoire. It actively fought for the ratification of the African Charter of 1981 by Côte d'Ivoire.

and inconsistencies are concerned in terms of guaranteeing acceptable standards on the rights of women in the country. In 2012, the state ratified the additional protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>4</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol. Since then, policies and programs in favour of women have multiplied and have gradually been implemented.

## 2 Context of ratification of the Maputo Protocol

The Maputo Protocol, signed by Côte d'Ivoire in February 2004, was ratified in September 2011<sup>5</sup> without any reservation and the instruments of ratification deposited on 9 March 2012. In practice, after the signature of a treaty, the Constitutional Council needs to control its conformity with the Constitution before the parliament authorises ratification by the President of the Republic. The ratification of the Maputo Protocol did not follow the mechanism provided for in the Constitution. There was no law authorising ratification for the simple reason that in 2011, the National Assembly was dissolved, and the Constitutional Council was not seized although it existed and functioned. The ratification of the Maputo Protocol was part of the general context linked to the promotion of the gender issues in Côte

d'Ivoire specifically to the implementation of the Beijing Action Program adopted in 1995. The Beijing Action Program is a strategic framework for actions that propose concrete measures to be taken by states and the international community to effectively fight against the inequalities and discrimination suffered by women in all sectors of public and private life. It has both an empirical and a legal basis and calls on all governments to step up their efforts to address the issue of gender equality, ensuring that a gender perspective is applied to all policies and programs at national, regional, and international levels. It seems that the Maputo Protocol was ratified more to fulfil commitments under the Beijing Action Program and less for the interest of this instrument.

## 3 Government focal point for implementation of the Maputo Protocol

Up to 2016, there was the Ministry of Solidarity, Family, Women and Children Affairs that oversaw gender equality issues. Within this Ministry, there was a Directorate aimed at ensuring implementation of the national policy on equal opportunities, equity and gender, and at instilling an enabling environment for gender mainstreaming in all sectors and at all levels. In 2014, the Directorate was transformed into an Observatory of equity and gender, the French name of such body is *Observatoire National de l'Équité et du Genre* (ONEG). The ONEG which is located within the Office of the Prime Minister, was created by decree 842 of 17 December 2014 with the mandate to monitor, evaluate and make recommendations for the promotion of gender equality in all public policies. The government also

4 [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&clang=\\_fr](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_fr) (accessed 5 December 2020).

5 *Décret no 2011-226 du 16 septembre 2011 portant ratification et publication du protocole à la Charte africaine des Droits de l'Homme et des Peuples relatif aux droits des femmes, adopté le 11 juillet 2003 à Maputo.*

created in October 2011 a Compendium of women competencies. The *Compendium des Compétences Féminines de Côte d'Ivoire* so-called COCOFCI was set up on 4 October 2011 by the Gender Advisor to the President of the Republic of Côte d'Ivoire to strengthen the visibility, participation and leadership of women in the management of public and private affairs.<sup>6</sup> Thus, the Compendium was viewed as providing the government with a comprehensive database of qualified Ivorian women for the purpose of appointing them to high-level decision-making positions. The government has also set up a National Committee to fight violence against women and children and adopted a National Strategy to fight sexual and gender-based violence.

Currently, it is the Ministry of Women, Family and Children that monitors the implementation of the Maputo Protocol. Within the said Ministry, a department, the Directorate for the Promotion of Gender and Equity, has been established and is responsible for ensuring the protection and promotion of women's rights as well as implementing international commitments through gender equity and equality. Members of this directorate have undergone specialised training both nationally and internationally on women's rights, particularly on the Maputo Protocol. The recent international training in which the members of this department took part is one organised in Dakar from 23 November to 4 December 2020 by the *Fondation René Cassin* and the Friedrich Nauman Foundation. It should be noted that the

*Fondation René Cassin* offers numerous training courses relating to human rights in connection with current themes. These training sessions allow human rights actors to develop their knowledge to achieve effective protection of human rights by providing them with the necessary tools to prevent but also to sanction human rights violations. The 11th delocalised training session, held in Dakar, Senegal, in November and December 2020 focused on the theme: 'Women's rights and international human rights law'.<sup>7</sup> The Directorate for the Promotion of Gender and Equity also works in collaboration with the Directorate of Human Rights of the Ministry of Justice and the National Human Rights Institution of the country, known as *Conseil National des Droits de l'Homme de Côte d'Ivoire*. These last two entities are in direct contact with the African Commission on Human and Peoples' Rights (African Commission). All this could fall under the overall move of the implementation of the Maputo Protocol at the institutional level as far as the government is concerned.

#### 4 The value of the Maputo Protocol in the Ivorian legal order

Like other French-speaking countries in Africa, Côte d'Ivoire has adopted the monist legal system with the primacy of international law. Once ratified, treaties become part of the law of the land without a transposition or domestication mechanism. Under article 123 of the Ivorian Constitution of 8 November 2016, duly ratified conventions have, upon publication, superior authority

6 <http://docstore.ohchr.org/SelfServices/FileHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsoVqDbaslinb8oXgzzpEhivi6LX%2BvdSMxgLpq7OF7NMTvG9IV38e4897A0H1skPSgym4IuFf7nmUe2OPDBP3IRp7Dg7mkGzAJRaeA%2FAayuDv%2F> (accessed 5 December 2020).

7 Fondation René Cassin 'Du 19 au 12 mai 2022 2ème session spéciale de Dakar 2022' <https://www.iidh.org/index.php?p=page&idP=9&pays=4> (accessed 20 December 2020).



than the one attributed to ordinary laws passed by the parliament.<sup>8</sup> However, the primacy given to the international law over the national law does not include the Constitution, which, in its preamble, is said to be the supreme law of the land, and any other legal instruments should be deemed of a lower authority before the Constitution. In any case, there is no conflict between the Maputo Protocol and the current Ivorian Constitution insofar as most of the provisions of the Maputo Protocol have been included in the 2016 Constitution in its first title devoted to Rights, Freedoms and Duties. Moreover, national legislation has been amended to comply with the provisions of the Maputo Protocol.

## 5 Legislative reform guided by the Maputo Protocol

The national legislation has been amended to give full effect to the provisions of the state's international commitments to promote and protect women's rights. The Maputo Protocol, alongside other instruments, has largely guided the adoption and amendment of legal frameworks at various levels:

### *Right to education:*

- The law 2015-635 of 17 September 2015 introduces compulsory education in the Ivorian education system in its article 2(1) which specifies that within the framework of the public service of education, schooling is compulsory for all children of both genders between the ages of six and 16;

8 Art 123 of the Constitution of Ivory Coast reads: '*les traités ou accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celles des lois, sous réserve, pour chaque traité ou accord, de son application réciproque par l'autre partie*'.

- The ministerial order 0041 MENETFP/DELC of 13 April 2017 on the Creation, Organization, Operation and Allocation of *Clubs mères d'élèves filles* in schools (CMEF) to support the education and maintenance of girls in school in case of interruption due to pregnancy or unpaid domestic work.

### *Right to health:*

- The decree 2015 on the obligation to notify cases of maternal death and the creation of the *Comité National de Surveillance des Décès Maternels et de Riposte* (SDMR);
- The law 2015-532 of 20 July 2015 prohibits discrimination against people living with HIV/AIDS.

### *Fight against gender-based violence (GBV):*

- The ministerial order 1651/MEME / CAB of 5 June 2012 on the Reception Charter in the Police services promotes access to the Police services and reserves a privileged reception for victims of criminal offenses relating to gender;
- The decree 2016-781 of 12 October 2016 allows anyone to have free access to justice and therefore facilitates access to justice for victims of sexual violence throughout the national territory;
- The amendment of the Penal Code in June 2019 with the strengthening of the criminalisation and repression of several forms of violence: female genital mutilation, forced and early marriages, etc.
- Several measures to prevent violence against women:
  - Circular 015/MJ/CAB of 13 July 2016 relating to the repression of rape to put an end to the practice of requalifying facts which constitute rape (this was leading to situations where perpetrators escape the punishment provided for culprits of rape and

getting lesser punishments to the extent of jeopardising the very aim of giving harsh sanctions for rape; namely the protection of potential victims through deterrence);

- Interministerial Circular 016/MJ/MEMIS/MPRD of 4 August 2016 relating to the receipt of complaints resulting from GBV.

### *The Civil Code:*

- Law 2019-570 of 26 June 2019 relating to marriage brings a major change in terms of equality between men and women. Previously, the marriage law designated men as the head of the family, giving them a casting vote in household management. From 2019, there is a removal of men being the sole head and master of the household in a marriage. Under article 51 of the 2019 law, the spouses now manage the family jointly. Henceforth, man and woman together assume the moral and material direction of the family. Thus, the family record book, which was initially given to the man during the civil celebration of marriage, is now given to the spouses. This situation often caused problems, because each of the two spouses could be seen pulling the family record book towards themselves. To resolve this inconvenience, the bride and groom are asked to designate, before the ceremony, the one to whom the civil officer will hand over the family record book. The law of 2019 on marriage raises a major innovation because black African civilisations, in general, are predominantly phallographic. Ivorian society is not an exception; men have always had dominance over women. This explains the fact that despite this provision of the law on equality between spouses, traditionally the parents of the bride remind her that it is her husband who has the last word;

- Law 2019-573 of 26 June 2019 relating to inheritance also brings a change by correcting an injustice. Previously, neither spouse could inherit from the deceased spouse. With the law of 2019, the surviving spouse is now among the heirs of the deceased spouse. Thus, the widow will benefit from a quarter of her husband's property. This amendment is important insofar as it brings legal protection to the widow who was very often marginalised by her in-laws when her husband died. She was often deprived of everything, and her property acquired in marriage was confiscated;
- Law 2020-490 of 29 May relating to name gives new prerogatives to women and thus strengthens equality between the two sexes. Under articles 2 and 3 of the law, the mother can request the addition of her name to a child in addition to that of the father.

## **6 Impact of the Maputo Protocol on policy formulation**

The ratification of the Maputo Protocol has undoubtedly influenced the adoption of policies in favour of women. Since 2013, the government's action in favour of women and young people has strived to be in line with the recommendations of the African Commission and the Beijing Platform for Action. At the political level, in education, health and employment, the situation of women has undergone remarkable development. The number of women in the government increased. Previously, there were three to four women at most in the government. Now, there are seven women at least. The Constitution of 2016 expressly enshrines the principle of equality between men and women. In March 2018, there was the launch of *Plan Stratégique d'Accélération de l'Education des Filles* (PSAEF). In terms of

empowerment and specific support to women and girls, specific plans and programs partners have been adopted to provide technical and financial support. In March 2019, the government adopted a draft law concerning a minimum quota of 30 per cent of women out of the total number of candidates presented for the ballots relating to the election of deputies, senators, regional, district and municipal councillors. It is certainly in line with this trend that in April 2019, the President appointed 33 senators, including 11 women representing 33 per cent of the members. The law was finally adopted by the National Assembly and promulgated by the President of the Republic on 14 October 2019 as Law 2019-870 promoting the representation of women in elected assemblies. However, the election of deputies of 6 March 2021 did not at all follow the law of 2019 in question, leading to missing the objectives of 30 per cent women in the National Assembly. The *Conseil National des Droits de l'Homme de Côte d'Ivoire* noted in a press release from 3 February 2021 that the candidate lists of all Ivorian political formations and coalitions did not meet the 30 per cent representation quota as provided for by law.<sup>9</sup> The *Rassemblement des Houphouëtistes pour la Démocratie et la Paix* (RHDP) presented 40 female candidates out of 255 candidates; the *Parti Démocratique de Côte d'Ivoire-Rassemblement Démocratique Afric-*

*ain* (PDCI-RDA) presented four female candidates out of 46 candidates; the *Front Populaire Ivoirien* (FPI) presented nine female candidates out of 64 candidates; the *EDS* platform presented five female candidates out of 71 candidates and the *EDS-PDCI* coalition presented 22 female candidates out of 128 candidates. Finally, for the legislative elections of 6 March, the Independent Electoral Commission (CEI) validated 1584 candidatures including 212 female candidates<sup>10</sup> for 255 positions of deputies.

## 7 Impact of the Maputo Protocol on the judiciary

Even if the provisions of the Maputo Protocol are directly applicable, national judges make few references to these texts, as well as other international instruments. It follows that international jurisprudence is not mentioned. Tanoh and Adjolohoun, in their article on the problems of human rights litigation in Côte d'Ivoire and Benin,<sup>11</sup> pointed out the lack of decisions from Ivorian courts with respect to human rights. One of the

9 Conseil National des Droits de l'homme 'Communiqué no 002/2021/CC/BE du février 2021 du Conseil National des Droits de l'Homme (CNDH) relatif à la représentation des femmes sur les listes provisoires de candidature à l'élection des députés à l'assemblée nationale du 06 mars 2021' <http://www.gouv.ci/doc/1612390012> CONSEIL-NATIONAL-DES-DROITS-DE-L-HOMME-REPRESENTATION-DES-FEMMES-SUR-LES-LISTES-PROVISOIRES-DE-CANDIDATURE-A-L-ELECTION-DE-S-DEPUTES-A-L-ASSEMBLEE-NATIONALE-DU-06-MARS-2021.pdf (accessed 6 March 2021).

10 The *Groupe des Organisations Féminines pour l'Egalité Homme-Femme* (GOFEHF), gathering 19 networks and organisations, organised on Thursday, 4 February and Friday, 5 February 2021, in Abidjan-Cocody, a training course for these 212 women, candidates for legislative elections. This training was part of the implementation of the project, '*Appui au renforcement de la participation des femmes aux processus électoraux en Côte d'Ivoire*', which benefits from the support of UN-Women. This project aims to strengthen the support for women in politics and especially those who are running for deputy positions. During the two days, the participants were instructed on modules relating to campaign planning, self-knowledge, the legal environment of elections and institutions of the Republic, communication and public speaking and finally resource mobilisation.

11 A Tanoh & H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010).

main challenges for the popularisation of the Maputo Protocol is that lawyers who are supposed to take human rights issues to court do not play their part. The training of judges and lawyers may explain this quasi-inexistent reference to international sources. The emphasis is instead on national texts, including the Criminal Code and the Civil Code, and most of the time, they are focused on issues connected to the usual legal subjects such as commercial law, civil law and penal law. Before closing its offices in Côte d'Ivoire, the Peacekeeping Mission of the United Nations in the country, known as *Opération des Nations Unies en Côte d'Ivoire* (ONUCI), through its Human Rights Division, together with the Institute for Human Rights and Democracy in Africa (IHRDA) had been providing training to judges on the use of international instruments and mechanisms to protect human rights. However, that was not enough to change the trend. The Maputo Protocol as well as other international instruments for the protection of human rights remain unused before Ivorian national courts. At this stage, it is expected that the situation will improve with courts referring to African instruments and jurisprudence when the judiciary is staffed with former law students and other people who have dealt with International Human Rights Law and its practice, such as former participants in national and international Human Rights Moot Court Competitions as well attendees to various international training and conferences about African instruments and jurisprudence.

## 8 Significant appropriation of the Maputo Protocol by civil society

Ivorian civil society is particularly dynamic with regard to the popularisation of instruments for the protection of women's rights in Africa. Since the entry into force of the Maputo Protocol in 2006, NGOs have started training their members on the instrument. The Human Rights Division of the ONUCI took an important part in the popularisation of the Maputo Protocol through training sessions organised in 2008 that focused on women's rights protection instruments.<sup>12</sup> The popularisation of the protocol has increased with the ratification by Côte d'Ivoire. The *Association des Femmes Juristes de Côte d'Ivoire* (AFJCI)<sup>13</sup> in collaboration with other NGOs or IO<sup>14</sup> and the *Association des Etudiants Juristes de Côte d'Ivoire* (AEJCI)<sup>15</sup> organised several national campaigns around the Maputo Protocol.

12 One of these training sessions held in April 2008 at *Université Méthodiste de Côte d'Ivoire* (UMECI) in collaboration with *Association des Etudiants Juristes de Côte d'Ivoire* (AEJCI) in which took part youth associations as *Association des Etudiants Musulmans de Côte d'Ivoire* (AEMCI) and the *Jeunesse Etudiante Catholique* (JEC).

13 It was in 1984 that a group of women lawyers began to work on the rights of women and children. In 1986, the *Association des Femmes Juristes de Côte d'Ivoire* (AFJCI) was officially created. Its members are women who have made a career in law. We therefore find within it, magistrates, lawyers, notaries, jurists, etc., which deal with the following themes: discrimination and violence based on gender, child labour, access to justice.

14 As UNDP and UN-WOMEN.

15 The *Association des Etudiants Juristes de Côte d'Ivoire* (AEJCI) is a non-profit structure, created in 1999, which brings together law students from public and private universities in Côte d'Ivoire. Its main objective is to promote the law while promoting the professional social integration of its members. AEJCI is committed to the promotion of Human Rights through various popularisation activities, one of the most

As part of the *Projet d'appui à l'Amélioration de l'Accès aux droits et à la Justice* (PALAJ), legal clinics have been set up in several areas of the country.<sup>16</sup> The PALAJ is an important project for AFJCI. Its main objective is to bring justice and litigants closer together, that is to say, to strengthen both the supply and demand for justice. The project aims in particular to improve access to justice for vulnerable groups such as women and children. The legal clinics were responsible for supporting the most vulnerable people, including rape victims, with justice services. The actors in this project, mostly from women's organisations, were tasked with raising awareness of women's rights. To do this, they monitor the relevant legal frameworks, in order to check the level of implementation and advise on all the recommendations and observations of treaty bodies, including the African Commission. Despite the dynamism of Ivorian civil society and women's organisations, there has not yet been a submission as far as shadow reports to the African Commission under the Maputo Protocol are concerned. On this point, the NGOs and the state stand on the same line, considering that Côte d'Ivoire is yet to submit a maiden report under article 26 of the Maputo Protocol.

important of which is the *Concours National René DEGNI-SEGUI* for Human Rights, which it organises every year. This is a moot court competition as the one organised by the Centre for Human Rights of the University of Pretoria whose one of the pioneers and former Director, Professor Christof Heyns, recently passed away. AEJCI is also a member of the *Convention de la Société Civile Ivoirienne* (CSCI).

16 Twelve legal clinics cover 11 courts, 40 departments, and 201 sub-prefectures.

## 9 Low appropriation of the Maputo Protocol by lawyers and judicial officers

The situation described in the 2016 edition of this publication has not changed significantly. Only a few lawyers who are human rights activists, or are involved in human rights activities, know about the Maputo Protocol and other human rights instruments and use these instruments in their work. Lawyers are not familiar with international law as well as international human rights law. Only a few lawyers know about the instruments and fewer have ever used human rights conventions in their arguments before domestic courts. The rare references to international instruments concern, in most cases, political trials.

## 10 Higher education and academic writing

Human rights education in primary and secondary schools in Côte d'Ivoire is still developing. Within the framework of the UN World Programme for Human Rights Education, the Government of Côte d'Ivoire adopted a decree in 2012, formally introducing human rights education in the curricula of educational systems at the primary and high school levels. This is being pursued at higher levels, in the professional training academies, Police and Gendarmerie Academies as well as at the National School of Administration (ENA), which trains civil servants. At university level, human rights education has evolved over the last few years with the development of various master's degrees by the National University as well as different human rights institutes. The Maputo Protocol is part of the curricula of the university as well as the institutes.

Several public and private universities now offer master's programs in human rights law. Many Ivorian academics have discussed the Maputo Protocol, but these discussions are mostly philosophical and too academic to have a wider impact in Côte d'Ivoire. The literature in Côte d'Ivoire with respect to the Maputo Protocol is thus limited. Lecturers at the National University have written and published a few articles, which have unfortunately not received a wider distribution.

### 11 Impact of Maputo Protocol on independent state institutions

Côte d'Ivoire has two independent state institutions that deal with human rights issues. These are the national human rights institution and an Ombudsman Office. The Ombudsman Office is known as the *Médiateur de la République*. The *Médiateur de la République* is an independent administrative body. It enjoys constitutional status and is an alternative dispute resolution mechanism.<sup>17</sup> However, this institution cannot really be considered as working in the field of Human Rights. Neither the law of 2007,<sup>18</sup> nor the 2014-2015 plan of action of the *Médiateur de la République* make any reference to the Maputo Protocol. The human rights institution is the *Conseil National des Droits de l'Homme de Côte d'Ivoire* (CNDHCI) established by law 2018-900 of 30 November 2018.<sup>19</sup> CNDHCI appears to be an independent consultative body whose functions are

to ensure consultation, evaluation, and make recommendations in the area of human rights. The current Conseil has been created in replacement of the former *Commission Nationale des Droits de l'Homme de Côte d'Ivoire* established by law 2012-1132 of 13 December 2012. The former Commission, despite several advocacy efforts and pieces of advice, did not comply with the Paris Principles on the establishment and functioning of national human rights institutions in several respects and rendered the Commission more of a consultative body. The role of the new CNDHCI is more extended regarding following up on the implementation of concluding observations and/or decisions of international human rights mechanisms. Article 2 of the law of 2018 establishing the CNDHCI enumerates the powers of the institution, and some important prerogatives are to be noted. It can receive complaints about human rights violations and carry out investigations. It is also involved in the submission of state reports under international human rights instruments. The CNDHCI has recently launched its 4th cycle of training on human rights<sup>20</sup> with an emphasis on women's rights. As part of the implementation of law 2019-870 of 14 October 2019 promoting the representation of women in elected assemblies, the CNDHCI has initiated a coaching program for women.<sup>21</sup>

17 The *Médiateur de la République* is instituted by the Constitution (art 165 of the Constitution of 2016).

18 *Loi organique no 2007-540 du 1er août 2007 fixant les attributions, l'organisation et le fonctionnement de l'organe de Médiation dénommé le 'Médiateur de la République'.*

19 *Loi no 2018-900 du 30 novembre 2018 portant création, attributions, organisation et fonctionnement du Conseil national des Droits de l'Homme (CNDH).*

20 'Le CNDH a lancé le cycle IV de l'université des droits de l'homme' *CNDH* (21 January 2021) <https://cndh.ci/le-cndh-a-lance-le-cycle-iv-de-luniversite-des-droits-de-lhomme/> (accessed 21 January 2021).

21 'Coaching des femmes: Le CNDH poursuit la formation des femmes' *CNDH* (19 January 2021) <https://cndh.ci/coaching-des-femmes-le-cndh-poursuit-la-formation-des-femmes/> (accessed 21 January 2021).

## 12 State reporting

Despite the mechanism instituted by decree 61-157 of 18 May 1961 to monitor the implementation of conventions, resolutions and other instruments, there is no clarity on who does what when it comes to state reporting. The responsibility is rather based on the thematic issues being reported. For instance, the ministry in charge of human rights and public liberties led the reporting process under international Human Rights instruments. In practice, the State Secretary in charge of Human Rights is responsible for state reporting under the Maputo Protocol. Its Directorate of the Promotion of Human Rights prepares the state report with main contributions from the *Direction de la Promotion du Genre et de l'Équité* of the *Ministère de la Femme, de la Famille et de l'Enfant* and the *Conseil National des Droits de l'Homme de Côte d'Ivoire*.

Côte d'Ivoire did not submit any state report under article 26 of the Maputo Protocol since the ratification. The general observation is that Côte d'Ivoire has a habit of submitting its periodic reports with delay. For the African Charter, for example, the initial report was submitted in 2012, 20 years after the ratification of the Charter in 1992. As at May 2021, the country had three overdue reports.<sup>22</sup> Its last report submitted was in November 2016 at the occasion of the 59th ordinary session. Regarding the Maputo Protocol, one of the reasons for the failure to submit a report is the political will as it seems that the government is mainly focused on the Universal Periodic Review (UPR) before the Human Rights Coun-

cil and any other reporting obligation at the universal or global level while neglecting or at least not putting the same efforts and resources into reporting under the African human rights system. A personal and logical opinion on this trend is that there seems to be no substantial consequences for failing to report under the African human rights system as it could be in the United Nations human rights system. Various donors and financial partners refer to the UN reporting system to determine the level of commitment of a country to human rights, which is a leading consideration in disbursing or releasing funds and loans for the benefit of developing countries. This justifies why Côte d'Ivoire would rather put the emphasis on the report required by the CEDAW and the responses to comments made. However, the State Secretary in charge of Human Rights acknowledged the failure to report as inappropriate and assured that efforts are underway to catch up in the short-term period.

## 13 Communications

Several cases have been brought against Côte d'Ivoire before three African mechanisms of Human Rights protection and some are still pending. There were eight cases<sup>23</sup> finalised before the Economic Community of West African States (ECOWAS) Court of Justice and in

22 African Commission 'State reports and Concluding Observations' <https://www.achpr.org/statereportsandconcludingobservations> (accessed 5 April 2021).

23 *Synecoci & Others v Côte d'Ivoire* (2018) ECW/CCJ/JUD/07/18; *M Bama Boubie & 10 Autres v Côte d'Ivoire* (2018) ECW/CCJ/JUD/05/18; *N'Guessan Yao v Côte d'Ivoire* (2016) ECW/CCJ/JUD/15/16; *Farouk Choukeir & Another v Côte d'Ivoire* (2015) ECW/CCJ/JUD/27/15; *Société Agriland v Côte d'Ivoire* (2015) ECW/CCJ/JUD/07/15; *Simone Ehivet and Michel Gbagbo v Côte d'Ivoire* (2013) ECW/CCJ/JUD/03/13; *Amouzou Henri & 5 Others v Côte d'Ivoire* (2009) ECW/CCJ/JUG/04/09; *The National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) v Côte d'Ivoire* (2009) ECW/CCJ/JUD/05/09.

most cases, the Court did not find a violation. Before the African Court of Human and Peoples' Rights, four cases were finalised.<sup>24</sup> Two of these cases were rejected<sup>25</sup> at admissibility stage and in two others,<sup>26</sup> the African Court went as far as to the merits stage.

There are six decided Communications against Côte d'Ivoire before the African Commission.<sup>27</sup> In two instances, the African Commission found that Côte d'Ivoire has violated its obligations under the African Charter. The first of these Communications deals with access to land in Côte d'Ivoire by foreigners.<sup>28</sup> The second Communication deals with the eligibility criteria for the office of President.<sup>29</sup> With regard to the first Communication, the law on access to land was not amended. With regard to the eligibility criteria for the presidency, one could first mention that a special decree was adopted in 2005 to allow all leaders of political parties to

run for Presidency.<sup>30</sup> Article 35 of the Constitution of 2000 was considered as a restrictive eligibility criterion to the Presidency. On his re-election in 2015, the President made the commitment to organise a referendum in order to amend this provision. Thus, the new Constitution promulgated on 8 November 2016 solved the problem of eligibility criteria raised by the former Constitution as per the findings in the Communication mentioned. No case to date has been filed on the Maputo Protocol.

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

The District of Yamoussoukro in Côte d'Ivoire hosted the 52nd ordinary session of the African Commission in October 2012. This session held at the occasion of celebration on the 25th anniversary of the African Commission helped in disseminating the Maputo Protocol and the Commission's work amongst NGOs and the broader human rights community.

The African Commission has organised three promotional visits to Côte d'Ivoire in 2001 and 2003. The first visit took place from 4 to 8 February 2001 and the delegation of the Commission was headed by Mrs Julienne Ondziel-Gnelenga, a member of the Commission and former Special Rapporteur on the Rights of Women in Africa. Given the political context of that time, the mission in its recommendations urged the Ivorian government to conduct

24 *Requête 044/2019 – Suy Bi Gohore Emile & 8 Others v Côte d'Ivoire*; *Requête 038/2016 – Gombert Jean-Claude Roger v Côte d'Ivoire*; *Requête 001/2014 – APDH v République de Côte d'Ivoire*; *Requête 006/2011 – Association des Juristes d'Afrique pour la Bonne Gouvernance v République de la Côte d'Ivoire*.

25 *Requête 038/2016 – Gombert Jean-Claude Roger v Côte d'Ivoire* and *Requête 006/2011 – Association des Juristes d'Afrique pour la Bonne Gouvernance v République de la Côte d'Ivoire*.

26 *Requête 044/2019 – Suy Bi Gohore Emile & 8 Others v Côte d'Ivoire* and *Requête 001/2014 – APDH v République de Côte d'Ivoire*.

27 Communications 318/06 *Open Society Justice Initiative v Côte d'Ivoire*; 400/11 *Réseau Ouest Africain des Défenseurs des Droits Humains et Coalition Ivoirienne des Défenseurs des Droits de l'Homme v Côte d'Ivoire*; 289/04 *Maîtres Brahim Koné et Tiéoulé Diarra v Côte d'Ivoire*; 246/02 *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*; 262/02 *Mouvement ivoirien des droits Humains (MIDH) v Côte d'Ivoire*; 138/94 *International PEN (on behalf of Senn and Sangare) v Côte d'Ivoire*.

28 *Mouvement ivoirien des droits Humains (MIDH) v Côte d'Ivoire* Communication 262/02.

29 As above.

30 Decision 2005-1/PR of 5 June 2005 regarding the designation of presidential candidates at the elections of October 2005 (*décision 2005-1/PR du 5 juin 2005 relative à la désignation à titre exceptionnel des candidats à l'élection présidentielle d'octobre 2005*).



investigations about allegations of rape of women in the police college in 2001 and other human rights violations that occurred during the electoral protests. So far, no trials have been organised and the perpetrators of these violations are yet to be identified. The second visit took place from 2 to 4 April 2001. The Chairperson of the Commission at that time, Professor EVO Dankwa, was the head of the delegation. The delegation met different high-level officials, including the President and ministers, to assess the human rights situation in Côte d'Ivoire. Different recommendations were made to the government of Côte d'Ivoire, amongst them, the setting up of commissions of inquiry on the massive human rights violations, the trial of the perpetrators of human rights violations and the submission of periodic reports under article 62 of the African Charter. The Commission itself admitted that no satisfactory measures had been taken in respect of the recommendations made. The third promotional visit of the African Commission took place from 24 to 29 May 2003, and the recommendations of the Commission were connected to peacebuilding and conflict resolution. These recommendations were in line with recommendations issued after the two preceding visits. Nothing has been done so far regarding the investigation and identification of perpetrators. The Commission's Special Rapporteur on Human Rights Defenders, Madam Reine Alapini-Gansou visited Côte d'Ivoire on two occasions in 2014 and 2015. She played an impressive advocacy role in the adoption of the law on human rights defenders in Côte d'Ivoire. The Special Mandate of the Special Rapporteur on

Human Rights Defenders<sup>31</sup> is still supporting civil society groups in Côte d'Ivoire to disseminate and sensitise members of the public on the law.

The last visits of the African Commission in Côte d'Ivoire took place in 2016 and 2017.<sup>32</sup> From 26 September to 4 October 2016, a delegation of the African Commission carried out a promotional mission in Côte d'Ivoire.<sup>33</sup> The delegation was made up of Commissioner Kayitesi Zainabo Sylvie, responsible for the promotion of human rights in Côte d'Ivoire and Chairperson of the Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Executions in Africa and Commissioner Jamesina Essie L. King, Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa. The recommendations of the delegation dealt with many aspects of human rights. Recommendations made by the delegation were relating to various points. The main recommendations were relating to the low representation of women in the National Assembly and other institutions; the overcrowding in Abidjan prison, the long period of preventive detention in prison; the needs of political detainees, in terms of their rights as detainees and the acceleration of their judicial proceedings before the court; the problem of criminal justice and the need to find lasting solutions, in

31 Madam Alapini-Gansou has left the Commission after 12 years of service and joined the International Criminal Court; the current Special rapporteur on Human Rights Defenders is Commissioner Rémy Ngoy Lumbu who is continuing the work.

32 There is no information available on the visit of 2017.

33 Commission africaine des droits de l'homme et des peuples 'Communiqué de presse sur la mission de promotion de la Commission africaine des droits de l'homme et des peuples en République de Côte d'Ivoire' (4 October 2016) <https://www.achpr.org/fr/pressrelease/detail?id=117> (accessed 23 January 2021).

particular on judicial practices and procedures in order to speed up investigations and trials, legal assistance which is not sufficiently operational. The government made efforts to improve the situation of women by adopting the law 2019-870 of 14 October 2019 promoting the representation of women in elected assemblies. Regarding the conditions of detention, the situation remains open to criticism.

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

The government of Côte d'Ivoire has the primary responsibility to respect, protect and fulfil the rights enshrined in the Maputo Protocol. In order to respect its international human rights obligations, the Ministry of Human Rights was established in 2003 with the mandate of promoting and protecting human rights. There were different campaigns and activities organised on the ground, but it remains that Ivorians, in general, are not aware of the existence of the Maputo Protocol. Other factors that impede the impact of the Maputo Protocol in Côte d'Ivoire are as follows:

- (a) Political environment: Côte d'Ivoire was a very unstable country for more than ten years (1999-2011). The civil war as well as the economic meltdown has brought the country to its knees. This instability complicates any action or effort aimed at the promotion of the Maputo Protocol in the country. Human rights violations are prominent and remedies or access to justice is not readily available. However, as mentioned above, the Ivorian authorities are fully aware of the work of the Commission as they regularly attend the sessions of the Commission. The challenge is to convey the messages or to promote the Protocol on a wider scale. Initiatives are being taken.
- (b) Lack of awareness and strong reliance of the judiciary on domestic law: As mentioned above, the judiciary plays a very important role in the recognition and justiciability of human rights. But, so far, no judgment has been rendered outlining violations of provisions of the Maputo Protocol. The judges still rely heavily on domestic law because this is the law they know better. There is no serious initiative or judicial activism despite different training organised by international NGOs and international human rights organisations. The standard training of judges does not include human rights and international law as such.
- (c) Lack of serious involvement of lawyers: Having decisions on human rights cases also requires the involvement of lawyers when writing or presenting their submissions to the courts. Lawyers in Côte d'Ivoire have not been able to submit cases on human rights violations. Only a few lawyers who are members of different human rights organisations have a good knowledge of human rights principles and treaties.
- (d) Poor media coverage: One of the means of popularisation of a human rights instrument is the media. In Côte d'Ivoire, the media has not been very active in the coverage of human rights activities because of the lack of resources and the limited number of private media agencies. For instance, if the media was interested in and active in covering

human rights activities and issues, the Maputo Protocol and any other legal framework that protect the rights of women could have been made accessible in user-friendly materials and local languages for the population.

## **16 Conclusion**

Côte d'Ivoire is committed to promoting equality between men and women at the various levels of social, economic and political life. This commitment was reflected in the ratification of the Maputo Protocol in 2012 and the adoption of concrete measures for its implementation. At this stage, even if it has not yet submitted reports that would allow an objective assessment of the implementation of the protocol, it will be fair to welcome and encourage the efforts of the Ivorian government. However, there are always efforts to be made in order to effectively achieve this equality between men and women. This is not an easy venture, because the discrimination between these two sexes is above all cultural. Raising awareness will take time and young people have an important role to play. The state, in collaboration with civil society, must therefore ensure the training of the youth for a better appropriation of the Maputo Protocol and all the other relevant instruments.

# THE IMPACT OF THE MAPUTO PROTOCOL IN THE DEMOCRATIC REPUBLIC OF CONGO



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## 1 Introduction

A study on masculinity in the Democratic Republic of Congo (DRC) conducted by the United Nations Entity for Gender Equality and the Empowerment of Women and the Swedish Embassy in the DRC indicated that ‘in the collective imagination of the people interviewed, men are imbued with the characteristics that are associated with a hegemonic view of masculinity’.<sup>1</sup> Both women and ‘men in “subordinate” or

less powerful positions’ are often affected by this negative masculinity.<sup>2</sup> Women are generally considered inferior to men,<sup>3</sup> and the division of labour in the political, administrative, and educational fields is often based on entrenched gender roles, including those that make women good financial managers and individuals who should teach relatively uncomplicated subjects.<sup>4</sup> Many factors may explain the discriminatory attitudes some members of the Congolese society can have *vis-à-vis* women including women’s historical marginalisation in education and politics as well as by religious and customary practices. At the independence in 1960, the country had one female graduate. This largely stemmed from the reluctance of many families to allow their girls to be exposed to western religious education that may prompt them to rebel against their traditional

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1 Mireia Cano Vinas ‘Gender audit of the Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region’ (October 2015) 23 [https://www.international-alert.org/sites/default/files/Gender\\_AuditDRC\\_EN\\_2015.pdf](https://www.international-alert.org/sites/default/files/Gender_AuditDRC_EN_2015.pdf) (accessed 11 June 2021).

2 Vinas (n 1) 23.

3 JR Oppong & T Woodruff *Democratic Republic of Congo* (2007) 48-50.

4 R Kamidi ‘Du statut de la femme en République démocratique du Congo : rapport d’une réflexion prospective pour un changement pérenne’ (Juin 2015) 11 [https://www.eda.admin.ch/dam/countries/count-ries-content/the-democratic-republic-of-congo/fr/Rapport%20SF%20RDC\\_0409.pdf](https://www.eda.admin.ch/dam/countries/count-ries-content/the-democratic-republic-of-congo/fr/Rapport%20SF%20RDC_0409.pdf) (accessed 11 June 2021).

marriage and other customary roles.<sup>5</sup> This was compounded by the 'missionary ideology' – schools were owned by Belgian missionaries – which 'emphasized the differences between the sexes and male superiority'.<sup>6</sup> As Coquery-Vidrovitch puts it, '[t]he girls educated by nuns, were supposed to develop the qualities of docility and sweetness and to practice housekeeping. The goal here was to make them good mothers, prepared to remain in the home and instil Christian values in their children'.<sup>7</sup>

The post-independence conception of women by political leaders and the musical portrayal of women were not anything to desire. Although President Mobutu Seseeko who ruled DRC for 32 years recognised the relevance of equal treatment between men and women, he is said to have claimed that 'it remains to be understood, with all due consideration, that there will always be a boss in every household'.<sup>8</sup> According to him:<sup>9</sup>

Until proof to the contrary, the boss in our land is the one who wears the pants. Our female citizens should also understand this, accept it with a smile, and with revolutionary submissiveness.

Mobutu was simply exposing a belief shared within the large spectrum of the Congolese society including in the musical sector. Luambo Makiadi, the best Congolese musician of the time, was known for his misogynistic tendencies and objectification of women through

songs and musical commentaries.<sup>10</sup> In the political sphere, Catherine Nzunzi wa Mbombo suggests that women generally serve as instruments for mass mobilisation and stepping stones to achieve the goals of male politicians. They are hardly considered as equal political partners.<sup>11</sup> The appointment of female candidates or political leaders tends to camouflage the exploitation of women for statistical or propaganda purposes.<sup>12</sup>

Before the formal occupation of what is today the DRC by the Belgians, women promoted the black consciousness through messianic movement. Some produced visions and prophecies that called for the restoration of the political order distorted by invaders.<sup>13</sup> The contribution of Dona Beatrice, a prophetess famously known as Kimpa Vita, stood out among many others. She launched a theology of liberation of blacks against Portuguese colonialists in the Kingdom of Kongo in the early 1700s. Kimpa Vita preached a theology centred on 'Kongo cultural symbolism' and emphasised on the African roots of Christ and Christianity and incited her fellow blacks to 'find their roots by rejecting European clothing and values'.<sup>14</sup> Kimpa Vita was burned at the age of 24 under the instigation of Portuguese who saw in her theology, a counter-European hegemony and anti-Catholic Christianity narrative antithetical to colonial business. However, the activism and stamina of Kimpa Vita, a

5 C Coquery-Vidrovitch *African women: a modern history* (1994) 43; GA Matsanza *Résilience ou sursis de l'Etat: l'identité nationale au secours de la RD Congo* (2018) 143.

6 Coquery-Vidrovitch (n 5) 144-113.

7 Coquery-Vidrovitch (n 5) 144. See also C Nzuzi wa Mbombo 'Le rôle de la femme politique en République Démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femme et engagement politique en République Démocratique du Congo* 68.

8 Coquery-Vidrovitch (n 5) 185-186.

9 As above.

10 L Kengo wa Dondo *La passion de l'Etat: mémoires* (2019) 102-103.

11 Nzuzi wa Mbombo (n 7) 68. PM Mantuba-Ngoma *Les élections dans l'histoire politique de la République démocratique du Congo (1957-2011)* (2013) 41.

12 C Odimba et al *La participation des femmes dans les processus de paix et la prise de décision politique en République démocratique du Congo* (2012) 41.

13 Coquery-Vidrovitch (n 5) 43.

14 As above.

female African messiah, had inspired the creation of numerous nationalist movements within and outside the Kingdom of Kongo.<sup>15</sup>

Kimpa Vita's legacy seems to be withering away as women's rights and women's image have broadly worsened off, particularly in the eastern DRC following the protracted armed conflicts in the late 1990s. Most of these conflicts are characterised by acts of sexual violence against women and the weaponization of female bodies for military advantages.<sup>16</sup> The response of the state was initially not robust, especially in the early 2000s. Political leaders were busy trying to end conflicts and reunite the country before they could bring back to the table the issue of accountability for women's rights violations.<sup>17</sup> Numerous public trials against military (officials) and civilian who engaged in sexual violence conducts were held by military and civilian tribunals.<sup>18</sup> Nevertheless, durable solutions to effectively dignify

women, including reparation,<sup>19</sup> mass awareness-raising about women rights, and behavioural/attitudinal change are slow. The adoption of a number of legal instruments, such as the Sexual Violence Acts, the application of the Rome Statute by military tribunals<sup>20</sup> and the commitment of the state to align other legislation with international agreements DRC has ratified are part of these efforts to further women's rights.

The explicit recognition and protection of women's rights, first in the 2003 Interim Constitution and then in the 2006 Final Constitution of the DRC, is an important step towards strengthening the legal protection of women's rights at the highest normative level. The 2006 DRC Constitution (the Constitution) emphasises the need to eliminate discrimination against women, protect and promote their rights, ensure their 'equitable' representation at the national, provincial and local levels and to eliminate violence against women and sexual violence in particular. The Constitution directly responds and attempts to prevent the re-occurrence of the historical violence women have been subjected to.<sup>21</sup> Constitutional provisions act as means to incrementally reform legislation that do not promote equality between men and women and to contribute to the change of attitudes

15 E. Descamps 'Kimpa Vita, l'étoile révolutionnaire du Kongo' 7 March 2018 *Jeune Africa* <https://www.jeuneafrique.com/444727/societe/kimpa-vita-lespoir-kongo/> (accessed 15 March 2021).

16 See generally United Nations Human Rights Office of the High Commissioner 'Rapport du projet mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre 1993 et juin 2003 sur le territoire de la République démocratique du Congo' (August 2010) paras 529-532 [https://www.ohchr.org/documents/countries/cd/drc\\_mapping\\_report\\_final\\_fr.pdf](https://www.ohchr.org/documents/countries/cd/drc_mapping_report_final_fr.pdf) (accessed 17 March 2021).

17 PT Shirambe 'Transitional justice and peacebuilding in the Democratic Republic of the Congo' (2015) 2(2) *Southern African Peace and Security Studies* 49; SP Tunamsifu 'Transitional justice processes in Africa: the case of the Democratic Republic of the Congo' (2018) 4 <https://www.csvr.org.za/project-reports/DRC-Case-Philippe-Tunamsifu.pdf> (accessed 17 March 2021).

18 See generally Avocats Sans Frontières *Recueil de jurisprudence congolaise en matière de crimes internationaux: édition critique* (2013) 32 [https://asf.be/wp-content/uploads/2013/12/ASF\\_RDC\\_JurisprudenceCrimesInternat\\_201312.pdf](https://asf.be/wp-content/uploads/2013/12/ASF_RDC_JurisprudenceCrimesInternat_201312.pdf) (accessed 17 March 2021).

19 Discussion with Nzuzi Mambakasa Benny, Deputy Coordinator, National Human Rights Commission, Kwango Province, December 2020, Kinshasa.

20 Avocats Sans Frontières (n 18). On the Rome Statute in DRC, see generally, PM Magadju 'Législation congolaise de mise en oeuvre du Statut de Rome: un pas en avant, un pas en arrière' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa, 2016* (2016) 165-199; B Kahombo 'The principle of complementarity in practice: A survey of Congolese legislation implementing the Rome Statute of the International Criminal Court' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa, 2016* (2016) 204-239.

21 2006 DRC Constitution, arts 14 & 15.

towards women in the broader society. The effective participation of women's rights organisations to and their advocacy for women's rights during the 2002 peace and reconciliation process influenced the recognition of women's specific rights in the 2006 Constitution.<sup>22</sup> Despite this normative progress, gender equality constitutional norms seem to be floating meaninglessly above the Congolese society for lack of effective implementation as discussed further.<sup>23</sup>

This chapter examines the impact of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in the DRC. In what follows, we review the background to and the status of the ratification of the Maputo Protocol, the question of its domestication and incorporation into the legal system, legislative reforms and governmental policy. We also analyse reasons behind the lack of court decisions invoking the Maputo Protocol, the DRC relationship with regional human rights mechanisms, the role of civil society organisations in improving the quality of the implementation of the Protocol, the place of the Maputo Protocol in the legal education as well as the possible role of the National Human Rights Commission. The chapter concludes by arguing that the implementation of the Maputo Protocol is characterized by a certain amount of progress in the legislative area that, however, lacks practical implications. The starting point for understanding this is the tension that the ratification of the Maputo Protocol has

faced in the DRC, as demonstrated below.

## 2 Background to and status of the ratification of the Maputo Protocol

The DRC signed the Maputo Protocol in December 2003, ratified it in July 2008 and deposited the instrument of ratification in February 2009.<sup>24</sup> The ratification was preceded by the parliamentary approval of the Protocol in 2006 and the authorisation to ratify it as contemplated under article 214(1) of the Constitution.<sup>25</sup> The government ratified the Protocol two years later, in June 2008.<sup>26</sup> The Maputo Protocol was published in the Official Gazette in March 2018.<sup>27</sup>

The power to negotiate and ratify treaties and international agreements rests with the President of the Republic.<sup>28</sup> However, parliament must

22 C Odimba, P-R Namegabe & Julienne Baseke Nzabandora *La participation des femmes dans le processus de paix et la prise de décision politique en République démocratique du Congo* (July 2012) 29

23 See the discussion in section 4 below.

24 Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 22 September 2018).

25 Act 06/015 of 12 June 2006 authorizing DRC to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in *J.O.R.D.C.* (5 June 2018) 5-6.

26 Ratification Table of the Maputo Protocol <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 11 July 2018).

27 Safe2choose 'RDC: Le protocole de Maputo enfin publié au journal officiel' 18 June 2018 <https://safe2choose.org/fr/blog/drc-maputo-protocol-legalization-abortion#:~:text=Le%20protocole%20de%20Maputo%20repr%C3%A9sente,aux%20services%20de%20sant%C3%A9%20reproductive> (last accessed 7 July 2018). For the consequence of the gazetting on the application of the Protocol in the national legal system, see AS Sidibe 'Communication introductive générale' in *Les Cahiers de l'AOA-HJF Les actes du colloque international sur l'application du droit international dans l'ordre juridique interne des Etats Africains francophones* (2003) 54-55.

28 The Constitution of the Democratic Republic of the Congo (n 21) art 213.

approve certain types of treaties such as treaties related to international organisations, those which modify domestic legal provisions and treaties on the status of individuals, before the government can effectively ratify them.<sup>29</sup> The procedure is meant to ensure that the international instrument obtains domestic legitimacy through the body on which the Constitution confers the power to make laws and oversee governmental activities.<sup>30</sup> The President of the Republic, the Prime Minister, the President of the National Assembly or Senate, one tenth of National Assembly and Senate members may approach the Constitutional Court to review the compatibility of an international treaty, such as the Maputo Protocol, with the Constitution before its approval and ratification.<sup>31</sup> This review is both procedural; (the Court may review whether individuals involved in the ratification are invested with such powers) and substantive; the Court must examine whether substantive provisions of the treaty are compatible with or contradictory to the Constitution including the Bill of Rights. It is only when the compatibility is confirmed that the treaty can be ratified, otherwise, the constitutional provision in question must be amended to align with the international treaty.<sup>32</sup>

On the ground, the process for ratifying the Maputo Protocol faced resistance, particularly because some religious and political groups believed the Protocol could be used to allow abortion on demand.<sup>33</sup> Those who supported the ratification of the Protocol, mainly activists and organisations protecting women's rights, regarded it as a modern legal instrument that effectively responds to the plight of women in post-conflict situations. Most of its ground-breaking provisions<sup>34</sup> on sexual and reproductive rights may reduce the dehumanising effects of sexual violence that were pervasive at the time of ratification. The pertinent provision in point is, for example, article 14(2)(c) which can facilitate women victims of 'sexual assault, rape, incest' perpetrated by national and foreign armed groups and forces to protect their reproductive rights by deciding whether to keep the pregnancy. However, the Catholic Church through its non-for-profit organisations pioneered the resistance on account that faith and culture prevent the suppression of innocent life.<sup>35</sup> As a consequence, academics, law students and the large population interested in the Protocol generally place emphasis on the right to safe abortion, regarded as

29 The Constitution of the Democratic Republic of the Congo (n 21) art 214.

30 The Constitution of the Democratic Republic of the Congo (n 21) art 100.

31 The Constitution of the Democratic Republic of the Congo (n 21) art 216.

32 The Constitution of the Democratic Republic of the Congo (n 21) art 216. This was the case the Treaty on the Organisation for the Harmonisation of Business Law in Africa (OHADA). *Decision R.Const. 112/TSR of 5 February 2010, Requête tendant à obtenir un avis consultatif sur la contrariété éventuelle à la Constitution de certaines dispositions du Traité du 17 Octobre 1993 relatif à l'harmonisation du droit des affaires en Afrique (Ohada)* available at <http://www.la-constitution-en-afrique.org/article-ohada-la-constitution-sacrifiee-47288675.html> (accessed 13 May 2018).

33 'La R. D. Congo en voie de ratifier le Protocole de Maputo' *Kakaluigi* (25 June 2007) <http://kakaluigi.unblog.fr/2007/06/25/la-r-d-congo-en-voie-de-ratifier-le-protocole-de-maputo/> (accessed 8 February 2020).

34 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa' (2009) 16(1) *Washington and Lee Journal of Civil Rights and Social Justice* 16.

35 L. Guignard 'Résistances catholiques au protocole de Maputo. Mobilisations et controverses autour de la libéralisation de l'avortement en Afrique' (2017) *Genre, sexualité & société*; 'Kananga? les parents s'insurgent contre le protocole de Maputo' *Radio Okapi* (1 August 2007) <https://www.radiookapi.net/sans-categorie/2007/08/01/kananga-les-parents-s-25e2%2580%2599in-surgent-contre-le-protocole-de-maputo> (accessed 8 February 2020).



pervasive, and put aside some ground-breaking provisions that empower women in the community, for instance in the political sphere.<sup>36</sup> The activism against the ratification of the Protocol created a distorted view of what the Maputo Protocol seeks to achieve. This negatively impacted the process for domesticating or incorporating the Protocol in the domestic legal order.

### 3 Domestication and incorporation

As in any monist country,<sup>37</sup> international law in DRC is an integral part to municipal law. However, certain procedural requirements must be met for treaties to be applicable in the domestic system. If taken rigidly, these formalities may hamper the prospects for the Maputo Protocol to make substantive contribution to the DRC legal system. The treaty must 'duly' be ratified and gazetted.<sup>38</sup> The last condition which generally does not apply to human rights treaties is the reciprocal application by other member states.<sup>39</sup> According to Professor Mampuya, the DRC Constitution allows international treaties to be applicable even if they do not

provide for a subjective right of an immediate effect.<sup>40</sup> If this view is taken seriously by academics, legal professionals and judges, the Maputo Protocol can be invoked before domestic courts and directly applied by judges.<sup>41</sup> This is hardly the case.

Controversy around the meaning of direct application of international (human rights) law,<sup>42</sup> and particularly the positivistic/formalistic approach to articles 153 and 215 of the Constitution prompt some scholars to suggest that only self-executing provisions can be directly applicable.<sup>43</sup> According to Dugard, one might recognise a self-executing provision when:<sup>44</sup>

the language of the treaty so indicates and existing municipal law, either common law or statute, is adequate in the sense that it fails to place any obstacle in the way of treaty application.

The dominant scholarly position holds that because article 14 of the Maputo Protocol clashes with articles 166 and 167 of the 1940 Congolese Penal Code and other specific legislation, it is neither a self-executing provision nor can it be applied directly by courts and tribunals without any amendment to the Penal Code. This is compounded by attitudes of most Congolese civil judges towards international (human rights) law norms. As Advocate Bampile wa Bampile Fabien suggested, 'Congolese judges hardly resort to international human rights law norms when deciding

36 S Vyas-Doorgapersad & TM Lukamba 'The status and political participation of women in the Democratic Republic of Congo (1960-2010): A critical historical reflection' (2011) 62 *New Contree* 94.

37 M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in Magnus Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5; B Kahombo 'Présentation du Traité de droit international public du professeur Auguste Mampuya: Regards croisés sur le régionalisme africain' (2016) 19 *Recht in Afrika – Law in Africa – Droit en Afrique* 213-217.

38 The Constitution of the Democratic Republic of the Congo (n 21) arts 153 & 215.

39 The Constitution of the Democratic Republic of the Congo (n 21) art 215.

40 A Mapuya Kanunk'a-Tshiabo *Traité de droit international public* (2016) 488-489.

41 See the discussion in section 6 below.

42 JK Mpiana 'La position du droit international dans l'ordre juridique congolais et l'application de ses normes' (2012), PhD dissertation, University of Sapienza (Roma) 163 (on file with authors).

43 B Kahombo (n 37) 213.

44 J Dugard *International law: A South African perspective* (2016) 57.

over relevant cases.<sup>45</sup> As it will be argued later, in the unique case where the DRC Constitutional Court had the opportunity to apply the Maputo Protocol, the Court failed to do so.

Substantively, the 2006 DRC Constitution and the Maputo Protocol validly complement each other in protecting women's rights. They offer a robust legal framework for enhancing a culture of women's rights protection that has never existed before in DRC. As the supreme law of the land, the Constitution provides for principles, rules and values based on which subsidiary legislation and the Maputo Protocol can ameliorate the plight of women. The breadth and scope of rights covered under the Maputo Protocol are extensive as compared to the Constitution. This is perhaps understandable since the Protocol is a specific treaty on women's rights. The Constitution provides for equality in rights and dignity and equal protection before the law.<sup>46</sup> It prohibits discrimination against any Congolese,<sup>47</sup> particularly women,<sup>48</sup> and enjoins the state to promote and protect women's rights. Under article 14, the state has, in addition, the following obligations. First, to adopt in different areas including civil, political, economic, social, and cultural spheres, appropriate measures to ensure total blossoming of women and their full participation in the nation's development. Second, to adopt all the measures to combat violence against women both in public and private spheres. Third, to ensure women's equitable representation in

national, provincial, and local institutions. Fourth, to implement gender-parity in all its institutions. The Constitution provides for the adoption of a subsidiary legislation to determine modalities of application of these rights. The Gender Parity Act was adopted nine years after the entry into force of the Constitution. Article 15 strengthens the protection of women's rights by enjoining the state to eliminate sexual violence. Under the Constitution:<sup>49</sup>

any sexual violence committed against any person with the intention to destabilize or to displace a family and to make a whole people disappear is established as a crime against humanity punishable by law.

More than any other previous constitution, the 2006 DRC Constitution devotes two provisions on women specific issues in what seems to be a direct response to violence that women have been historically subjected to. This progressive constitutional framework has prompted some scholars, Muzaliwa among others,<sup>50</sup> to suggest that the Protocol will make no difference as the rights it provides are already enshrined in the Constitution. This argument is not entirely valid for the specific nature of the Protocol's guarantees are more far fetching than the Constitution. Further, it is hazardous to start pitting legal instruments or their norms against each other since they seek to achieve similar goals. We believe that the extent to which the Constitution and the Protocol both contribute to furthering women's rights and how they do complement each other should be the focus of academic scholarship and debates. Viewed from this angle, the Maputo

45 Interview with Advocate Bampile wa Bampile Fabien, December 2020, Kinshasa.

46 The Constitution of the Democratic Republic of the Congo (n 21) arts 11 & 12.

47 The Constitution of the Democratic Republic of the Congo (n 21) art 13.

48 The Constitution of the Democratic Republic of the Congo (n 21) art 14(1).

49 The Constitution of the Democratic Republic of the Congo (n 21) art 15.

50 KP Muzaliwa 'Publication of the Maputo Protocol in the official gazette: Does it make any difference in Congolese criminal law?' (2020) (on file with the author).

Protocol provides many other rights from which law-makers can learn to improve women's rights. Soft law instruments such as general comments clarifying the normative content of the provisions of the Protocol, concluding observations issued by the African Commission on Human and Peoples' Rights (African Commission) and the jurisprudence of the African Commission and the African Court on Human and Peoples' Rights (African Court),<sup>51</sup> if any, can also be used to clarify the meaning and content of articles 14 and 15 of the DRC Constitution as far as effective protection of women's rights is concerned.

## 4 Legislative reform

Since the ratification of the Maputo Protocol, the DRC has enacted or amended some legislation that enhance the protection of women's rights. Others maintain the *status quo*. Whilst the link is always not clear whether these revisions are the result of the ratification, what is evident is that new legislation attempts to correct retrogressive practices provided for in some of the previous laws.

### 4.1 Elimination of discrimination against women

The Gender Parity Act was passed in 2015 to set down different principles determining modalities of application of the parity between women and men recognised under article 14 of the Constitution. The Act recognises the persistent inequality between men and

women. It also explicitly mentions the Maputo Protocol as containing obligations by DRC to adopt legislative and administrative measures to enhance women's rights. It does not explicitly indicate whether its adoption is prompted by the ratification of the Protocol. Nonetheless, as indicated, the adoption of the Act seeks to implement article 14(6) of the Constitution. The Act fosters women's rights in the political, administrative, social, economic and cultural spheres. It prohibits discrimination in the education sector,<sup>52</sup> professional environment especially towards pregnant women,<sup>53</sup> as well as in the judiciary, military and police institutions.<sup>54</sup> The Act is silent in relation to women's political participation. It does not obligate state organs to ensure that equality between men and women is enforced. It creates governmental institutions tasked with following up the level of its implementation. These institutions encompass the Inter-Ministerial Committee and the National Council of Gender and Parity.<sup>55</sup> The Inter-Ministerial Committee is composed of ministries of gender, women and family, labour, youth, planning, social affairs, health, education and justice whilst the National Council of Gender and Parity is made of representatives of relevant institutions, ministries and CSOs that promote women's rights.<sup>56</sup>

The Family Code has been amended in 2016 to primarily comply with the Constitution and other international human rights instruments. Its amendment aims to strengthen non-discrimination provisions. In its preamble, the Family Code indicates that the purpose

51 Article 32 of the Protocol provides the following: 'Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.'

52 Articles 10 & 11 of the 2015 Gender Parity Act.

53 Gender Parity Act (n 52) arts 21 & 22.

54 Gender Parity Act (n 52) art 27.

55 Gender Parity Act (n 52) arts 28 & 31.

56 Gender Parity Act (n 52) art 29 & 30.

of the amendment is to align the 1987 Family Code with the country international obligations as enshrined in the International Covenant on Civil and Political Rights, International Covenant on Social, Economic and Cultural Rights, the African Charter on Human and Peoples' Rights (African Charter), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and from the Convention on the Rights of the Child (CRC). Whilst the absence of specific mention of the African Charter on the Rights and Welfare of the Child is understandable,<sup>57</sup> it is unclear why parliament failed to mention the Maputo Protocol.

Substantively, the Family Code innovates in various respects. Equality between men and women is restored in contractual matters and the prosecution for adultery. Child parenting responsibility and the management of the household are done by spouses on equal footage. The previous code required of women to have their husband's permission before they could enter into contracts.<sup>58</sup> Spouses are given equal power over their children.<sup>59</sup> As to the administration of assets, spouses are free to decide who between them will administer assets.<sup>60</sup> Some of the requirements imposed by the Protocol existed since 1987, long before the entry into force of the Maputo Protocol. These include free consent to marriage<sup>61</sup> with sanctions over parents who coerce a person to get married.<sup>62</sup> The right of a married woman to use her own name and that of her husband if she wants,<sup>63</sup>

the preference of monogamy<sup>64</sup> with sanctions for all forms of polygamy;<sup>65</sup> intervention of the judge in divorce matters on an equal basis for all the spouses, among others.

#### 4.2 Elimination of harmful cultural practices

The Constitution states that traditions inconsistent with public order cannot be part of the legislation.<sup>66</sup> The Gender Parity Act outlaws stereotype of any nature in schools.<sup>67</sup> This law affirms that the government must combat all harmful practices in property rights issues.<sup>68</sup> The Family Code also forbids harmful cultural practices such as rituals women are forced to undergo following the death of their spouse.<sup>69</sup> The widow has the right to inherit the property of her deceased husband<sup>70</sup> and to become the guardian and custodian of her children.<sup>71</sup> The minimum age for marriage is 18 years since 2009, with the adoption of the Child Rights Act.<sup>72</sup> This has been reaffirmed by the Family Code<sup>73</sup> recently revised. The Child Rights Act is also explicit on the prohibition of female genital mutilation. This practice is a crime punishable under this law.<sup>74</sup>

57 It was ratified on 8 December 2020 whilst the Family Code was revised in 2016.

58 2016 Revised Family Code, art 448.

59 Revised Family Code (n 58) art 445.

60 Revised Family Code (n 58) art 490.

61 Revised Family Code (n 58) arts 351 & 334.

62 Revised Family Code (n 58) art 336.

63 Revised Family Code (n 58) art 62.

64 Revised Family Code (n 58) art 330.

65 Revised Family Code (n 58) arts 409 to 412.

66 The Constitution of the Democratic Republic of the Congo (n 21) art 153(4).

67 The 2015 Gender Parity Act art 11.

68 Gender Parity Act (n 67) art 9.

69 The 2016 Revised Family Code arts 541 to 545.

70 Revised Family Code (n 69) art 758.

71 Revised Family Code (n 69) arts 322 & 198.

72 The 2009 Child Rights Act art 48.

73 Revised Family Code (n 69) art 352.

74 The 2009 Child Rights Act art 153.

Further, Sexual Violence Act prohibits and sanction several harmful practices. The DRC Initial Report to the African Commission on the Maputo Protocol notes the following:<sup>75</sup>

... sexual mutilation, exploitation of minors for purposes of debauchery, pimping, forced prostitution, harassment and sexual slavery, forced marriage, slavery, zoophilia, the deliberate transmission of sexually transmitted infections, child trafficking and exploitation for sexual purposes, pregnancy and forced sterilization, prostitution and pornography involving children.

In reality, harmful practices are pervasive in some customary rituals, for example sexual mutilations of girls by the *Ngwaka* tribe, in the north and rapists mutilating the genital parts of their victims.<sup>76</sup> Some scholars argued that the society does not generally combat traditional practices that dehumanise women and girls.<sup>77</sup>

### 4.3 Sexual and reproductive rights

The Gender Parity Act introduced some provisions on sexual and reproductive rights. These include the right of women

to choose in agreement with her husband the suitable contraceptive method and the best way of family planning.<sup>78</sup> The Act also adds that the government is responsible for securing accessible, affordable and even free services for the benefit of pregnant women.<sup>79</sup>

The Act Protecting Persons with and Affected by HIV/AIDS (HIV/AIDS Act) provides for free care to HIV positive individuals.<sup>80</sup> In addition, the Act has been modified to include the obligation to provide 'information' to the other spouse when the partner has been tested HIV positive. In its previous form, the law obliged the spouse who is found positive to HIV to inform *immediately* their partner. After several discussions during workshops and guided by the first general comment of the African Commission, parliament amended this provision in 2018 to include a reasonable time that the HIV positive spouse must observe before they can inform the other spouse. This is a direct influence of General Comment 1 on article 14(1)(d) and (e) of the Maputo Protocol.

One of the most debated issues about the Maputo Protocol relates to abortion. It is a crime to commit abortion according to the Penal Code which has not yet been modified up to now.<sup>81</sup> It is, however, worth mentioning that the Medical Deontology Rules authorises, since 1970, medical practitioners to carry on abortion in order to save the life of the woman.<sup>82</sup> The Medical Deontology Rules, the Public Health Principles Act and the Penal Code forbid

75 Democratic Republic of Congo 'Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (initial report and 1st, 2nd and 3rd Periodic Reports)' (2017) para 160.

76 Democratic Republic of Congo (n 75) para 159.

77 For a full account for the difficulties facing survivors of sexual violence, see SP Tunamsifu 'The right to justice: A challenge of survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo' (2015) 15 *African Human Rights Law Journal* 475-481; S Kitharidis 'Rape as a weapon of war: Combating sexual violence and impunity in the Democratic Republic of the Congo, and the way forward' (2015) 15 *African Human Rights Law Journal* 451-464.

78 The 2015 Gender Parity Act art 13.

79 Gender Parity Act (n 78) 14.

80 Act 8/11 of 14 July 2008 Protecting Persons with and Affected by HIV/AIDS art 11.

81 1940 Penal Code arts 165 & 166.

82 Ordinance 70-158 of 30 April 1970 determining Medical Deontology Rules.

voluntary interruption of pregnancy.<sup>83</sup> Exceptionally, the Public Health Principles Act permits 'therapeutic abortion and eugenic abortion' to save the life of a woman and where a foetus cannot survive.<sup>84</sup> The Public Health Principles Act does not include sexual assault, rape or incest as grounds for abortion paradoxically despite the fact that it was adopted nine years after DRC had ratified the Maputo Protocol.

#### 4.4 Education and political participation

The Framework Act 14/004 of 11 February 2014 on National Education System provides for equal access to education. Article 33 explicitly provides that 'the fight against discrimination and inequality in education aims to provide access to education for vulnerable and disadvantaged groups in the national education system [including] girls and women'.<sup>85</sup> The DRC report to the African Commission notes the following progress achieved in ensuring the right to education:<sup>86</sup>

the public authorities have taken measures to ensure gender equality in education, the major ones focus on: (i) elimination of obstacles impeding access to school by girls and boys (ii) strengthening the presence and maintenance of girls and women in higher education (sciences, mathematics and technology), (iii) reduction of the gap between men and women in basic functional literacy, and (iv) elimination of obstacles preventing the enrolment of adolescent pregnant girls.

In the political sphere, the Constitution and the Gender Parity Act provide for the equitable representation of women in local, provincial and national institutions.<sup>87</sup> Political parties are called to take into account the principle of parity between men and women when presenting their candidates at national and local elections.<sup>88</sup> The Act further indicates that political parties that do not observe this rule will not receive any funding from the government.<sup>89</sup> Since the government in practice does not fund political parties activities and campaigns, it is hard to measure whether this provision will have any practical impact whatsoever. Importantly, the General Electoral Law as last amended in 2017 attempts to ensure that political parties present female candidates to elections. It provides under article 13 that lists of political parties to elections must have both female and male candidates. Ironically, article 13(2) of the General Electoral Law indicates that the absence of one of the two genders does not render the list invalid. Those who support article 13(2) argue that female commitment to political affairs in DRC is volatile. To obligate political parties to have female candidates can prevent the participation of other political parties as it is difficult to find female candidates. The law must not be rigidly prescriptive about the number of women to be included on the list. In an almost formalistic ruling following a petition challenging the constitutionality of the Act, the male-dominated Constitutional Court<sup>90</sup> observed in 2018 that article 13 of the electoral law was not inconsistent with article 14 of the Constitution on

83 The Public Health Principles Act 18-035 of 13 December 2018 art 85.

84 The Public Health Principles Act (n 83) art 86.

85 Framework-Act 14/004 of 11 February 2014 on National Education System art 33.

86 Democratic Republic of Congo (n 75) para 139.

87 Gender Parity Act (n 52) art 4(2).

88 Gender Parity Act (n 52) art 5.

89 Gender Parity Act (n 52) art 33.

90 At the time the Constitutional Court issued the decision, it was composed of nine male judges. Since 2020, one female judge has joined the bench.

women political empowerment. According to the Constitutional Court,<sup>91</sup>

... gender equality cannot be conceived of either in arithmetic terms or as a mathematical equation, with regard to equal opportunities between men and women, and secondly that commitment to political parties are free so that the number of women and men actually engaged in the life of political parties is likely to vary from one political party to another and could not be foreseen in advance to render inadmissible lists which would not provide a determined number of seats for women.

This ruling along with the regressive amendment to the electoral law and the inability of political parties to empower women candidates are simply the emerging part of the iceberg of the widespread male chauvinism in the Congolese society and the unpreparedness of male politicians to have their female colleagues as equal partners. As Makunya argued elsewhere, 'in past elections, some female candidates were removed from party lists and replaced by male candidates'.<sup>92</sup> There is also an increasing political activism by female leaders. This sorry tale tells us more about the societal commitment to ensuring effective

participation of women in the political process and the manner in which laws continue to be used to maintain the *status quo ante* instead of being progressively construed in a way that encourage women participation and hone their rising political activism with effective legal tools. Article 14 of the Constitution and article 9 of the Maputo Protocol already provide sufficient normative framework that can be utilised to counter regressive behaviours and religious and cultural practices.<sup>93</sup> Unless these provisions are taken seriously by both the judiciary, in particular the apex court in constitutional matters and political institutions, the Constitution and the Maputo Protocol will not be worth the paper they are written on.

Available data on women's political participation suggests that the state has not done much to boost the participation of women in the political sphere. During the presidential elections, in 2006, there were four female candidates, none in 2011<sup>94</sup> and one female candidate in 2018. Women made only 8.4 per cent (42 women) of 500 elected members of the National Assembly in 2006, while 4.6 per cent were elected the same year in the 108 seats Senate. At the provincial level, 43 women were elected as members of the 11 provincial assemblies in a total of 632 seats in 2006. Women's representation in the National Assembly did not improve much in 2018 as compared to the Senate. Currently, the National Assem-

91 Decision *R.Const.* 624/630/631 30 March 2018. The original French reads: '*La Cour considère que l'incise de l'article 13 visé au moyen trouve son explication non point dans une volonté de compromettre le principe de la promotion de la femme proclamé par le constituant, mais uniquement, d'une part dans le fait que l'égalité genre ne peut se concevoir ni en des termes arithmétiques, ni en une équation mathématique, s'agissant d'une égalité de chances entre l'homme et la femme, et d'autre part par le fait que l'engagement dans les partis politiques est libre, en sorte que le nombre de femmes et d'hommes effectivement engagés dans la vie des partis politiques est susceptible de variation d'un parti politique à un autre et ne peut être maîtrisé en amont pour justifier l'irrecevabilité de toutes listes qui n'auraient pas prévu un nombre déterminé de sièges aux femmes*'.

92 TM Makunya 'Beyond legal measures: A review of the DRC's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(1) *Journal of African Law* 10.

93 Discussion with Djafari Ramazani, Monitoring Department, National Human Rights Commission, December 2020, Kinshasa.

94 Alternative report to the Committee Against Discrimination 'Rapport sur les violences contre les femmes au Nord et Sud-Kivu, en République Démocratique du Congo' 5, available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/COD/INT\\_CEDAW\\_NGO\\_COD\\_13432\\_F.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/COD/INT_CEDAW_NGO_COD_13432_F.pdf)

bly has a total of 50 women members of parliament (10 per cent) whilst the Senate quadrupled women's representation from five to 20 senators (20 per cent).<sup>95</sup> The government (cabinet) has been unequally constituted since the dawn of democracy in 2006 although 17 per cent of women (12 female ministers out of 67) were appointed in 2019. Twenty two out of 26 provincial governors are male.<sup>96</sup>

Some have suggested that women willing to embark on a political journey 'must be serious about their political engagement, demonstrate technical know-how and be competent'.<sup>97</sup> However, Léonie Kandolo, women's rights activist, responds that 'there are many competent and expert women in the country'.<sup>98</sup> The key to women political success, observes Inès Kayakumba, includes the following:<sup>99</sup>

women must [...] have an intellectual background and wisdom, because the political world is very cruel. Moreover, they must show stability to have homeostasis in politics. Also, they must apply strategies that will allow them to resist in this world.

Rachel Wamulu, female journalist, makes observations along these lines:<sup>100</sup>

Congolese women must work hard, trying to show what they are capable of. Those who have embraced a career should not demand parity in the media. Rather, they must show that politics is not the preserve of men.

Horxis Boongo, female student at the University of Kinshasa, believes that:<sup>101</sup>

[t]o emerge in politics, Congolese women must first banish their femininity and not behave like the Congolese women of the 1960s. Clearly, they must not consider themselves as naturally weak. Above all, they must not underestimate themselves or believe that there are activities reserved only for men, such as politics.

Some of these testimonies seem to illustrate a deep belief that women need to prove themselves before they can be entrusted with public office role; that women are 'naturally' weak and that there is the necessity to be more demanding towards women. Men hardly go through the same scrutiny whilst incompetent, corrupt and uneducated male politicians are not difficult to find in the Congolese political sphere.<sup>102</sup> These comments often ignore that historical marginalisation, cultural stereotypes, discrimination fuelled by religious practices, the objectification women have been subjected to, may down the line develop an unconscious belief by both men and women about female inferiority.<sup>103</sup>

95 D Mangali 'Elections : la participation des femmes au Sénat passe de 5 à 20%' (2019) 42 *Journal du Citoyen* 2.

96 G Tshijuka 'Elections des gouverneurs : les femmes de moins en moins dans la course!' *Digital Congo* 19 February 2019 <https://www.digitalcongo.net/article/5c6c21a16f6d3c00044d732b/> (accessed 17 March 2021).

97 J Mpitu 'Que pensez-vous de l'émergence de la femme en politique en RDC?' (2019) 42 *Journal du Citoyen* at 3.

98 Radio France Internationale 'RDC: des femmes réclament un futur gouvernement plus paritaire' 27 May 2019 <https://www.rfi.fr/fr/afrique/20190527-rdc-femmes-reclament-parite-futur-gouvernement-ong> (accessed 15 March 2021).

99 Mpitu (n 97).

100 Mpitu (n 97).

101 Mpitu (n 97).

102 Observatoire de la parité de la République démocratique du Congo 'Elections gouverneurs' *Débout congolais* <https://deboutcongolaises.org/elections-gouverneurs-7-gouverneure-0/> (accessed 17 March 2021).

103 As above.



## 5 Governmental policy reform and formulation

### 5.1 The 2019 governmental programme

The Prime Minister presented to the National Assembly a programme which focuses on 15 pillars in 2019. Amongst all these pillars, two are of interest to the implementation of provisions of the Maputo Protocol: pillars 13 (fighting poverty and social marginalisation) and 14 (women's autonomy and promotion of the youth).

With the 13th pillar, a presidential programme<sup>104</sup> has been put in place to reduce, in a short time, disparities in sustainable human development in rural areas of the country.<sup>105</sup> This programme is motivated by the lack of tangible success from the former three strategic plans on poverty reduction.<sup>106</sup> Poverty affects 63,9 per cent of the population. Three women out of four (75,6 per cent) are poor whereas one man out of two (51,5 per cent) is poor.<sup>107</sup> This programme will help women to access microfinance,<sup>108</sup> access education in a proportion of 40 per cent;<sup>109</sup> actively be involved in agriculture<sup>110</sup> and to benefit from the creation of work.<sup>111</sup> Although a focus is manifestly put on women, the presidential programme does not mention the ratification of the Maputo Protocol as a motivation to establishing this policy. However, the policy shows

that it seeks to comply with the requirements set forth in CEDAW ratified in 1986.

Pillar 14 seeks to improve women autonomy. The government intended to enable women to participate in the political and economic decisions making; to invest in educating young girls; and establish an environment where women will be autonomous (especially rural women) as a means to achieve inclusion and sustainable growth. The government managed to implement its free access to primary education for both boys and girls. Members of the National Assembly accused the government of having failed to improve social conditions of people including women. In a nutshell, the programmes established by the government were short-lived and did not have significant impact.

### 5.2 Action and strategic plans

Many action and strategic plans have been adopted by previous governments in different sectors. Only a few relate to the implementation of substantive provisions of the Maputo Protocol.

#### 5.2.1 Gender strategic and action plans

Two documents are worth mentioning. The first is the National Action Plan II on the United Nations Security Council Resolution 1325 (2019-2022) published in September 2018.<sup>112</sup> This document aims to promote 'a secured environment which guarantees an equitable implica-

104 Présidence de la République 'Programme présidentiel accéléré de lutte contre la pauvreté et les inégalités (PPA LCPI), Document de programme' (2019) 19, para 26 [www.presidentcerdc.cd](http://www.presidentcerdc.cd) (accessed 31 January 2021).

105 Présidence de la République (n 104) para 40.

106 Présidence de la République (n 104) para 38.

107 Présidence de la République (n 104) para 18.

108 Présidence de la République (n 104) para 55.

109 Présidence de la République (n 104) para 62.

110 Présidence de la République (n 104) para 68.

111 Présidence de la République (n 104) para 97.

112 Ministère du Genre, de la Famille et de l'Enfant, 'Plan d'Action National de la mise en œuvre de la Résolution 1325 du Conseil de Sécurité des Nations Unies, sur les femmes, la paix et la sécurité IIème génération 2018 – 2022' (September 2018). Discussion with Christian Mupika, civil servant, *Maison de la Femme*, Goma (26 January 2021).

tion of women, men and the youth to peace building efforts in DRC'.<sup>113</sup> The ongoing National Action Plan is based on an evaluation of the previous plan adopted in 2010. The plan notes that armed conflicts still exist; sexual violence against women continue to be perpetrated whilst the state meets with some difficulty to punish the perpetrators.

To improve women's rights, the policy establishes four priority areas of actions: 1) Participation (by increasing the number of women in the sphere of decision-making); 2) Prevention (of all forms of women's and girls' rights violations); 3) Protection (of women's, girls' and other vulnerable groups' rights in a context of armed conflict or not); and 4) the Implementation of programs geared towards uplifting women and girls.<sup>114</sup> Government institutions are established to follow-up with the implementation of the National Action Plan II. They encompass key ministries, a representative of the President of the Republic, representatives of United Nations agencies, national and international non-governmental organisations. The National Action Plan II mentions the Maputo Protocol among regional human rights instruments ratified by the DRC.

### 5.2.2 *The Revised National Strategy against Gender Based Violence*

This document was developed by several actors to improve the previous Strategic Plan adopted in 2009 which had demonstrated some weaknesses.<sup>115</sup> The 2009 Strategic Plan focused on sexual violence in the context of armed

conflict, especially in the eastern DRC. The current strategic plan encompasses all types of gender-based violence in all the 26 provinces of the country.<sup>116</sup> It has seven components, 29 results to achieve (strategic axes) and 128 activities to put in place in the coming five years.<sup>117</sup>

The strategic plan shows that despite all the progress made through the legislative reform, there still are problems on the ground. For instance, as regard to forced marriages, the proportion of women between 20 to 24 years old who enter into marriage before the age of 15 years and 18 years is respectively of 8 per cent and 29 per cent,<sup>118</sup> many of them are from rural areas.

The Strategic Plan II has put in place a well-coordinated structure to do follow-up on activities unlike the 2009 strategic plan.<sup>119</sup> Among other challenges to overcome, the strategic plan notes the inclusion of gender based approach in development programs and proposals; effective application of existing laws (fighting impunity, inefficacy of the judicial system, facilitate access of victims by removing financial barriers to enable victims filing a case in courts and tribunals, provide for well-trained lawyers, enhance the system of compensation or reparations).<sup>120</sup>

<sup>113</sup> As above.

<sup>114</sup> Ministère du Genre, de la Famille et de l'Enfant (n 112) 19-23.

<sup>115</sup> Ministère du Genre, de la Famille et de l'Enfant 'Stratégie nationale de lutte contre les violences basées sur le genre révisée (Revised SNVBG)' (December 2019) 15 (on file with authors).

<sup>116</sup> Ministère du Genre, de la Famille et de l'Enfant (n 115), 11.

<sup>117</sup> As above.

<sup>118</sup> Ministère du Genre, de la Famille et de l'Enfant (n 115), 19.

<sup>119</sup> Ministère du Genre, de la Famille et de l'Enfant (n 115), 22-23.

<sup>120</sup> Ministère du Genre, de la Famille et de l'Enfant (n 115), 23-27.

## 6 The lack of court decisions invoking the Maputo Protocol

Broadly speaking, Congolese civil courts and tribunals do not rely on international law.<sup>121</sup> Even when some lawyers attempt to draw judges attention to international human rights instruments, they generally remain less inclined to rely on them.<sup>122</sup> A study on the application of international law in domestic litigation confirmed the reluctance of most African civil law judges to rely on international human rights law norms.<sup>123</sup> This can be attributed to the formalistic approach through which judges view international law norms and the ignorance of the existence and the content of certain human rights instruments by lawyers and judges. Most judges have not realised that at any time of global history, the internationalisation of most branches of the law including constitutional, administrative and criminal law requires of them to be flexible and to resort to norms that can help them clarify the meaning and nature of rights they are dealing with. Advocate Defi-Augustin Fataki wa Luhindi, Senior Counsel at the Court of Cassation, Professor Pacifique Magadju, and Bienvenue Malyabwana, Judge President at the *Tribunal de Grande Instance* of Bukavu, noted the difficulty by judges to rely on international instruments whether counsels have raised them or not. However, Bienvenue Malyabwana noted that one prosecutor had issued an order to approve the abortion by a victim of

rape. This is clearly an implicit and positive influence of the Maputo Protocol although it is not a judicial decision *per se*. We also identify one decision where the tribunal mentioned the African Charter in passing.<sup>124</sup> A petition challenging the constitutionality of the Public Health Principles Act, particularly in relation to its abortion related provisions, is pending before the Constitutional Court. This will be a good litmus test to appreciate the extent to which the Constitutional Court may rely on or give effect to the Maputo Protocol provisions.

## 7 Relationship with African human rights mechanisms

### 7.1 State reporting<sup>125</sup>

Although, the DRC is lagging behind with its reporting obligations – the country has not submitted three reports (2015 to 2021)<sup>126</sup> – it is nonetheless among the few countries that have submitted their initial report pursuant to article 26(1) of the Maputo Protocol and 62 of the African Charter. Its initial and combined report which covers the period between 2005 and 2015 was considered at the African Commission's 61st ordinary session organised from 1 to 15 November 2017 in The Gambia. However, at the time of writing the African Commission has issued concluding observations, but they have not been made public yet,

121 A number of decisions from military courts and tribunals have relied on the Rome Statute. See *Avocats Sans Frontières* (n 18).

122 TGI/Bukavu, 30 décembre 2006, RP 11133/CD, *Ministère public et partie civile Madame Cibalonza M'Rwambika c. Madame Sikuzani M'balole* REJUSCO (February 2010). Discussion with Senior Counsel Defi-Augustin Fataki wa Luhindi, senior advocate at the Court of Cassation.

123 Killander & Adjolohoun (n 37) 6.

124 For example, CSJ (Section Administrative) 2 November 1990 *Affaire Panzu Mavinga Pelot; Kandi Makwala v Banque du Zaïre* Arrêt RA 236 *Bulletin des Arrêts de la Cour Suprême de Justice, Années 1990 à 1999*, Kinshasa, Editions du Service de Documentation et d'Etudes du Ministère de la Justice (2003) 40-44.

125 This section draws extensively from T Makunya (n 92).

126 Democratic Republic of Congo <https://www.achpr.org/states/statereport?id=114>.

over four years after the consideration of the report.<sup>127</sup>

The report follows the formal requirements enshrined in the 2009 Guidelines on the elaboration of reports: in part B, the report presents the process of its preparation – which included state institutions, United Nations relevant agencies and non-governmental organisations specialised in the protection and the promotion of women's rights, the background information and the implementation of the provisions. The development of the report benefited from international support.<sup>128</sup> Its successful drafting may be the result of a number of promotional visits undertaken to DRC,<sup>129</sup> and technical supports,<sup>130</sup> by the African Commission, in particular the mission conducted in 2016.<sup>131</sup>

There are a number of issues that can be flagged out. First, the report is unclear as to the type of CSOs that were involved in its drafting and whether organisations based in provinces and

active in rural areas were also represented. It also does not indicate the type of subject these organisations are specialised in to ensure for example that organisations specialised in the protection of indigenous women, women with disability, internally displaced women, among others, were represented. Second, while the development of the report attempted to be inclusive, some members of civil society organisations and independent institutions involved in its development claimed they were not involved in its validation. In a sense, the drafting and the validation of the report were not as inclusive as they appeared. The trend among state representatives in the drafting committee to remove information that may jeopardise the 'image' of the country may have prompted the Inter-Ministerial Technical Committee for the Preparation and Monitoring of Initial and Periodic Human Rights Reports to adopt and submit the report without seeking the validation by CSOs.<sup>132</sup>

## 7.2 Communications

Since the ratification of the Maputo Protocol, no national or international organisation has approached the African Commission against DRC on grounds that it violated the Protocol. Even if such road was to be taken, the DRC does not generally participate in proceedings when communications are filed against it before the African Commission. There is no clear evidence that the DRC has complied with recommendations issued by the African Commission in cases against it. In *Interights, ASADHO and Madam O. Disu v Democratic Republic of Congo*, the African

127 43rd Activity Report of the African Commission on Human and Peoples' Rights, para 18 [http://www.achpr.org/files/activity-reports/43/43rd\\_activity\\_report\\_eng.pdf](http://www.achpr.org/files/activity-reports/43/43rd_activity_report_eng.pdf) (accessed 26 September 2018). These concluding observations have not been adopted at the time of the writing of this chapter. It has been suggested that the DRC delegation had not responded, in time, to written questions posed by the African Commission.

128 Democratic Republic of Congo (n 75) paras 33-34.

129 The Commission undertook missions in 2011 and 2016 and the issue of reporting was discussed including the technical support the country needed for such a process.

130 The technical support by the then Commissioner in charge of monitoring the promotion and protection of human rights in the DRC and Special Rapporteur on Human Rights Defenders in Africa, Reine Alapini Gansou, was acknowledged in the report.

131 'Press release on the promotion mission of the African Commission on Human and Peoples' Rights to the Democratic Republic of Congo (6-12 August 2016)' 14 August 2016 <http://www.achpr.org/press/2016/08/d310/> (accessed 26 September 2018).

132 Discussion with one of the legal experts, National Human Rights Commission, December 2020 (Kinshasa).

Commission *urgently* requested in November 2013 the DRC to re-open and review a case on the conviction of over 130 individuals for the assassination of former President Laurent-Désiré Kabila 'in strict compliance with human rights [fair trial related] standards at least for persons still in detention'.<sup>133</sup> The DRC neither participated in proceedings, nor did it comply with the recommendations. The pattern of the absence of state submissions, effective engagement with the African Commission and compliance with its recommendations may be observed in other cases including *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo* (2017),<sup>134</sup> *Marcel Wetsh'Okonda Koso and others v DRC* (2008); *Mr Kizila Watumbulwa v Democratic Republic of Congo* (2012),<sup>135</sup> *Dino Noca v Democratic Republic of Congo* (2012),<sup>136</sup> *Maître Mamboleo M. Itundamilamba v Democratic Republic of Congo* (2013 in relation to admissibility)<sup>137</sup> and *Albert Bialufa Ngandu v Democratic Republic of Congo* (2016). This situation may discourage individuals and organisations seeking remedies before regional human rights from doing so.

The DRC deposited the instruments of the ratification of the Protocol to the African Charter on the Establishment of an African Court on Human and

Peoples' Rights but had not made the Declaration under article 34(6) to allow NGOs and individuals to lodge petitions against it. Whilst civil society organisations and potential victims of women's rights violations may indirectly access the Court via the African Commission, the reluctance by the latter to refer cases before the Court does not provide much hope that this alternative route can be utilised.<sup>138</sup>

### 7.3 Special mechanism and promotional visits of the African Commission

As stated above, the development of the DRC initial report benefited from and was boosted by the African Commission's promotional visit. This visit was conducted in 2016 by the DRC country rapporteur and Special Rapporteur on Human Rights Defenders in Africa. She supported 'the training of multi-sectoral experts engaged with the task of data collection and drafting of the State Report'.<sup>139</sup> During the African Commission 2016 promotion mission, the delegation noted the<sup>140</sup>

commitment of the authorities to ensure that the country meets its obligation to submit periodic reports on the status of implementation of the Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, under Article 62 of the Charter and Article 26 of the Protocol.

133 *Interights, ASADHO and Maître O. Disu v République Démocratique du Congo* Communication 274/03 et 282/03, para 89(b).

134 *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo* 393/10 (2017).

135 *Mr Kizila Watumbulwa v Democratic Republic of the Congo* 285/04.

136 *Dino Noca v Democratic Republic of the Congo* 286/04 (2012).

137 I Derek et al 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: revisiting the Endorois and the Mamboleo decisions' (2018) 2 *Annuaire africain des droits de l'homme* 418.

138 See generally F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67(1) *International & Comparative Law Quarterly* 75-80.

139 *Democratic Republic of Congo* (n 75) para 83.

140 Press release on the Promotion Mission of the African Commission on Human and Peoples' Rights to the Democratic Republic of Congo (6-12 August 2016) 12 August 2016 <https://www.achpr.org/pressrelease/detail?id=125> (accessed 16 March 2021).

The Commission further called on the state to submit its overdue report. It can be suggested that these missions contributed to exerted indirect pressure on the state which led to the submission of the report in 2017.

## 8 The role of civil society organisations in improving the implementation of the Protocol

Several non-governmental organisations raise awareness about rights provided under the Maputo Protocol. They complement the role of government institutions in educating people on women's rights. Even though the Protocol provides for many rights, sensitisations and discussions are centred around article 14 of the Protocol which is the subject of controversies. CSOs have established a coalition named '*Coalition grossesse non désirée*' (CGND) to coordinate their actions aimed at implementing the Maputo Protocol such as awareness raising, advocacy and field activities. These organisations militated for the adoption of legislation which strengthens the protection of women's rights including the Gender Parity Act, the revised Family Code as well as the HIV/AIDS Act.

Despite some resistance by members of parliament, the CGND conducted a robust campaign which led to the ratification of the Maputo Protocol and its subsequent publication in the national gazette.<sup>141</sup> On the ground, NGOs distributed copies of the Protocol to judges and other judicial officers. Significantly, the President of the Superior Council of the Magistracy (CSM) and enjoined judges to rely directly, when necessary, on article 14 of the

Maputo Protocol.<sup>142</sup> This decision was met with some resistance from judges who believed that the CSM was not empowered to give directives on the law applicable to legal matters since such a power is vested with the legislature. This highlights the relevance of a parliamentary Act incorporating the Maputo Protocol into the domestic legal order.

CSOs generally rely on the expertise of legal professionals during awareness campaign with community leaders. The recommendation to revise the HIV/AIDS Act to ensure confidentiality of one's own HIV status *vis-à-vis* the spouse emerged from these forums. This recommendation was inspired by General Comment 1 of the African Commission. In a nutshell, the close collaboration between NGOs and human rights experts ensures that the former is significantly aware about the nature and extent of women's rights protection as provided under the Maputo Protocol and clarified by the African Commission's general comments.

A few organisations directly provide healthcare services to women. Since 2009, Care International launched a programme named 'Uzazi bora' (Better parenting) and Supporting Access to Family Planning Post Abortion Care (SAFPAC). Between 2019 and 2020, over 531 women received post abortion care and 80 per cent of them were willing to use contraceptive methods that were suggested to them. These actions are aimed to saving lives since, as Care International explains, non-safe abor-

<sup>141</sup> Discussion with Dr Bergson Kakule, programme Manager & Quality Advisor

Supporting Access to Family Planning Post Abortion Care Project at Care International (February 2021), Goma.

<sup>142</sup> Circulaire 04/SPCSM/CFLS/EER/2018 du 06 Avril 2018 relative à la mise en exécution des dispositions de l'article 14 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux droits de la femme en Afrique.

tion remains one of the main causes of maternal deaths. Currently, NGOs and the government are developing medical norms which will facilitate care givers to provide safe and medicalised abortion.

## 9 The Maputo Protocol in legal education<sup>143</sup>

The curriculum of law schools includes courses on some aspects of human rights. In the final (fifth) year, law students are taught a human rights devoted course. The 45 hours, three credits course does not have a standardised content thereby providing some room to the lecturer to design the content of their course. This comes with some disadvantages. Lecturers interested in and familiar with domestic public law related matters (constitutional and administrative law) tend to teach only the Bill of Rights. They leave aside regional and global protection of human rights. Others attempt to combine the two aspects with the relative consequence that a lecturer familiar with the international human rights system will not devote significant time to the Bill of Rights. An approach that combines the two levels is generally the best but requires the existence of well-trained lecturers in both domestic and international protection of human rights. At the University of Goma (eastern DRC), since 2012, the teaching of human rights includes an overview of international human rights law. The lecturer examines specific women's rights especially

when dealing with rights of vulnerable groups. They introduce the meaning and content of general comments during discussions related to the sources of international human rights law. Decisions by the African Court and the African Commission are equally discussed with students. This approach is not the same everywhere. Certain lecturers, especially those educated in European universities or African universities with less exposure to the African human rights system, pay more attention to the protection of human rights at the United Nations and the European Court of Human Rights levels during their teachings. Consequently, students, who later become advocates, judges and prosecutors graduate with an insignificant, if any, knowledge of the regional and sub-regional human rights protection mechanisms.<sup>144</sup> This may be one of the root causes of the lack of reliance on the Maputo Protocol in domestic litigation.

It is worth mentioning that since 2016, some aspects of women's rights are dealt with in various courses. The course on 'Gender and development' was introduced in the legal education curriculum for first year students. Another course that was introduced in the curriculum is 'Child Protection'.<sup>145</sup> This course is taught in the third year of law and is compulsory for 60 hours (4 credits). The lecturer has an opportunity to discuss issues such as forced marriage, female genital mutilation,

143 At the time of writing, the DRC had yet to introduce reforms in legal education. With the advent of the *Licence-Master-Doctorat* education system, undergraduate students now have the opportunity to study human rights in various courses up to 207 hours. At the Master's level, specialised human rights courses have been instituted including a specialised master in human rights. The system started to operate in 2022.

144 KK Bindu & T Makunya 'Bringing the African human rights system into classrooms: Some lessons drawn from a lecture delivered at the Université Libre des Pays des Grands Lacs (DR Congo)' *AfricLaw* (4 February 2019) <https://africlaw.com/2019/02/04/bringing-the-african-human-rights-system-into-classrooms-some-lessons-drawn-from-a-lecture-delivered-at-the-universite-libre-des-pays-des-grands-lacs-dr-congo/> (accessed 17 March 2021).

145 Note circulaire 032/MINESU/CABMIN/TMF/12/10/2016 du 12 octobre 2016.

cultural practices that endanger children's rights. However, these legal issues may be taught from an international human rights or municipal law perspective. The lecturer seems to have much room to decide their own perspective. Touching upon the Maputo Protocol will thus depend on whether lecturers rely on international law and understand regional and global dynamics surrounding the protection of children and gender related rights.

## 10 The role of the National Human Rights Commission

The National Human Rights Commission (CNDH) has a robust human rights mandate<sup>146</sup> that can be used to enhance the implementation of the Maputo Protocol and ensure compliance with concluding observations, if any, delivered by the African Commission.<sup>147</sup> The fact that it enjoys affiliate status with the Commission is an opportunity to raise women's rights issues in the African Commission sessions and learn from the way other national human rights institutions contribute to improving the quality of the implementation of the Protocol. The then CNDH President, Advocate Mwamba Mushikonke admits that although the CNDH generally participates in the African Commission sessions, it has not filed a petition. In a training session organised by the Network of African Human Rights Institutions in Kinshasa (December 2020) participants invoked reasons such as the lack of familiarity with regional human rights mechanisms and proce-

dures before them as some of the reasons why the CNDH has not meaningfully engaged with the African Commission, including on matters related to the Maputo Protocol. Nonetheless, the CNDH participated in the preparation of the 2017 DRC state report submitted to the African Commission. Alidor Kazadi Alika, a member of the CNDH, notes the following:<sup>148</sup>

the government must harmonise legislation to be consistent with the Maputo Protocol. The CNDH should engage with human rights organisations to increase sensitization, organise sessions to increase the knowledge of men and women about their rights and conduct advocacy to ensure the teaching of human rights at the secondary school level.

This wish is echoed by Mundumbu Chantal, then Deputy Rapporteur of the CNDH. She notes that 'there is a need for intensified awareness raising campaign. We must ensure that fund is raised for the reparation of rape cases'.<sup>149</sup>

## 11 Conclusion

The road to implementation of the Maputo Protocol in the DRC is characterised by some progress made in the adoption of legislation – chief among them is the Constitution – that fairly and in theory protect specific aspects of women's rights but hardly have practical impact. Theoretical improvements in the legal framework for the protection of women's rights which also includes the ratification and the gazetting of the Maputo Protocol cannot be expected on

146 Article 6 of Act 13/011 of 21 March 2013 on the CNDH.

147 On the CNDH, see generally B Kahombo 'The Democratic Republic of the Congo's National Commission on Human Rights' in CM Fombad (ed) *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (2019) 101-265.

148 Interview with Alidor Kazadi Alika, member of the DRC CNDH, Kinshasa, December 2020 (notes on file with authors).

149 Notes taken during a December 2020 training session of members of the DRC CNDH, Kinshasa (on file with authors).



its own to improve practical realities in which women live. This is partly because women discrimination is deeply rooted in religious, cultural and political practices which hardly perceive women as equal partners and perpetuate a common belief that women must prove themselves before they can be entrusted with public affairs. What has been progress in theory must thus be honed with robust awareness campaigns geared towards changing the behaviours, attitudes and perceptions of religious leaders, politicians and the community in general towards women. This is of utmost importance since institutions established to monitor the implementation of relevant domestic and international legal instruments protecting women are composed of men and women who may still hold regressive attitudes and perceptions towards women and fail to ensure appropriate transformation. There are many instances of indirect influence of the Maputo Protocol on existing legal framework and institutional practices such as the permission granted by the prosecutor in one case so that the victim of rape could abort and the amendment of the HIV/AIDS Act to conform to the African Commission's General Comment 1. This chapter has demonstrated the low level of engagement with regional human rights bodies, in particular the African Commission. This implies that a serious advocacy campaign is needed to change mindsets at all levels of public and private spheres.

# THE IMPACT OF THE MAPUTO PROTOCOL IN THE KINGDOM OF ESWATINI



*Simangele Mavundla\**

## 1 Introduction

Since the last report on the impact of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 2016,<sup>1</sup> the Kingdom of Swaziland changed its name to the Kingdom of Eswatini.<sup>2</sup> According to the latest census, there are 1,093,238 people in the country, and women constitute 51 per cent of the population.<sup>3</sup> However, according to the SADC Gender and Development Monitor of 2018, the total population mid-2018 was at 1,159,000, of which 56.2 per cent were women,

and 43.8 per cent were men.<sup>4</sup> This puts the Population Annual Growth Rate from 2017 to mid-2018 at 0.7 per cent.<sup>5</sup> The SADC Monitor projects that adult literacy in Eswatini in 2018 was at 88.54 per cent for women and 88.29 per cent among men.<sup>6</sup> The 2019 Human Development Report reveals that the HIV prevalence rate among adults was at 27.2 per cent in the Kingdom of Eswatini, and women were the most affected by the virus.<sup>7</sup>

Even though Eswatini is categorised as a lower-middle-income country, there are prevailing problems in the development situation which are intertwined with development challenges. Some of the challenges the country faces include slow and non-inclusive economic growth, poverty, food and nutrition insecurity, weak social protection policy environment, inadequate social services, climate change-related shocks, and the

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1 D Dlamini & S Hlatshwayo 'The impact of the African Charter and the Maputo Protocol in Swaziland' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 233-248.

2 On 19 April 2018, the King of Swaziland changed the name of the country from the Kingdom of Swaziland to Kingdom of Eswatini through Legal Notice 80 of 2018. The Notice stipulates in section 3 that 'reference in any written law or international agreement or legal document to Swaziland should be read and construed as reference to Eswatini'.

3 Central Statistical Office (CSO) 'The 2017 population and housing census preliminary results' (2017) 10.

4 SADC Gender and Development Monitor of 2018, 1.

5 As above.

6 As above.

7 United Nations Development Programme (UNDP) 'Human Development Report 2019 Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (2019) 38.

high burden of HIV and non-communicable diseases.<sup>8</sup>

Other challenges that the country faces include the steady increase of the unemployment rates, the rates being higher among females in comparison to their male counterparts at 24.8 per cent and at 21.2 per cent respectively in 2016.<sup>9</sup>

The country has been forced to grapple with new challenges such as the Coronavirus. With the advent of the Coronavirus aka COVID-19 restrictions and lockdown, women and children were the most affected. The COVID-19 situation which encompassed a new normal of social distancing and nationwide lockdown, showed how vulnerable women are to gender-based violence (GBV) as incidences spiked considerably during this period.

Women were to a larger extent left out at the decision-making table and as such women in informal enterprises such as street vending and cross-border hawking were cut off from economic activity without being consulted or informed prior. Healthwise, women and children who needed to access hospitals could not do so, as public transportation was brought to a standstill. Since the relaxation of the restrictions and lockdown levels women had to adjust and pick up their business interests in order to make ends meet.

The situation of women's rights in the country has been improving at a slow pace considering that the Kingdom of Eswatini adopted its Constitution in 2005 as the supreme law of the land.

Despite the Constitution being founded on principles of equality and non-discrimination, the process of reviewing, amending and repealing laws that are discriminatory to women is still ongoing.

There have been a number of court cases that have successfully challenged laws and practices that continue to undermine women's emancipation. Some of the cases were discussed in the Impact of the Maputo Protocol 2016 Report, hence this chapter discusses the latest case of *Sacolo v Sacolo* of 2019.<sup>10</sup> This indicates that there is an urgent need to align existing laws with the Constitution and international and regional women's rights instruments. This further shows that, there is a great need for the country to adopt a national law reform committee or commission to systematically embark on the alignment of all laws with the provisions of the Constitution.

## 2 Ratification of the Maputo Protocol

The Maputo Protocol was ratified by Eswatini on 5 October 2012 without any reservations. The Deputy Prime Minister's Office houses the Department on gender issues as well as all other issues affecting vulnerable groups in the country (such as women, children, persons with disability) and therefore was instrumental in the lobbying of Parliament to domesticate the Maputo protocol once the country ratified it. No official records were found in the course of this research suggesting how the process of ratification was carried out by parliament. However, the interview with Mr

8 See the Kingdom of Eswatini's country progress report on the implementation of the Beijing Declaration and Platform for Action of May (2019) 16.

9 Integrated Labour force surveys 2007-2016.

10 *Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law – Eswatini v Jukhi Justice Sacolo and Others* Unreported: (1403/16) 2019 SZHC (166).

Masuku at the Deputy Prime Minister's Office revealed that his office works hand in hand with civil society organisations (CSOs) in the country and abroad, hence, it can be said that CSOs are part and parcel of actors in the mandate of ensuring gender equality.

It must be noted that the Ministry of Justice and Constitutional Affairs in collaboration with the Deputy Prime Minister's Office are the two organs of state responsible for the implementation of the Maputo Protocol, with the Ministry of Justice responsible for promulgating laws that domesticate the Protocol, while the Deputy Prime Minister's Office is responsible for policy implementation aspects of the Maputo Protocol. The two are conversant with the provisions of the Maputo Protocol, having written a state report on the implementation of the African Charter on Human and Peoples' Rights (African Charter) and the Maputo Protocol in 2019-2020. Also, the Government focal person who liaises with the African Commission on Human and Peoples' Rights (African Commission) through the Swazi Embassy in Ethiopia is located at the Ministry of Justice, and Constitutional Affairs.

### 3 Domestication

There are two schools of thought when it comes to the reception of treaties into national law, the monist school and the dualist school.<sup>11</sup> The exponents of the monist school, Hans Kelsen, Vedross and Scelle, maintain that international and domestic law must be regarded as a single conception of law, and conse-

quently, that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts of transformation into national legislation.<sup>12</sup> Dualists, on the other hand, see international law and municipal law as entirely different systems of law, and as such, international law can only be applied by domestic courts if adopted or transformed into domestic law through legislation.<sup>13</sup>

The Constitution of the Kingdom of Eswatini is the supreme law and is the primary determinant of human rights reception into municipal law in the Kingdom.<sup>14</sup> For an international convention such as the Maputo Protocol to apply as part of the domestic law of Eswatini, that convention must be ratified and domesticated. Section 238 of the Constitution establishes the primary procedure for the incorporation of international law into domestic law. Section 238(2) provides

An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by (a) an Act of Parliament; or (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.

The provisions of sub-section 2 do not apply where the agreement is of a technical, administrative, or executive nature or is an agreement which does

11 This debate is covered in JG Starke 'Monism and dualism in the theory of international law' (1936) 12 *BYIL* 66 and C Roodt 'National law and treaties' (1987-8) *SAYIL* 72.

12 See Spaak, Torben, Kelsen 'Monism and dualism' in M Novakovic (ed) *Basic concepts of public international law: Monism & dualism* (2013) at 322-343, available at SSRN: <https://ssrn.com/abstract=2231530>

13 See H Lauterpacht 'International law and municipal law' in E Lauterpacht (ed) *International law: Being the collected papers of Hersch Lauterpacht* (1970) 27.

14 This is confirmed in section 2(1) of the Constitution which states that 'This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void'.

not require ratification or accession. Sub-section 4 provides that 'Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament.'

This means that parliament must pass a law (an Act of Parliament) incorporating the international convention. The international convention will then become part of national law. In this case, it is presumed that the Maputo Protocol is domesticated by the Constitution of Eswatini of 2005 as well as, by the Sexual Offences and Domestic Violence (SODV) Act of 2018, including the Gender policy of 2010.

#### 4 Legislative and policy reform

One of the most significant law reforms that the country has carried out since the last report of 2016 has been the enactment of the SODV Act of 2018, which aims to protect 'women from *all forms of sexual violence and domestic violence*'.<sup>15</sup> The SODV Act 2018 is relatively new and as such a recently enacted law which deals with Violence against women (VAW) in Eswatini head-on. It criminalises all forms of violence, such as domestic, Intimate partner violence (IPV), and sexual violence.

The notable feature of this Act is that it reviews, and reforms legislation passed before it, by providing a normative framework that is aimed at curbing domestic violence and sexual offences holistically. The Act came about as a response to public outcry over the prevalence of domestic and sexual violence offences against women and children which was viewed as a contributing factor into the high prevalence of HIV

among adolescent girls and young women in the Kingdom.<sup>16</sup>

The SODV Act expands the definition of violence in line with international norms and defines it as any act that physically, sexually, emotionally, economically, verbally or psychologically abuses another person, including acts of intimidation, harassment, unlawful stalking or damage to property and controlling abusive behaviour.<sup>17</sup> The Act is revolutionary by nature in that it criminalises sexual harassment, stalking (acts which predominately lead to VAW) and by striking down the defence available to married men in a charge of marital rape. It is the first law to make provisions for protection orders in cases of domestic violence,<sup>18</sup> and the establishment of domestic violence courts at the magistrate's court level.<sup>19</sup> It removes the common law defence of irrevocable sexual consent by the wife to conjugal rights once married, despite not criminalising marital rape. The Act provides as follows: 'A marital or other relationship, previous or existing, shall not provide a defence to any offence under this Act'.<sup>20</sup>

The judicial interpretation of the Act will determine the extent to which VAW is tackled in Eswatini, thus providing access to justice to victims of violence. The SODV Act of 2018 places an obligation on police and prosecutors to ensure that victims of violence are referred to support services and given information about access to post-exposure prophylaxis (PEP) intervention as

15 Emphasis added.

16 E Hlanze et al *Customary practices, the laws, and risky behaviours – a concern for the increased prevalence and vulnerability to HIV and AIDS among women and the girl child: a rights-based approach* (2008) 155.

17 Sec 77(1) of the SODV Act of 2018.

18 Secs 78-103 of the SODV Act of 2018.

19 Sec 126 of the SODV Act of 2018.

20 Sec 151 of the SODV Act of 2018.

part of post-rape care services.<sup>21</sup> It also provides for protection orders as remedial measures in cases where a person experiences domestic violence.<sup>22</sup>

The progressive SODV Act<sup>23</sup> is a positive step towards combating violence against HIV-positive women provided that it is fully implemented. The Act provides for criminal prosecution of offenders as well as civil protection orders. It provides for the 'protection'<sup>24</sup> of women, regardless of HIV status, from violence, and sexual offences, offering the hope of some protection against the perpetuation of violence by intimate partners and families.

Another significant legislative reform that the country adopted in 2018, is the promulgation of the Persons with Disability Act (PDA) 2018. It provides that persons with disability have a right to access to health, assistance, public facilities, amenities and services and buildings, education, transport facilities, employment, recreation, etc. on an equal basis with others. There is a Disability Policy that has been adopted that seeks to guide the implementation of government programmes in relation to disability in the country. For instance, National Disability Action Plan, 2018–2022 ensures that national policies and development programmes mainstream disability in all stages of planning, implementation, and monitoring of the programmes. Also, it aims at promoting and protecting the fundamental rights of persons with disabilities as well as ensuring that they are empowered to exercise those rights and enjoy equal participation in the life of the

community in which they live, without discrimination of any kind based on their disability.<sup>25</sup>

Gauging whether a study was undertaken before the Maputo Protocol was ratified, interviews with officials at the Ministry of Justice and Constitutional Affairs as well as at the Deputy Prime Minister's Office indicated that none of them were aware of the study,<sup>26</sup> whereas when it comes to resources allocation, the Gender Coordinating and Family Issues Department, reported that there had not been any changes to the allocation of their resources.<sup>27</sup>

## 5 Court judgments

In the meanwhile, some women brought cases that aimed at protecting women from violence and gender inequality, including the recent case of *Sacolo v Sacolo*,<sup>28</sup> in which the Eswatini High Court found the principle of marital power of husband to be 'discriminatory against married women and offending their constitutional right to equality before the law'.<sup>29</sup> In this case, the applicant's heads of arguments refer to international treaties and conventions. The heads of arguments explicitly referred to the Maputo Protocol and is captured as follows: '... the Protocol on the Rights of Women guarantee[s] the right of women in Swaziland to equality in

21 Sec 72 of the SODV Act of 2018.

22 Sec 100 of the SODV Act of 2018.

23 Emphasis added.

24 Emphasis added.

25 See National Disability Action Plan, 2015 retrieved from <http://www.gov.sz/nw17/images/dpm/social/Swazi%20National%20Disability%20Plan%20of%20Action%20FINAL%20PRINTING%20October%20%20FInal.pdf>

26 These were members of the National Mechanism for Reporting and Follow-up (NMRF) based at the Ministry of Justice and Constitutional Affairs on 15 October 2020 and 20 October 2020 in Mbabane.

27 As above.

28 *Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law – Eswatini v Jukhi Justice Sacolo and Others*, Unreported (1403/16) 2019 SZHC (166).

29 Emphasis added.

marriage and equality before the law with men without regard to their gender'.<sup>30</sup>

However, the judgment does not make any reference to the Maputo Protocol. The court acknowledged that the applicant's argument was reliant on international treaties and convention.<sup>31</sup> The court concluded that there was no need to resort to international law when domestic law was sufficient in resolving the issue in question.<sup>32</sup>

In this case, the parties were husband and wife and married in community of property in terms of the Marriage Act 67 of 1964. The facts were that Mrs Sacolo sought to terminate the entire concept of marital power which allowed husbands the sole discretion to administer matrimonial property. The suit emanated from Mrs Sacolo's frustration after she bought ten cows which were registered in her husband's name since she was married in community of property and the husband was the administrator of the joint estate. He then sold some of the animals without informing the wife and without sharing the proceeds. The husband had frequently refused her requests to sell part of the livestock she had bought to meet the children's academic needs as well as the family's needs. Mr Sacolo refused the requests despite having sold a number of the beasts even after he had moved out of the matrimonial home.

She sought the following orders:

- Declaring the common law doctrine of marital power to be unconstitutional in so far as it was inconsistent with Section 18, 20 and 28 of the Constitution of Eswatini Act 1 of 2005.

- Declaring that section 24 and 25 of the Marriage Act of 1964 are unconstitutional and invalid in that they were inconsistent with section 20 and 28 of the Constitution of Eswatini.
- Declaring that spouses married in terms of the Marriage Act of 1964 and in community of property have equal capacity to administer marital property.
- That the first applicant was authorised to administer the marital assets accruing to her marriage with the first respondent.

The Court referred to two landmark cases (cited below) as providing the 'much-needed watershed'<sup>33</sup> regarding women's rights in Eswatini. The Court observed that these cases dealt with specific instances and did not address the main challenge, which was marital power vested in men. The Court further adverted to the prejudice endured by women which included not being able to deal with the marital property despite contributing to the common pool of assets. The Court acknowledged that this practice had been abused over the years and was a continuing source of tension in marital relations.

The Court decided that it 'was not fair that women must put in place certain measures in order to attain equality',<sup>34</sup> especially since husbands did not have to take this legal step to preserve their right to equality. The Court ruled that such practices violated the right to dignity of women which embraced 'human value and the requirement to respect others'. Mlangeni further asserted:<sup>35</sup>

[L]ife without dignity is like a sound which cannot be heard. Dignity speaks ... It is a

30 Applicants Heads of Arguments, para 10.2.

31 The *Sacolo* case (n 28) para 29.

32 As above.

33 The *Sacolo* case (n 28) para 10.

34 The *Sacolo* case (n 28) para 15.

35 The *Sacolo* case (n 28) para 16. The Judge quoted J Leburu in *Letsweletse Motshidie Mang v Attorney General*, (unreported case) MAHGB -000591-16, 11 June 2019.

combination of thought and feeling ... It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.

The Court made the following orders:

- (1) Common law marital power is hereby declared unconstitutional as it is discriminatory against married women.
- (2) Spouses married in terms of The Marriage Act 1964 and in community of property have equal capacity and authority to administer marital property.

Before the 2019 decision, two cases had been brought before the Eswatini High Court, challenging certain aspects of the principle of marital power.<sup>36</sup> The decisions in these cases had chipped away at the marital power of the husband in respect of standing before courts unassisted (*locus standi*) and women's rights to property registration, paving the way for the *Sacolo* decision. These are the *Sihlongonyane v Sihlongonyane*<sup>37</sup> case and the case of *Attorney-General v Aphane*.<sup>38</sup> These cases were extensively discussed in the 2016 report.

## 6 Awareness and use by lawyers and judges

As correctly reported in the 2016 volume of the Impact of the Maputo Protocol, Eswatini uses a dualist system, which requires the domestication of international instruments before they can be invoked in domestic courts.<sup>39</sup>

In the case of *Sacolo v Sacolo*, the applicant's lawyer referred to the Maputo Protocol, and the judge did not consider it. It looks like there is an erroneous belief on the part of judges in the Kingdom that international conventions and treaties even though domesticated, are not part of domestic or municipal law, therefore should be evoked when there are no domestic laws addressing the point in issue.

However, there are many avenues that are available which should enable lawyers and judges in the Kingdom to have sufficient knowledge and understanding of human rights in general. The University of Eswatini is a custodian of the law degree in the entire country and the syllabus covers human rights at both international, regional, and sub-regional levels.

## 7 Awareness and use by civil society organisation

CSOs in Eswatini are familiar with the African Charter and have taken advantage of the African Human Rights system including engaging with the African Commission. The Maputo Protocol is quite known by CSOs, however, interviews revealed that organisations do not set out to specifically mention that their interventions are under the Protocol. Instead, they implement provisions of the Maputo Protocol under the blanket name of international and regional conventions.<sup>40</sup> One of the reasons NGOs have lagged behind in engaging the government on the Maputo Protocol is the fact that Eswatini has been non-compliant with article 62 of the African Charter, and article 26(1) of the Maputo Protocol and as such the country submitted its initial report in year 2000

36 See *The Attorney General v Mary Joyce Doo Aphane*, unreported civil appeal case 12/2010 and *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane* unreported High Court case No 470/2013 A.

37 As above.

38 *Attorney General v Mary Joyce Doo Aphane* Unreported Civil Appeal case 12/2010.

39 Dlamini & Hlatshwayo (n 1).

40 As above.



and then omitted to report up until year 2020. This state of affairs can be seen in the combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Eswatini State Periodic Report under the African Charter and the initial report under the Maputo Protocol deposited with the African Commission in 2020.

## 8 Higher education and academic writing

The country through the University of Eswatini Law Department offers courses to law students designed to protect Human and Peoples' Rights and respect for the rule of law. Courses offered by the University that advance the subject of human rights and respect for rule of law are amongst others: Constitutional law, Public International Law, Human Rights Law, International Organisations, as well as introduction to Legal systems and methods.

Since the last 2016 writeup, very few articles touching on the Maputo Protocol were written by Eswatini's scholars. For instance, an article was published by Mavundla and others in the 2020 *Potchefstroom Electronic Journal*.<sup>41</sup> The article heavily relies on the Maputo protocol to enumerate women's rights and finds Eswatini government's obligation to protect women from GBV wanting.<sup>42</sup>

There has been a key milestone in relation to legal aid as the university offers free legal services to indigent members of the community who require legal assistance. The establishment of a legal aid clinic at the University of

Eswatini has been a novel intervention which sees law students under the supervision of lecturers and practising attorneys provide legal aid services to non-paying members of the society, focusing on the vulnerable and minority groups such as children and women. The Legal Aid Clinic was set up through support from the United Nations Joint Gender Programme, the Ministry of Justice and Constitutional Affairs and the University of Eswatini Law Department.

## 9 National human rights institutions

The Commission on Human Rights and Public Administration is mandated by the Constitution to promote and protect human and peoples' rights. The mandate of the Commission is to, among other things, sensitise communities on human rights, and investigate complaints concerning alleged violations of fundamental rights and freedoms enshrined in the Constitution. The Commission is a creature of statute and is said to be independent.<sup>43</sup> However, it is totally dependent on government for funding.

The Commission for Human Rights and Public Administration has been criticised for its lack of visibility in the country and is perceived to have taken a back seat in dealing with human rights issues in the country.<sup>44</sup> However, the Commission has been instrumental in assisting the state in drafting state reports. For instance, the Commission

41 SD Mavundla and others 'Marital Power Finally Obliterated: The History of the Abolition of the Marital Power in Civil Marriages in Eswatini' *PER/PELJ* 2020 (23).

42 Mavundla (n 41) 8-9.

43 The 2005 Constitution of eSwatini established the Commission on Human Rights and Public Administration (CHRPA).

44 The 2005 Constitution of eSwatini (n 43). According to the state report to the UPR process of 2021, the Commission is raising awareness on human rights by running a radio program through the National Radio Station.

played a pivotal role in the state report to the African Commission submitted in 2020. The Human Rights Commission is part of the team of officials known as the National Mechanism for Report Writing and Follow-up (NMRF) which was established sometime in 2019 with the mandate to draft state reports and to follow up.<sup>45</sup> The Commission normally forms part of the government delegation when a state report on human rights is to be discussed by a treaty body.

## 10 State reporting

Since the publication of the 2016 Report on the Impact of the Maputo Protocol, Eswatini in 2019 embarked on drafting the first state report on the implementation of the Maputo Protocol with technical assistance and financial support from the University of Pretoria's Centre for Human Rights. The final report has been submitted to the African Commission by the Government of Eswatini. As stated above, in 2019, the Government of Eswatini established the NMRF – a body of officials from different ministries that has the sole mandate to write state reports. CSOs participate in the drafting process only by invitation from government. The invitation is extended as a matter of practice and it is not every organisation that is invited. CSOs again through invitations, participate at validation meetings of the drafted state report. As things stand, there is a need to ensure that CSOs are made part of the NMRF so as to avoid a situation where an invitation get lost or is never sent or issued.

45 The Human Rights Commission has taken part in the drafting of the state report on the implementation of the African Charter and the Maputo Protocol, an exercise which took place in 2019 and the state report has been submitted to the African Commission on Human and Peoples' Rights.

## 11 Relationship with the African Commission

Since the last report of 2016 on the Impact of the Maputo Protocol in Eswatini, two Commissioners of the African Commission had a joint promotion mission to the Kingdom of Eswatini.<sup>46</sup> The two commissioners were Pansy Tlakula and Solomon Dersso.<sup>47</sup> Their mission was from 7 to 11 March 2016. After meeting with various stakeholders, including the Government,<sup>48</sup> the Commissioners raised areas of concern on the way the country was discharging its human rights mandate of promoting, protecting and fulfilment of human rights.<sup>49</sup> The commissioners noted the failure by the Eswatini government to domesticate ratified regional and international instruments, including the Maputo Protocol; as well as the failure by Eswatini to submit periodic reports in fulfilment of her obligations under the African Charter and the Maputo Protocol.<sup>50</sup>

The commissioners' report on the promotion mission visit contains elaborate recommendations addressed to the state party. The commissioners recommended that Eswatini domesticate all regional and international human rights, in particular the African Charter and the Maputo Protocol which were ratified by her, as well as, to submit periodic reports in fulfilment of her obligations

46 The first promotion Mission to Eswatini was done in 2006 by Commissioner Pansy Tlakula, and the details of the mission were covered in the 2016 Report on the Impact of the Maputo Protocol in Eswatini.

47 African Commission on Human and Peoples' Rights – Report of the joint promotion mission to the Kingdom of Swaziland by Commissioner Pansy Tlakula and Commissioner Solomon Dersso 7-11 March 2016.

48 As above.

49 As above para 200.

50 As above para 200(iii).

under the African Charter and the Maputo Protocol.<sup>51</sup>

The report further recommends that the Eswatini government urgently expedite a comprehensive law reform process, in order to align all existing laws with the Constitution, and in particular with the Bill of Rights, amongst other recommendations.<sup>52</sup>

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

The country does not have a Law Reform Commission to review all laws that have implications on the rights of women (which can then review, and then recommend that certain laws be repealed, amended or enacted). However, according to the state, in 2020, 'Eswatini established a Law Reform Unit to systematically review and reform laws of the country so as to comply with international norms and standards as well as the Constitution'.<sup>53</sup> The state report further reveals that the Law Reform Unit will at a later stage cascade and develop into a Law Reform Commission.<sup>54</sup>

The failure to set a fully-fledged Law Reform Commission in line with the provisions of the Constitution delayed the process of fast-tracking the review of many laws that have a bearing on the improvement of the status of women in society; for instance, laws such as the Matrimonial Property Bill, Administration of Estates Bill, drafting

of the Land Policy and the review of the current citizenship Bill to promote gender equality.

One of the biggest challenges to the implementation of laws and policies that would ensure the enfranchisement of women in the country is the absence of the provision of budgetary commitments that will aid the implementation aspect of those laws and policies. The budget would ensure that the justice enforcement sector is trained and made aware of their role in guaranteeing that women's issues receive all attention they deserve instead of being dismissed. This includes the courts, police, lawyers and government officials. Insufficient budgets also contribute to a lack of awareness of main laws and policies on women's freedom to the general populace as the laws would end up not being translated to a language understood by the locals.

Women and girls in Eswatini still face a number of challenges as they bear the brunt of poverty, unemployment, inequality and are the most affected by HIV/AIDS in the country. The challenges face by the women are attached to the challenges that the country is facing at large. For instance, the Kingdom is facing a stagnant economic growth which has an impact on job creation, thus resulting in unemployment.<sup>55</sup> In an effort to alleviate this problem, the country has developed a Strategic Road Map 2018-2023, which identifies sectors of the economy that will have an impact on job creation amongst priorities.

51 The Constitution of eSwatini (n 43) para 202(i).

52 The Constitution of eSwatini (n 43) para 202(iv).

53 Eswatini National Report on the Universal Periodic Review – 3rd Cycle (draft report July 2021).

54 As above.

55 UNFPA Eswatini Annual Report 2019. See also the Eswatini National Budget Brief as reported by UNICEF for the period 2018/2019 3 which reported that Eswatini economic growth declined in real terms from 7.3 per cent in fiscal year 2015/16 to -0.7 per cent in 2016/17.

It must be noted that women and girls face various intersecting factors which increase their vulnerability to various forms of oppression. As a result, the Kingdom of Eswatini has made efforts to put in place a number of measures to address some of these challenges. For instance, to address these elements, CSOs and government departments such as Gender Coordination and Family Issues under DPMO have conducted consultations and sensitisation workshops in different communities on gender equality and women's rights.<sup>56</sup> In addition, with the support of development partners, studies have been carried out in the country on the drivers of violence against women and children.<sup>57</sup>

Another thorny issue is that of GBV or violence against women and children. One of the biggest drivers of GBV in the country is harmful traditional and cultural norms which limit women's ability to enjoy the freedoms enshrined in the Constitution fully.<sup>58</sup> Such practices relegate women to minority status, thereby increasing women's vulnerability to violence. Furthermore, Eswatini is a country with high rates of HIV – there is a strong correlation between HIV/AIDS and GBV.

Despite the above-mentioned efforts, violence continues to escalate at an alarming rate. Intensifying efforts in addressing this scourge is necessary; recommendations include the expansion of services to hard-to-reach areas and allocating necessary budgets to ensure

that these establishments function optimally.

Finally, the issue of women participation in decision making positions as well as representation still is lagging behind despite the ratification of the Maputo Protocol in 2012. It is stated that barriers that hinder women's ability to be elected or appointed into decision making positions (politically) are patriarchy, economic disadvantages, social stereotypes, harmful cultural norms (such as mourning)<sup>59</sup> and socio-political perceptions around women's leadership.<sup>60</sup>

The Kingdom of Eswatini currently has no programmes in place to tackle cultural and economic barriers that prevent women from equal participation and representation. According to WILSA, Eswatini's Baseline Survey 2018 on 'Breaking barriers: Enhancing Swazi women's participation and representation in decision making' barriers on women participation and inclusion include gender stereotypes, cultural and traditional beliefs, restrictions based on educational qualifications, and lack of preparation for political activity. The government has acknowledged in state reports that barriers still exist that hinder women's ability to be elected or appointed into decision making positions and include patriarchy, economic disadvantages, social stereotypes, and socio-political perceptions around women's leadership.<sup>61</sup> A major obstacle for women was and continues to be financing for campaigns due to their

56 See the Eswatini National Gender Policy of 2010.

57 See for instance the UNICEF Study on Violence Against Children in Eswatini 2007.

58 Women and Law in Southern Africa Multiple Jeopardy: Domestic Violence and Women's Search for Justice in Swaziland (2001) 33-107.

59 It must be noted that during the mourning period according to Eswatini culture, widows are forbidden to be in public spaces such as Chief's residence and/or King's residence, yet elections begin at chieftdom levels.

60 Barriers to women's political participation 2018 (WILSA) Report.

61 UPR 2021.

underrepresentation in the economic sphere.

In conclusion, there is still a lot that needs to happen in order for the women of Eswatini to fully enjoy the rights and freedoms enunciated in the Maputo Protocol. For starters, there is a great need for the laws of the country to be aligned with human rights norms and for the government to be committed into promoting, respecting, and fulfilling women's rights. Women have a right to live in a country where they are protected from GBV, have a say on how they are governed and economically empowered. These attributes will ensure that women and men in the country live in harmony as equal partners. It will be then that it can be said that the Maputo Protocol has had a positive impact in the lives of women in Eswatini.

# THE IMPACT OF THE MAPUTO PROTOCOL IN ETHIOPIA

*Henok Ashagrey\**



## 1 Introduction

Ethiopia is Africa's oldest sovereign state and the second most populous nation after Nigeria. The country is unique among African states in that it maintained and kept its independence from colonial rule. In its history so far, Ethiopia has had four codified constitutions: the 1931 Constitution, the 1955 Constitution, the 1987 Constitution and the current 1995 Constitution. Under the 1931 Constitution, which was the first modern constitution for Ethiopia, women's rights were not recognised.<sup>1</sup> In the 1955 Constitution, though women's rights were still not explicitly recognised, some human rights ideas were incorporated under the title of 'Rights and Duties of the People.'<sup>2</sup> The 1987 Constitution, adopted by the Derg regime, 'became the first to explicitly

recognise women's rights'.<sup>3</sup> This Constitution mandated the government to apply a policy of affirmative action benefiting women to correct the historical legacy of gender inequality.<sup>4</sup>

The Ethiopian People's Revolutionary Democratic Front (EPRDF), which took power after toppling down the Derg regime in 1991, established the Transitional Government of Ethiopia. It introduced an interim charter that espoused fundamental rights and freedoms. This was followed by the formulation of the National Ethiopian Women's Policy in 1993, which aims to institutionalise the political, economic and social rights of women by creating an appropriate structure in government offices and institutions.<sup>5</sup> After a prolonged transition, under the EPRDF's interim government, the now operative constitution (the FDRE Constitution), was adopted on 8 December 1994 and came into full force as of 21 August 1995. The FDRE Constitution, which is the supreme law of the

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1 SK Gebrewold 'Women, ethno-cultural communities and the state in Ethiopia' (2017) 7. [https://www.ecmi.de/fileadmin/redakteure/publications/pdf/Working\\_Paper\\_100.pdf](https://www.ecmi.de/fileadmin/redakteure/publications/pdf/Working_Paper_100.pdf) (accessed 21 September 2020). This Constitution had some provisions on human rights (see articles 18-29).

2 The 1955 Revised Imperial Constitution of the Empire of Ethiopia arts 37-65.

3 Gebrewold (n 1).

4 Gebrewold (n 1).

5 World Bank 'Gender issue in Ethiopia: Implementing the national policy on women' (1998) <https://openknowledge.worldbank.org/handle/10986/9885> (accessed 11 September 2010).

land,<sup>6</sup> is the most progressive and comprehensive Constitution compared to its predecessors regarding protection of the rights and liberties of people and individuals, including the rights of women. Aspiring to ensure formal, substantive, and transformative equalities,<sup>7</sup> article 35 guarantees gender equality in all aspects of economic, social and political activities. To compensate generational gender discrimination within the country, it entitles women to benefit from temporary special measures. Ethiopia has also acceded to almost all the major international human rights treaties regarding women's and girls' rights, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). These treaties are integrated into the domestic laws of Ethiopia.<sup>8</sup> The principles of these treaties and other human rights instruments adopted by Ethiopia are also elevated to the status of interpretative guidelines for the Bill of Rights section of the Constitution.<sup>9</sup>

Grounding on the Constitution and the 1993 policy on women, subsequently enacted laws provide women rights with an utmost significance, even though they are still not perfect. These include the Revised Federal Family Code (Family Code) and the 2005 Criminal Code. The revised Family Code,

which was enacted on 4 July 2000, repealed most of the discriminatory provisions of the 1960 Civil Code, which allowed marriage at age 15, required women to live at their spouses' homes, and regarded the husband the head of the family.<sup>10</sup> The Family Code sets the legal age of marriage at 18 years of age, though it allows for marriage from the ages of 16 with the approval of the Minister of Justice.<sup>11</sup> It also recognises women's equal rights in selecting their family residence, and grants them equal footing in family administration and decisions about a family property.<sup>12</sup> Next to the Family Code, Ethiopia has also adopted a new criminal code in 2004, aimed at guaranteeing, *inter alia*, the protection of women from various harms and acts, including abduction, female circumcision and infibulations or other harmful practices.<sup>13</sup>

Even though remarkable progress has been made in ensuring the rights of women since 1991 and the 2020 World Economic Forum's Global Gender Gap Report named Ethiopia as one of the most improved countries in the world in reducing gender gaps,<sup>14</sup> the route to gender equality, especially for women living in the countryside, where most people live, is still a long and winding

6 FDRE Constitution art 9(1).

7 DA Fulas 'The legal framework regulating polygamy in Ethiopia: An assessment in light of liberal feminist legal theory and international human rights law' Master thesis, Lund University, 2018 at 5. <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8954047&fileId=8954052> (accessed 5 September 2020).

8 FDRE Constitution art 9(4).

9 FDRE Constitution art 13(2).

10 The 1960 Civil Code of Ethiopia (Civil Code) arts 635(2) & 644(1)(2). See also H Beyene 'Final report national assessment: Ethiopia gender equality and the knowledge society' (2015) <https://owsd.net/sites/default/files/National%20Assessment%20on%20Gender%20and%20STI%20-%20Ethiopia.pdf> (accessed 25 September 2020).

11 The Revised Family Code 200 (Family Code) art 7.

12 The Family Code (n 11) arts 54 & 61.

13 The 2004 Criminal Code of the Federal Democratic Republic of Ethiopia (the Criminal Code) arts 548, 587, 565-568 & 650.

14 World Economic Forum *Global gender gap report 2020* (2020) <https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality> (accessed 28 October 2020).

one. It is not uncommon to see gender-based violence (GBV) and discrimination against women in Ethiopia.<sup>15</sup> In 2016, the Central Statistical Agency of Ethiopia noted that nearly a third of Ethiopian women aged between 15 and 49 had experienced either physical or sexual violence.<sup>16</sup> It is also noted that Ethiopia has the 15th highest rate of child marriages in the world; 40 per cent of girls are still married before they are 18, though the country outlawed the practice nearly 20 years ago.<sup>17</sup> In addition, 65 per cent of Ethiopian women aged 15-49 had undergone female genital mutilation (FGM).<sup>18</sup> Further, Ethiopia is still struggling to progress on gender parity in education (85 per cent, 140th) and economic opportunities (56.8 per cent, 125th).<sup>19</sup>

## 2 Ratification of the Maputo Protocol

In Ethiopia, the procedure for the negotiation, signature and ratification of treaties and international agreement is

governed by the FDRE Constitution and International Agreements Making and Ratification Procedure Proclamation No 1024/2017 (Treaty Making Procedures Proclamation), issued on 7 July 2017. The Constitution, under article 51(8), declares that the power to negotiate and ratify international agreements belongs to the Federal Government. Specifically, article 55(12) empowers the executive to negotiate and sign international treaties, while it provides the federal legislature – the House of Peoples' Representatives (HoPR) with the power to ratify those agreements concluded by the executive. Further, the President is given the power to proclaim in the *Negarit Gazeta* laws and international agreements approved by the HoPR in accordance with the Constitution.<sup>20</sup>

The Treaty Making Procedures Proclamation specifies the details regarding the division of duties and responsibilities among the various organs of government concerning treaty making power and the processes involved. The proclamation provides that the Prime Minister (PM) and the Minister of Foreign Affairs (MoFA) have the power to negotiate and sign any international agreement, on behalf of Ethiopia.<sup>21</sup> However, the PM may delegate this power into the hands of other government officials by issuing a written authorisation to that end.<sup>22</sup> It is also provided that senior government officials from member states of the federation may be authorised by the government to sign an international agreement that implements a ratified

15 E Kedir 'Major gaps on the rights of women in Ethiopia' Unpublished Master thesis, Lund University, 2016 file:///C:/Users/user/Desktop/women%20rights%20in%20Ethiopia.pdf (accessed 24 September 2020).

16 Central Statistical Agency 'Demographic and health survey 2016' (2017) <https://dhsprogram.com/pubs/pdf/FR328/FR328.pdf> (accessed 28 September 2020); UNDOC 'Addressing violence against women and girls in Ethiopia' (2020) <https://www.unodc.org/easternafrika/en/addressing-violence-against-women-and-girls-in-ethiopia.html> (accessed 29 September 2020).

17 UNICEF 'Surprising trends in child marriage in Ethiopia' (2016) 4 <https://www.unicef.org/ethiopia/media/1506/file/Surprising%20trends%20in%20child%20marriage%20in%20Ethiopia.pdf> (accessed 22 September 2020).

18 Ethiopian Government 'Fifth national report on progress made in the implementation of the Beijing Declaration and Platform for Action' (2019) 43 [https://www.uneca.org/sites/default/files/uploaded-documents/Beijing25/ethiopia-beijing25\\_national\\_report.pdf](https://www.uneca.org/sites/default/files/uploaded-documents/Beijing25/ethiopia-beijing25_national_report.pdf) (accessed 21 August 2020).

19 World Economic Forum (n 14).

20 FDRE Constitution art 71(2).

21 International Agreements Making and Ratification Procedure Proclamation 1024/2017 (Treaty Making Procedures Proclamation) art 6.

22 Treaty Making Procedures Proclamation (n 21) arts 2(2) & 6.



international agreement.<sup>23</sup> Further still, the Proclamation that defines the Powers and Duties of the Executive Organs of the Federal Government (Executive Organs Establishment Proclamation No 1263/2021) indicates that ministers such as the Ministry of Women and Social Affairs (MoWSA) have the power to conclude treaties in their areas of competence.<sup>24</sup>

The Treaty Making Procedures Proclamation spells out the procedure for negotiation of international agreements as follows:

- (1) Any government organ that initiates negotiation of an international agreement shall consult the Ministry of Foreign Affairs and concerned organs and submit an explanatory note on the obligations and benefits the agreement would entail on Ethiopia and get approval from the Office of the Council of Ministers.
- (2) The Attorney General [Ministry of Justice] shall be consulted if the international agreement will require the enactment of a new law or amendment of an existing legislation.
- (3) The MoFA shall send the draft international agreement approved by the Office of the Council of Ministers pursuant to sub-article 1 of this article to the other contracting party.

Ethiopia signed and ratified the Maputo Protocol on 1 June 2004 and 18 July 2018, respectively. The instrument of ratification was deposited with the Chairperson of the Commission of the African Union (AU) on 17 September 2019 as required by article 28 of the Maputo Protocol. The rationale behind the decision to ratify the Protocol is not

clear from the Preamble of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Ratification Proclamation No1082/2017 (Maputo Protocol Ratification Proclamation). However, examination of ratification documentations, such as minutes, reports and recommendations, reveals various justifications that prompted Ethiopia's ratification of the Protocol. For instance, the joint report and recommendation, which was submitted by the Women's Affairs Standing Committee in conjunction with the Legal, Justice, and Democracy Affairs Standing Committee to the HoPR, listed different reasons why Ethiopia should ratify the Protocol. The first of which was that the rights and freedoms enshrined under the protocol are in consonance with Ethiopia's existing laws, policies and international commitments so the ratification of the protocol will not bring any additional obligations nor require further institutional structures or resources for its implementation.<sup>25</sup> Secondly, it was stated that the protocol substantially addresses diverse forms of violence against women (VAW) and harmful cultural and traditional practices (HTPs) so that it helps to strengthen Ethiopia's ongoing effort to alter or eradicate those practices.<sup>26</sup> The third reason was the belief that the ratification of the protocol would help Ethiopia to work hand in hand with other African countries to address challenges facing African women.<sup>27</sup> It was further stated that the

23 Treaty Making Procedures Proclamation (n 21) art 5(1).

24 Definition of Powers and Duties of the Executive Organs Proclamation No 1263/2021 (Executive Organs Establishment Proclamation 1263/2021) art 36(1)(u).

25 The Woman's Affairs Standing Committee & the Legal, Justice, and Democracy Affairs Standing Committee to the HoPR 'Conclusions and recommendations of the joint committee on the draft proclamation to ratify the Maputo Protocol (Summary of Standing Committees report)' (2018) 2 (on file with the author).

26 As above.

27 Summary of Standing Committees report (n 25) 4.

protocol gives special attention to particularly vulnerable groups of women such as women with disability, older women, among others.<sup>28</sup> In the same vein, the explanatory note prepared by MoFA indicates that ratification of the protocol was desirable to comply with concluding observations and recommendations provided by the African Commission as feedback to the 5th and 6th Periodic Reports of Ethiopia, where the African Commission, *inter alia*, required the government to ratify the Protocol.<sup>29</sup> The explanatory note further stated that ratifying and implementing the protocol helps to achieve the objective of the second National Human Rights Action Plan of Ethiopia.<sup>30</sup> Additional reasons, include but not limited to the following: to maintain Ethiopia's good track record in the implementation of the United Nations (UN) and AU initiatives and campaigns to improve girls' education and to end child marriage, FGM, among others;<sup>31</sup> to contribute to the image of the country as a champion in ratifying many international and regional treaties;<sup>32</sup> and to be exemplary as the host of the headquarters of the AU.<sup>33</sup>

At the time of ratification, Ethiopia made seven reservations and six interpretative declarations. The first reservation is made to article 6(c) of the Maputo Protocol which provides that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital rela-

tionships are promoted and protected.' The exact justification for this specific reservation is not clear from minutes and other related documents that are accessible to the researcher at the time of writing. Perhaps, the reservation could be attributable to the lack of consensus among parliamentarians or members of the drafting teams as to whether the Maputo Protocol rejects or condones the practice of polygamy. During various discussions that preceded ratification of the Maputo Protocol, which were held by parliamentary standing committees (the Women's Affairs Standing Committee and the Legal, Justice, and Democracy Affairs Standing Committee) and Women Parliamentarians caucus with source persons and experts, there was heated debate regarding the Maputo Protocol approach towards polygamy.<sup>34</sup> On one hand, are those who argue that the Maputo Protocol adopts regulatory approach (showing leniency to prohibit the practice of polygamy in the strongest anatomy of words) so it is not in line with Ethiopia's laws such as the Family Code and the Criminal Code, which adopt abolitionist approach as a matter of principle.<sup>35</sup> On the other, are those who argue that the Protocol indeed discourages polygamy and calls upon member states to shift from polygamy to embracing monogamy while concomi-

28 Summary of Standing Committees report (n 25).

29 MoFA 'Explanatory note to the draft proclamation to ratify the Maputo Protocol' (2017) 9 (on file with the author).

30 National Human Rights Action Plan (2013-2015) 145.

31 MoFA explanatory note (n 29) 10.

32 As above.

33 As above.

34 Minutes of the women's Affairs Standing Committee & the Legal, Justice, and Democracy Affairs Standing Committee joint meeting held on 30 October 2017 with source persons and experts (2017) (on file with the author); Minutes of the Women Parliamentarians caucus meeting held on 30 October 2017 with source persons and experts' (2017) (on file with the author); Minutes of the public forum organised on 10 January 2018 by the women's Affairs Standing Committee & the Legal, Justice, and Democracy Affairs Standing Committee regarding the draft Maputo Protocol ratification proclamation (2018) (on file with the author).

35 As above.

tantly devising mechanisms to protect the interest of women involved in it.<sup>36</sup>

The second reservation is made to article 6(d) of the Maputo Protocol that provides that 'every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized.' The justification for this reservation was that it was not in line with Ethiopian laws such as the Family Code. It was said that while registration of marriage is required under the Family Code, the non-registration does not affect the validity of the marriage.<sup>37</sup> The third reservation is made to article 6(f), which provides that 'a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname'. Ethiopia's position in this regard was that the sub-provision does not have any practical relevance in Ethiopia because, unlike other African countries, it is not customary for Ethiopian women to change their names at marriage.<sup>38</sup> The fourth reservation is made to article 7(a) of the Maputo Protocol which provides that 'separation, divorce or annulment of a marriage shall be effected by judicial order.' The justification for this specific reservation, as provided under the ratification proclamation, is to give effect to Ethiopia's laws that permit spouses to separate by agreement.<sup>39</sup> Fifthly, Ethiopia does not consider itself to be bound by article 10(3) of the Maputo Protocol which states that 'States Parties shall take the necessary measures to reduce military expenditure significantly in favor of spending on social development in general, and the promotion of women

in particular.' This reservation was entered into for fear of unreasonable interpretation of the provision that may ignore Ethiopia's situation and the facts on the ground.<sup>40</sup> Sixth, Ethiopia placed a reservation on article 21(1) of the Maputo Protocol regarding the right of a widow to inherit from her deceased spouse. The justification for this specific reservation, as noted under the ratification proclamation, is to give effect to the law of the country according to which spouses can only inherit from each other if he or she is designated as a legatee by a will.<sup>41</sup> Finally, Ethiopia does not consider itself bound by article 27 of the Maputo Protocol, which states that 'the African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol'. Ethiopia excludes the supervisory jurisdiction of the court arguing that she is not a party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.<sup>42</sup> This is not quite as surprising as it might first seem, since Ethiopia is known to actively avail itself of its right to reserve away from treaty provisions that empower treaty bodies with a mandate to consider individual communications.

Ethiopia also entered several 'interpretive declarations'. The first of which is made to article 4(2)(a) of the Maputo Protocol, which requires member states to prohibit all forms of violence against women including unwanted or forced sex in either the private or the public sphere, and regardless of their marital status. Restricting the scope of the prohibition, Ethiopia states that the defi-

36 As above.

37 MoFA explanatory note (n 29) 4.

38 Summary of Standing Committees report (n 25) 3.

39 MoFA explanatory note (n 29) 4.

40 MoFA explanatory note (n 29) 5.

41 MoFA explanatory note (n 29) 8.

42 MoFA explanatory note (n 29) 9.

nition of rape has the same meaning and scope as provided under article 620 of the Criminal Code of Ethiopia, which defines rape to be a forced sexual intercourse that occurs out of wedlock; suggesting that rape committed within marriage is an exception to rape that is punishable by law. The government's justification for this declaration was that the sexual relationship between spouses is too personal to be regulated by the criminal law, and it is also hard to prove. It was further said that criminalising spousal rape would jeopardise the sanctity of the family and thereby violates Ethiopia's traditional norms.<sup>43</sup> The same arguments were made by members of the parliament in excluding marital rape from the type of rape that is punishable under the criminal code of Ethiopia.<sup>44</sup> More to the point, it was stressed that criminalising marital rape goes against the provision of the Family Code, which states that '[t]hey shall have with one another the sexual relations normal in marriage unless these relations involve a risk of seriously prejudicing their health'.<sup>45</sup>

The second 'declaration' is made to article 6(b) of the Maputo Protocol, which calls members states to set the minimum age for marriage at 18. The declaration states that the law of Ethiopia that allows dispensation from the minimum marriageable age of 18 years should be upheld.<sup>46</sup> Under the Family Code, though marriage below the age of 18 is prohibited, under exceptional circumstance, the Minister of Justice

may, on the application of the future spouses, or the parents or guardian of one of them for serious cause, grant dispensation of not more than two years. This declaration is ironic in light of the fact that Ethiopia has not entered a similar declaration to the African Charter on the Rights and Welfare of the Child whose prohibition precludes any exceptions to the minimum age of 18 for betrothal and marriage. Perhaps, this could lead us to argue that the drafters of the ratification proclamation only checked the Maputo Protocol's compatibility with the provisions of the constitution and other domestic laws, leaving aside ratified human rights treaties such as the African Children's Charter for which domestic laws such as the Family Code are expected to bow down in case of inconsistency, as discussed in the fourth section.

The third 'interpretative declaration' made, in respect of article 7(d) of the Maputo Protocol, states that

the right of women to acquire equitable share from the common property in the marriage shall apply in line with the laws of Ethiopia that provide for equal share of spouses on the common property.

The rationale behind this declaration, as it is stated under the MoFA's explanatory note, is that the protocol follows the principles of equitable distribution (need not mean equal division) and this is inconsistent with the Family Code that provides for equal division of common property in the absence of contrary agreement.<sup>47</sup> The fourth declaration made, to article 13(j) of the Maputo Protocol, states that 'the secondary responsibility of the private sector to contribute to the upbringing and development of children shall apply in

43 As above.

44 S Fekadu 'An assessment of causes of rape and its sociohealth effects: The case of female victims in Kirkos Sub-City, Addis Ababa' Master thesis, Addis Ababa University, 2008 at 18 <http://etd.aau.edu.et/handle/123456789/7083> (accessed 25 September 2020).

45 Family Code (n 11) art 53.

46 As above.

47 MoFA explanatory note (n 29) 5.

accordance with the domestic law.’ The only reason for the declaration pertaining to ‘secondary responsibility’ is the absence of comparable domestic laws that impose obligations on the private sector to contribute to the upbringing and development of children.<sup>48</sup> The last ‘interpretative declaration’ is made with regard to article 14(b) of the Maputo Protocol, which requires member states to ensure that a woman is free to decide whether and when to have children. Ethiopia’s position in this regard is that the decision whether to have birth or not should be made in accordance with the agreement of both spouses when they are within wedlock.

To date, there is no special legislative attempt to withdraw the abovementioned reservations and declarations.

### 3 Government focal point

MoWSA is the main focal point for coordinating implementation of Ethiopia’s obligations under the Maputo Protocol. Pursuant to article 4 of the Ratification Proclamation, MoWSA is required to take appropriate measures to implement and follow-up the Maputo Protocol in cooperation with other relevant organs.<sup>49</sup> It has a specific depart-

ment tasked with ensuring follow up on women rights, including those rights provided under the Maputo Protocol: that is the Department of Women Affairs.<sup>50</sup> It has been said that awareness about the contents of the Maputo Protocol is very low among workers of MoWSA, except for officers who are primarily responsible for the implementation of the Maputo Protocol. Regarding the reporting obligation, the mandate to prepare the Ethiopian national report on the implementation of human rights treaties, including the Maputo Protocol, is given to the Minister of Justice,<sup>51</sup> while MoFA is responsible for liaising and communicating with the African Commission as it is a diplomatic channel of Ethiopia pursuant to article 39(1)(e) of Executive Organs Establishment Proclamation No 1263/2021.

### 4 Domestication or incorporation

The Maputo Protocol is incorporated into Ethiopian legal system in accordance with article 9(4) of the FDRE Constitution, which states that ‘all international agreements ratified by Ethiopia are [an] integral part of the law of the land.’ Article 55(12) of the Constitution states that the HoPR has the power to ratify international agreements concluded by the Executive. Taken together, articles 9(4) and 55(12) aver that international agreements concluded by the executive can be brought into domestic effect upon ratification by the HoPR. The inevitable question is: When is an international agreement concluded by the executive said to have domestic legal

48 MoFA explanatory note (n 29) 7.

49 Proclamation to Ratify the Protocol to the African Charter on Human and Peoples Rights on The Rights of Women in Africa (Maputo Protocol Ratification Proclamation) art 4. The Ministry of Women and Social Affairs (MoWSA) was established as per Proclamation No 1263/2021. The establishment has been made through the merger of the Social Affairs of the previous Ministry of Labour and Social Affairs (MoLSA) and the Ministry of Women, Children and Youth Affairs (MoWCY). In addition to women, children, and youth, the newly established Ministries of Women and Social Affairs is also responsible for the overall social welfare of the elderly, the homeless, the poor, vulnerable and marginalised segments of the Ethiopian population.

50 It was stated that ‘No training is provided to workers of MWCY regarding the Maputo Protocol’.

51 Federal Attorney General [now Ministry of Justice] Establishment Proclamation 943/2016 (Attorney General Establishment Proclamation) art 6(8)(e).

force and effect in the eyes of article 9(4) read together with article 55(12)? Two major divergent views have been expressed by authors. Some scholars aver that article 9(4) of the Constitution enables international treaties to apply directly as part of the laws of the land upon ratification, whether or not they are published in the law gazette.<sup>52</sup> Turning to the second line of thought, it espouses an opposite view arguing that treaties that secure HoPR's blessing can only come into domestic effect upon publication in the federal government's official law gazette. The Federal Negarit Gazeta Establishment Proclamation requires publication of every law either duly enacted domestically or ratified to have legal effect; and once published, judges at different levels bear the duty to take judicial notice of such instruments.<sup>53</sup> In further strengthening their argument, they said that the President is constitutionally mandated to proclaim in Negarit Gazette all laws and international instruments ratified by Ethiopia.<sup>54</sup>

The researcher espouses the first argument that publication is not a condition precedent for treaties' entry into force as per the language of article 9(4) of the Constitution; a position which also finds support in judicial practices.<sup>55</sup> However, the recent approach taken by HoPR appears to show otherwise. The Treaty Making Procedures

Proclamation under article 11 provides as follows:

- (1) The House of Peoples' Representatives shall promulgate a ratification proclamation for an international agreement it ratifies.
- (2) The House of Peoples' Representatives may decide to publish the provisions of the international agreements with the ratification proclamation.

From the provision, three issues of importance deserve some reiteration. First, HoPR is required to promulgate a ratification proclamation to incorporate treaties it ratifies into the national law. Second, the HoPR, under normal circumstances, incorporates these treaties into the national law through what is called a 'ratification proclamation', which practically comprises just four or five provisions presenting 'short title', 'ratification clause', 'reservation and declaration', 'implementing organ,' and 'effective date'. When HoPR finds it necessary, it may however reproduce every detail of the treaty provisions into the ratification proclamation. More to the point, the cumulative effect of article 11(1) and 11(2) indicates that all kinds of treaties or international agreements Ethiopia enters are said to be incorporated into domestic laws upon promulgation of ratification proclamation. For this purpose, the promulgation of ratification proclamation, which merely indicates that a particular treaty has been ratified without reproducing the whole body of the treaty, is as good as a Proclamation that reproduces the full text of such an instrument. This also holds true for the Maputo Protocol. It is incorporated into the domestic legal system through a piece of legislation that heralds its ratification. Here, it is important to note that even though the Preamble of the ratification proclamation makes it clear that HoPR has ratified the

52 See SA Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 289.

53 The Federal Negarit Gazeta Establishment Proclamation 3/1995 arts 2(2) & (3).

54 I Idris 'The place of international human rights conventions in the 1994 [FDRE] Constitution' (2000) 20 *Journal of Ethiopian Law* 113.

55 GA Woldemariam 'The place of international law in the Ethiopian legal system' in Z Yihdego, MG Desta & F Merso (eds) *Ethiopian Yearbook of International Law* (2016) 77.

Maputo Protocol at its session held on 10 January 2017,<sup>56</sup> its article 5 stresses the need for its publication as a requirement for its entry into force. Consequently, the proclamation that heralds the ratification of the Protocol and by implication, the Maputo Protocol, has become effective in the domestic arena only after 30 March 2018 (the day of the publication in the Law Gazette), one year, two months after obtaining HoPR's blessing.<sup>57</sup>

The Maputo Protocol did not play any role during the drafting of the Bill of Rights, as the adoption of the FDRE Constitution in 1994 precedes not only the ratification of the protocol by Ethiopia in 2018 but also its adoption in 2003. The Bill of Rights was not also changed after Ethiopia became a party to the protocol. This notwithstanding, the majority of the rights and freedoms enshrined in the Maputo Protocol are inculcated under the Bill of Rights. The constitution encapsulated both specific and general provisions on the rights of women.

It has recognised a spectrum of rights, which help to ensure formal equality, substantive equality and transformative equality. These include equal protection of the law, equality in marriage and family relations, entitlement to affirmative measures, protection from HTPs, maternity rights in employment, the right to participation in programme planning and implementation, equality in property ownership and inheritance rights, employment rights

and access to family planning information and services. The Constitution also guarantees gender equality in the enjoyment of marital, personal and family rights while entering or during marriage, or at the time of divorce.<sup>58</sup>

A look at the Constitution indicates that it is still incomplete compared to the rights espoused under the Maputo Protocol. For instance, there is no prohibition against unwanted or forced sex in either the private or the public sphere, and regardless of their marital status in the Constitution and other domestic laws that corresponds to article 4(2) of the Protocol. It does not also extend special protection to particularly vulnerable groups of women such as women with disability and older women, among others.

## 5 Legislative reform or adoption

Examination of Ethiopian laws and manuals on legislative drafting and treaty making reveals that international treaties are ratified only after compatibility studies comparing the treaties with provisions of the Constitution, other ratified treaties, international instruments adopted by Ethiopia and existing laws have been undertaken.<sup>59</sup> However, there is no evidence to indicate that Ethiopia undertook a compatibility study before it ratified the Protocol. Yet, Dereje Tegybelu, Legal Affairs Department Director at the MoWSA, averred that the MoWSA has undertaken a kind of ratification study with limited inputs from other ministries and civil societies.

56 Preamble of the Maputo Protocol Ratification Proclamation para 3.

57 The proclamation that heralds the ratification of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa also follows similar path as regards to incorporation and effective date.

58 FDRE Constitution art 34.

59 The Treaty Making Procedures Proclamation (n 21) art 4(2); Federal Attorney General (now Ministry of Justice) Establishment Proclamation 943/2016 (Attorney General Establishment Proclamation) art 6(5)(a); Legislative Drafting Manual of Ethiopia (2008) at 35-39.

The study aimed to ensure that the protocol is consistent with the Constitution and federal laws. According to him, the result of the study reveals some inconsistencies between the Maputo Protocol and national laws, and it was these inconsistencies that led the Parliament to enter about twelve reservations and declarations to the protocol upon ratification. The pre-ratification study did not thus result in amendment of existing laws.

In the post ratification period, various human rights related legislation has been adopted by HoPR though they might not be directed by the provisions of the Maputo Protocol. Examples include the Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No 1178/2020; the Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020; the Organisations of Civil Societies Proclamation No 1113/2019; the Ethiopian Election, Political Parties Registration and Election Ethics Proclamation No 1162/2019; the Labour Proclamation No 1156/2019; the revised Refugee Proclamation No 1110/2019; and Executive Organs Establishment Proclamation No 1263/2021. However, none of them make specific reference to the Protocol. It is also doubtful whether these laws were enacted to implement the Maputo Protocol. However, substantial correspondence exists between the causes espoused by this legislation and the rights and obligation set forth by the Maputo Protocol. For instance, Executive Organs Establishment Proclamation 1263/2021 requires all government institutions to address women's issues in policies, laws, and development programs and projects, as well as to create conditions whereby the elderly and other segments of society vulnerable to social and

economic problems benefit from equal opportunities and full participation.<sup>60</sup> Moreover, the adoption of the Organisations of Civil Societies Proclamation No 1113/2019, which replaced the Charities and Civil Societies Proclamation of 2009 and lifted funding precincts, is also a major plus in ensuring women rights set forth under the Maputo Protocol. As a result of the restrictive space for operations with the passing of the 2009 civil society organisations law, the work of prominent human rights organisations, including Ethiopian Women Lawyers Associations (EWLA), was severely curtailed and they had spent ten years (2009-2019) in survival mode. Further still, both the Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No 1178-2020 and the revised Refugee Proclamation No 1110/2019 put special emphasis on the peculiar vulnerabilities and the specific needs of certain categories of persons such as women and children. On its part, the Labour Proclamation No 1156/2019, which repealed Ethiopia's Labour Proclamation No 377/2003, grants female workers an extended period of maternal leave by according to them at least 120 days for maternity leave including a one-month pre-natal leave and a three-month long post-natal leave. The new Ethiopian Election, Political Parties Registration and Election Ethics Proclamation also stresses the need to give priority, among others, to the elderly and pregnant women during registration as well as voting. However, the HoPR voted against a draft clause proposing giving priority to female nominees who fail to obtain an equal number of votes with male opponents in an election,

60 Executive Organs Establishment Proclamation 1263/2021 (n 24) arts 10(3) & (4).



arguing that it transgresses the very concept of gender equality.<sup>61</sup>

In addition to the above-mentioned laws, there is other relevant legislation that was adopted in the pre-ratification period but still very helpful to give effect to the Maputo Protocol by virtue of correspondence in norms. These include the Family Code, the Criminal Code, the Federal Government of Ethiopian Financial Administration Proclamation No 970/2016, which institutionalise gender responsive budgeting, Proclamation on the Registration of Vital Events and National Identity Card (Proclamation 760/2012) and the new Civil Servants Proclamation No 1064/2017.

## 6 Policy reform or formulation

Grounding on the National Policy Principles and Objectives provided in the Constitution, Ethiopian government issues various Policies and strategies that impact on different rights covered by the Maputo Protocol. These include the National Plan of Action for Gender-Equality (2006-2010), the Women's Development and Change Strategy (2017), the National Human Rights Action Plan (2016–2020), the National Reproductive Health Strategy (2016–2020), the Criminal Justice Policy (2011), the National Strategy and Action Plan on HTPs against Women and Children in Ethiopia (2013), the National Adolescent and Youth Health Strategy (2016-2020), the Democratic System Building Policy (2002), the Education Sector Development Plan 2016-2020 and the Health Sector Trans-

formation Plan (2015/16-2019/20). Even though these policies and strategies were adopted before the ratification of the Maputo Protocol, they mirror not only the normative contents of the Protocol but also the jurisprudence of the African Commission in respect of women's rights. They set forth different plans and strategies to address gender inequalities resulting from harmful traditional practices and structural and social discrimination that gives rise to poor well-being, nutrition, education and employment opportunities for women. They also endorse the need to have affirmative action for women to correct generational discrimination.

Several policies and strategies have also been adopted in the post ratification period, including the National Coasted Roadmap to End Child Marriage and FGM/Cutting (FGM/C) (National Roadmap FGM/Child Marriage) 2020-2024, the National Human immunodeficiency virus (HIV) Prevention 2020 Roadmap, Plan of Action for Job Creation 2020-2025 and Ethiopian National Strategy and Plan of Action (2020-2030) themed 'Ethiopia: An African Beacon of Prosperity'. However, except for the National Roadmap FGM/child marriage, none of these policies make direct reference to the Protocol. It is also not clear whether these policies were formulated to give effect to the Protocol. Nevertheless, they embrace the spirit of the Protocol in promoting and protecting women's rights. The National Roadmap to end FGM/child marriage sets out the different strategies, packages of interventions, and projected results, targets, and indicators towards the eradication of child marriage and FGM/C. It reiterates Ethiopia's obligations under regional legal and policy frameworks including the Maputo Protocol to prohibit and condemn all forms of

61 M Fasil 'Despite complaints from opposition coalition election board stands by new law' *Addis Standard* (Addis Ababa) 5 September 2019 <https://addisstandard.com/news-despite-complaints-from-opposition-coalition-election-board-stands-by-new-law/> (accessed 10 November 2020).

harmful practices that impede the realisation of women rights. In particular, it has a duty to create public awareness in all sectors of society regarding HTPs; prohibit all forms of FGM/C; provide the necessary support to victims of HTPs; and protect women who are at risk of being subjected to the practices.<sup>62</sup> It also recalls the African Common Position on the AU Campaign to End Child Marriage in Africa (2015), and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and African Commission Joint General Comment on Ending Child Marriage 2017 as part of Ethiopia's commitments under the continental legal and policy frameworks to end child marriage.<sup>63</sup>

Further, the National HIV Prevention 2020 Roadmap, which aspires to ensure access to sexual and reproductive health services, inculcates gender-sensitive approach that caters for the different needs of women, girls, men and boys in accessing HIV information and related services as a guiding principle of the roadmap.<sup>64</sup> The Plan of Action for Job Creation 2020-2025 (prepared by FDRE jobs Creation Commission) also makes women's inclusiveness as its primary target. The plan aims to reduce the level of unpaid employment in rural areas among women, and expand village and community-based economic empowerment and livelihood programs for

women.<sup>65</sup> In a similar fashion, the new Green Economy Resilient Strategy identifies women's empowerment as one of its pillars in achieving the needed outcomes. In addition, the draft Educational Roadmap (Ministry of Education) seeks to increase women participation in primary, secondary and tertiary education. It also stresses the need to strengthen affirmative action measures as one of its tools to increase female enrolment, and the share of female academic staff in higher education.<sup>66</sup> In the same vein, the new 10-year development plan, which is said to be 'women and youth' centred, aims to ensure equitable participation of women in all sectors.<sup>67</sup>

There are also other policies and strategies that are adopted both before and after the ratification of the Maputo Protocol, which are helpful to give effect to the Protocol by virtue of correspondence in norms. For instance, Ethiopia's strategic plan (2020–2025) recognises that women and girls are strongly disadvantaged in all sectors, compared with men and boys and consequently it stresses the need to improve their access to education, employment and health services.<sup>68</sup> In the same breath, the draft 10-year perspective plan of the

62 National Costed Roadmap to End Child Marriage and FGM/C 2020–2024 at 18, 30 & 74 <https://www.unicef.org/ethiopia/reports/national-costed-roadmap-end-child-marriage-and-fgmc-ethiopia> (accessed 10 November 2020).

63 As above.

64 HIV Prevention in Ethiopia National Road Map 2018 – 2020 at 3 [https://ethiopia.unfpa.org/sites/default/files/pub-pdf/HIV%20Prevention%20in%20Ethiopia%20National%20Road%20Map%202018%20-%202020%20FINAL\\_FINAL.pdf](https://ethiopia.unfpa.org/sites/default/files/pub-pdf/HIV%20Prevention%20in%20Ethiopia%20National%20Road%20Map%202018%20-%202020%20FINAL_FINAL.pdf) (accessed 29 September 2020).

65 Plan of Action for Job Creation Sustainable Jobs for All 2020-2025 at 16-17.

66 Ethiopian Education Development Roadmap (2018-2030) 50 [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiHobblq93tAhXHa8AKHcv9BdUQFjAAegQIAhAC&url=https://www.unesco.org/2Ffiles%2Fplanipolis%2Ffiles%2Fresources%2Fethiopia\\_education\\_development\\_roadmap\\_2018-2030.pdf&usq=AOvVaw2VljH2vylxRSxQ3lzlu8zu](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiHobblq93tAhXHa8AKHcv9BdUQFjAAegQIAhAC&url=https://www.unesco.org/2Ffiles%2Fplanipolis%2Ffiles%2Fresources%2Fethiopia_education_development_roadmap_2018-2030.pdf&usq=AOvVaw2VljH2vylxRSxQ3lzlu8zu) (accessed 20 November 2020).

67 Ethiopian Monitor 'Ethiopia Unveils 10-Year Development Plan' June 11 2020 <https://ethiopianmonitor.com/2020/06/11/ethiopia-unveils-10-year-development-plan/> (accessed 10 November 2020).

68 Ethiopia country strategic plan (2020–2025) <https://docs.wfp.org/api/documents/WFP-0000115598/download/> (accessed 11 November 2020).

MOWSA outlines the different strategies, targets and indicators relating to women's representation in economic, social and political positions.<sup>69</sup> More to the point, the National Ethiopian Women's Policy that was enacted in 1993 is now in the process of revision. According to Ashenafi, Women Affairs Inclusion and Benefit Assuring Acting Director at the MOWSA, the draft policy has reflected the provisions of the Maputo Protocol and other international human rights instruments on the rights of women.

## 7 Impact on the judiciary

Human rights instruments ratified by Ethiopia may enjoy judicial application in domestic courts in two ways: direct enforcement and reference as interpretative guide. Ethiopian courts may directly apply rights and freedoms set forth under human rights instruments pursuant to article 9(4), which makes human rights treaties ratified by Ethiopia part of the law of the land, thereby extends the jurisdiction of Ethiopian courts to apply their provisions.<sup>70</sup> In this regard, article 3(1) of the Federal Courts Proclamation 1234/2021 makes it clear that federal courts have jurisdiction over international treaties. Article 6(1) of the same proclamation requires Federal Courts to settle cases or disputes submitted to them on the basis of, among others, international treaties like the Maputo Protocol. The Federal High Court may, for instance, rely on human rights treaties ratified by Ethiopia, such as the Maputo Protocol, when exercising its power to adjudicate human rights according to article 11(3) of the Federal Courts Proclamation 1234/2021. Regarding indirect application, as has

been said before, article 13(2) requires courts to use international human rights instruments as interpretive guides.

However, examination of all cassation decisions reported by the Federal Supreme Court between 2018 (year of ratification) and 2020 reveals that no reference is made to the Maputo Protocol let alone to the jurisprudence and authoritative comments of the African Commission. The same holds true as regards to decisions of lower courts in Addis Ababa, Ethiopia. In an interview with the researcher, Aron Degol, Research and Legal Assistance Directorate Director at the Federal Supreme Court, noted that the Maputo Protocol has not featured in any way before the Supreme Court. He attributed this to absence of awareness among judges as to the existence of the Maputo Protocol and whether Ethiopia is party to it; lack of translation, publication and circulation of the Protocol in local languages; and failures of lawyers to mention or make reference to the Protocol in their written and oral submissions.<sup>71</sup> Temamene Ali and Meles Worku, assistant judges at the Supreme Court, also aver that they know of no cases that have been decided by the Supreme Court on the basis of the Maputo Protocol.<sup>72</sup> In the same vein, judges sitting on the Federal High Court and First Instance Court admit that they have been using neither the Maputo Protocol nor the jurisprudence of the African Commission in their judgments. They further stress that they have never come across any judicial decisions that rely on the

69 On file with the author.

70 Yeshanew (n 52) 286.

71 21 September 2020.

72 21 September 2020.

Maputo Protocol or the jurisprudence of the African Commission.<sup>73</sup>

From the above discussion, one could argue that Ethiopian judges have little or no awareness of the Maputo Protocol. But in part, the glaring absence of judicial application of the Protocol may be attributable to the general stalemate in the Ethiopia courts, where there remains little concern for and limited application of international human rights standards by the judiciary. This, however, should not be misunderstood as to mean that there are no case laws that rely on other international instruments. For instance, there are decisions that apply or refer to treaties like International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC) and African Charter.<sup>74</sup>

## 8 Awareness and use by civil society

According to information available on the website of the African Commission, as at the end of 2020 there were only

three NGOs in Ethiopia that enjoyed observer status with the African Commission; thereby entitled to participate fully in the African Commission's activities and sessions. The organisations are Human Rights Council (since 1993), Justice For All – Prison Fellowship Ethiopia (since 2006) and African Child Policy Forum (since 2017). However, the results of this study reveal that they rarely participate in the African Commission's public sessions. They are also not utilising their observer status for effectively engaging with various procedures and mechanisms of the African Commission, such as individual communication, reporting (shadow reports and popularising concluding observations) and special mechanisms; nor do they play active role in the popularisation of the Maputo Protocol in Ethiopia. Nevertheless, the African Child Policy Forum, in a report titled 'Getting Girls Equal – The African Report on Girls and the Law', relied heavily on the Maputo Protocol and used it as its primary tool of analysis.<sup>75</sup>

The same holds true for NGOs without observer status. They do not utilise the Maputo Protocol in their projects and programmes. Their level of awareness in respect of the Protocol is generally low. Although women's rights civil society organisations like the EWLA<sup>76</sup> and Setaweet Movement have been vocal on issues of women's rights in Ethiopia, they also seem not to have clearly deployed the Maputo Protocol in their activities. For instance, Wendmeh and Shimels, from EWLA, indicat-

73 Interviews with Justice Getachew Megersa, Noah Fantahun, Betelhem Getnet; Behailu Tewabe of the Federal First Instance Court (30 September 2020); interview with Justice Belete of the High Court (2 October 2020).

74 For instance, the Cassation Division of the Federal Supreme Court, on the matter between *Tsedale Demissie v Kifle Demissie*, explicitly relied on art 3(1) of the UN Convention on the Rights of the Child, which provides for the best interest of the child principle, to interpret the provision of the Family Law as regards child custody. Similarly, on the matter between *Tesfaye Tumro v Federal Anti-Corruption Commission*, the cassation division of the Supreme Court directly relied on ICCPR provision on the principle of non-retroactivity of criminal law along with the Constitution and the Criminal Code. In the same vein, the Council of Constitutional Inquiry (CCI), the expert body that aids the House of the Federation in the interpretation of the Constitution, has engaged in analysis and interpretation of the ICCPR and the African Charter on Human and Peoples' Rights.

75 ACPF & Plan International 'Getting girls equal: The African report on girls and the law' (2019) <https://www.africanchildforum.org/index.php/en/girls> (accessed 29 October 2020).

76 Before the ratification of the Protocol, EWLA and NEWA organised awareness creation and lobbying campaigns calling for ratification of the Protocol.

ed that the provisions of human rights treaties are rarely referred to in their judicial submissions because domestic law, especially the Constitution, incorporates the provisions of international instruments including the Maputo Protocol. In the same vein, Abebaye Asrat from Setaweet, said that they do not use the Maputo Protocol as a main source of reference in their activities. It has however been stressed that Setaweet Movement has been lobbying the Criminal Justice Reform Working Group to ensure that provisions of the Maputo Protocol and CEDAW find their way into the draft Criminal Procedure Code.

## 9 Awareness and use by lawyers

The Maputo Protocol is also not popular among lawyers in Ethiopia; as such, the researcher could not find occasions where they have used the Maputo Protocol and the African Commission's jurisprudence in their submissions or in any other way before domestic courts. In Ethiopia, lawyers rarely mention let alone rely on principles and rules of human rights treaties and other international instruments in their activities. They are strongly attached to domestic primary and secondary legislations, save for modest but significant reference to global human rights instrument such as ICCPR, CRC and International Labour Organisation (ILO)'s instruments. Reliance on regional human instruments is almost non-existent. Though there is scant trend of referencing to the African Charter in pleadings submitted by lawyers, the Maputo Protocol seems not to have been deployed at all.

Some reasons were advanced for the lack of reliance on the Maputo Protocol. The first reason is lack of awareness. Lawyers admit that they have little or no knowledge of the Maputo Protocol.

In fact, not only the Maputo Protocol but also instruments that make up the African Human Rights system are still alien to the vast majority of lawyers in Ethiopia. The second reason, closely related to the first, is inaccessibility. The Maputo Protocol is neither translated nor made available outside the concerned ministries. Thirdly, some lawyers do not see the importance of using international instruments. They aver that domestic legal frameworks are comprehensive enough to provide them with arguments to make and/or defend their cases. Moreover, it was said that courts are reluctant to apply international law instruments even when they are cited by litigants. This, it is believed, is due to the fact that judges particularly those who preside over first instance courts have limited theoretical knowledge about the interpretation and application of norms stipulated under international instruments. In the same breath, the jurisprudence of the African Commission is not well known to Ethiopian law practitioners.

## 10 Higher education and academic writing

There are about 32 law schools in Ethiopia that operate under the Harmonised National Curriculum for the LLB Program in Laws of 2013. The curriculum incorporates different undergraduate courses that make reference to the African human rights frameworks including the Maputo Protocol. These include African Union and Human Rights Law, Human Rights Law, and Gender and the Law.<sup>77</sup> Most important-

<sup>77</sup> Gender and the Law course contains about ten references to the Protocol to elaborate different rights of women such as freedom from violence, the right to education, the right to employment, the right to political participation, and reproductive right.

ly, the AU and Human Rights Law course examines the regional human rights protection within the framework of the AU and its monitoring system. As such, it briefly examines women's right under the AU framework, with a focus on the Maputo Protocol. The African human rights system is also taught in postgraduate studies as part of Regional Human Rights System course. One of the main areas of the course is the African human rights framework including the Maputo Protocol, so it provides students with an opportunity to get acquainted with the normative rights and freedoms provided under the Maputo Protocol. In addition, the increasing participation of Ethiopian University students in annual African Human Rights Moot Court Competition helps them to improve their knowledge about the African human rights system.<sup>78</sup>

By contrast, the Justice Professionals Training Centers for prospective judges and public prosecutors fail to incorporate the Maputo Protocol in their judicial training modules. For instance, the Women's rights and FDRE Constitution module, which gives wide coverage for the CEDAW, does not make any reference to the Maputo Protocol.<sup>79</sup> Regarding academic writings, though there are many articles and postgraduate dissertations that make reference to the Maputo Protocol, in reference to various human rights

issues,<sup>80</sup> there are only a handful of writings with specific focus on the protocol. Notably, Enguday Meskel authored a book chapter titled 'Renewed commitment towards gender equality and women's rights in Ethiopia: Promises and limits of ratification of the Maputo Protocol'. She argues that 'ratification of the Protocol with several reservations and declarations will likely erode the normative significance of the protocol in terms of protecting and promoting women's rights at the domestic level'.<sup>81</sup> In the pre-ratification period, Fana Hagos also published an interesting piece titled 'Why Ethiopia should ratify the Maputo Protocol'.<sup>82</sup>

## 11 Impact on independent state institutions

The Constitution vested the HoPR with the power and duty of establishing human rights and democratic institutions such as Human Rights Commission (EHRC).<sup>83</sup> Drawing on this, the HoPR established the EHRC in 2000. Mandated to promote and protect human rights in Ethiopia, the EHRC has during the last decades undertaken various activities including research, law reviews, training, public education and advocacy activities, as well as complaints investigations. It has an affil-

78 For instance, Haramaya University (2016), Wollo University (2017), University of Gondar (2019) and Dilla University and Haramaya University (2022) are the case in point.

79 EM Ashine 'Renewed commitment towards gender equality and women's rights in Ethiopia: Promises and limits of ratification of the Maputo Protocol' (2020) 187 (on file with the author).

80 Among others, Etsegenet Kedir, Mulugeta Tesfaye, Aytenew Debebe, Kidus Meskel Ashine, Birhanu Mosisa, etc., rely on the Protocol to make their case or arguments.

81 EM Ashine 'Renewed commitment towards gender equality and women's rights in Ethiopia: Promises and limits of ratification of the Maputo Protocol' in M Zeleke & M Geset (eds) *Gender, development and women's rights: Ethiopian perspective* (2020) 187.

82 FH Berhane 'Why Ethiopia should ratify the Maputo Protocol' *Pambazuka News* 25 November 2010 <https://www.pambazuka.org/governance/why-ethiopia-should-ratify-maputo-protocol> (accessed 28 September 2020).

83 FDRE Constitution art 55(14).

iate status with the African Commission,<sup>84</sup> and attends African Commission's sessions, albeit not regularly. In an interview with the researcher, Etsehiwot Sereke and Solomon Shumye, Officer and Team Leader at Women and Children Affairs Directorate of EHRC respectively, say that the Commission participated in the drafting of Ethiopia's periodic reports to the African Commission.

The EHRC deploys the Maputo Protocol in some of its activities. For instance, EHRC has prepared a draft report title 'Review of Ethiopian law from a gender perspective' on the basis of the Maputo Protocol and other relevant human rights instruments. The report explicitly states that its analysis and recommendations has been informed by the normative framework of women's rights as recognised under the FDRE Constitution as well as treaties ratified by Ethiopia including the Maputo Protocol.<sup>85</sup> The draft report specifically discusses provisions of the Maputo Protocol on definition of harmful practices, violence against women, right to education and training, elimination of harmful practices, marriage, health and reproductive rights and right to inheritance. The analysis has also been informed by general comments of the African Commission.<sup>86</sup> Flowing

from this analysis, the report forwards list of proposed legislative measures, for example: to amend the Civil Code's provisions on succession to comply with the provisions of the Maputo Protocol that recognise 'the right of widows/widowers to remain in the marital residence'; to adopt a comprehensive law addressing gender based and domestic violence; to adopt a comprehensive law on equality and non-discrimination; and to eliminate 'the exceptions to the minimum age requirements under article 7(2) of the Family Code and article 648 of the Criminal Code.'<sup>87</sup> In the same vein, the EHRC has adopted a draft 'Gender Mainstreaming Guideline' on the basis of the Constitution and human rights treaties ratified by Ethiopia including the Maputo Protocol. This guideline explicitly requires the use of principles and standards of international human rights instruments, including the Maputo Protocol, CEDAW and Beijing Declaration and Platform for Action in applying and interpreting its normative elements.<sup>88</sup>

The EHRC makes reference to the Maputo Protocol in its training workshops, public education and advocacy activities like it does with other human rights treaties ratified by Ethiopia. However, targeted plans to promote the Maputo Protocol and the jurisprudence of the African Commission have not yet been implemented. Further, the EHRC seems not to have deployed the Maputo Protocol in its decision on complaints.<sup>89</sup> At the time of this study, the EHRC has also not translated the Maputo Protocol

84 <https://www.achpr.org/nhris> (accessed 3 November 2020).

85 Ethiopian Human Rights Commission 'Review of Ethiopian law from a gender perspective draft Report' (2020) 12 (on file with the author).

86 Ethiopian Human Rights Commission (n 85) 51-52. The draft report discusses about African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage.

87 Ethiopian Human Rights Commission (n 85).

88 Ethiopian Human Rights Commission 'Gender Mainstreaming draft Guideline' (2020) 10 (on file with author).

89 Etsubhiwot Sereke, Solomon Shumye and Meser Mamo state that they know of no complaints that have decided by the EHRC on the basis of the Protocol.

into local vernaculars.<sup>90</sup> It is also important to note that the recommendations and concluding observations of the African Commission have not been accorded same degree of emphasis, as Universal Periodic Review (UPR) recommendations, in the EHRC's continuous awareness raising programs and other specific projects. For instance, unlike UPR recommendations, the general comments and recommendations of the African Commission are neither translated into local languages nor distributed to stakeholders.

## 12 State reporting

Until recently, the MoFA was mandated to lead the state reporting process, including under the African Charter and other treaties ratified by Ethiopia. However, with cabinet reshuffle in 2021 it is now the Ministry of Justice that bears the power and duty to prepare, in collaboration with relevant bodies, national reports on the implementation of treaties including the African Charter and the Maputo Protocol.<sup>91</sup> It is also tasked with disseminating concluding observations and following up on recommendations of treaty bodies as well as counselling government on which human rights instruments to accede to. The report preparation process is led by the National Mechanisms for Reporting and Follow-up (established under the auspices of the Attorney General's Office, now, the Ministry of Justice) with the support of an ad-hoc drafting team and a Steering Committee (composed of main stakeholder ministries). The preparation of

the report is expected to witness meaningful participation of all relevant government stakeholders from the early stage of preparing the report to the validation workshop. It has been said that EHRC and civil societies play a limited role in the preparation of periodic reports; they participate in consultative workshops but not in the drafting stage.

Ethiopia has fallen behind in its reports to the African Commission with respect to the African Charter, submitting only two reports so far. The first is a combined report of its initial, first, second, third and fourth reports and was submitted in 2008 and the second is a combined report of the 5th and 6th Periodic Report, submitted in 2014 and no more have been submitted since. Ethiopia has thus three outstanding reports under the African Charter. Regarding the Maputo Protocol, Ethiopia has not submitted an initial report or any periodic report since ratification in 2018; though a national committee for the preparation of Ethiopia's report in respect of both the Charter and the Maputo Protocol is said to be established. It has been said that the delays in reporting are attributed to challenges such as limited expertise,<sup>92</sup> lack of co-operation in relation to data gathering (various ministries are reluctant to submit their contributions in due time), lack of disaggregated data and challenges in relation to accessing budget.

## 13 Communications

At the time of writing in 2020, no communication has been filed against

90 EHRC is mandated by law to translate treaties ratified by Ethiopia.

91 Federal Attorney General (now Ministry of Justice) Establishment Proclamation 943/2016 (Attorney General Establishment Proclamation) Article 6(8)(e).

92 The mandate to prepare the Ethiopian national report regarding the implementation of human rights in the country is given to the Federal Attorney in 2016; as such, the employees of the AGO do not have rich experience in preparation of reports.



Ethiopia alleging violation of the provisions of the Maputo Protocol. However, a total of 13 communications, which relied on the African Charter, were submitted to and decided by the African Commission in respect of Ethiopia. Of these, 10 communications were declared inadmissible; one was postponed 'sine die'; and two were declared admissible. Violations were found in both communications that were found to be admissible.

Communication 341/2007, concerned a 13 year-old Woineshet Zebene Negash who was allegedly kidnapped, raped and forced to marry by Aberew Jemma Negussie, with the aid of several accomplices.<sup>93</sup> The African Commission used and relied on the African Charter, not the Maputo Protocol (since during that time, Ethiopia was not a party to the Maputo Protocol), to find that Ethiopia failed in its duty to diligently investigate the acts, identify all the perpetrators and sanction their acts. However, the rights and issues discussed were similar to those addressed by the Maputo Protocol. In their submission, the applicants, Equality Now and Ethiopian Women Lawyers Association (EWLA), argued that the government failed to diligently investigate the criminal acts and respond appropriately through the judicial system, thereby violating different provisions of the African Charter including the right to equal protection of the law, protection from discrimination against women, integrity and security of the person and freedom from cruel, inhuman and degrading treatment, as provided under articles 3, 4, 5, 6 and 18(3). In its ruling, the Afri-

can Commission found Ethiopia in violation of the Charter's rights, specifically, integrity of the person, dignity, liberty, and security of the person, protection from inhuman and degrading treatment, fair trial right and right to protection of the law.<sup>94</sup> Consequently, the African Commission recommended that the government of Ethiopia take necessary measures to redress the violations; including paying the sum of USD 150,000 to Ms Negash as compensation; adopting and implementing escalated measures specifically to address marriage by abduction and rape, and prosecuting offenders; and report to the African Commission in 180 days on measures adopted. This communication is noteworthy not only for being the first case of rape, abduction and forced marriage considered and decided by the African Commission, but also for being among handful of cases where the African Commission ordered a government to pay a specified amount of compensation. Unfortunately, the decision has not been publicised in Ethiopia; as such, it is not even known within the circle of civil societies.

The Ministry of Justice bears the power and duty to represent the government in litigation and conduct negotiations in consultation with concerned bodies at international judicial or quasi-judicial bodies where the government of the FDRE sues or is sued, and enforce the decision thereto.<sup>95</sup> That being said, the problem of non-compliance with and the absence of sufficient publicising of the rulings of the African Commis-

93 *Equality Now and Ethiopian Women Lawyers Association (EWLA) (on behalf of Ms Negash) v Federal Republic of Ethiopia*, Communication 341/2007, African Commission on Human and Peoples' Rights, 57th Ordinary Session, 18 November 2015.

94 Regrettably, the Commission declined to find discrimination committed against the victim by relying on the male-comparator standard it had established in the *Interights and Another v Egypt* (2006) AHRLR 94 (African Commission 2006).

95 Attorney General Establishment Proclamation (n 91) art 6(4)(G).

sion, as is the case in the case shown above, have seriously compromised the effective discharge of the mandate of the African Commission. If these problems remain unsolved, they will also curtail the African Commission's potential role in the fight to ensure that the rights and protections guaranteed under the Maputo Protocol become a reality for women and girls in Ethiopia. It is thus important that profound measures need to be made to increase the likelihood of enforceability of the Commission's remedial orders among States parties for breathing life into the Protocol.

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

Information on the website of the African Commission indicates two of the special mechanisms of the African Commission conducted a visit to Ethiopia, one in 2004, and the other in 2019, and made recommendations to the country concerning various human rights issues including women's rights. The then Special Rapporteur for Prisons and Detention Conditions of the African Commission (SRPDC), Dr Vera Chirwa, conducted a mission to and visited prisons and detention centres in Ethiopia. Following her visit, the SRPDC provided an elaborate list of recommendations to address the problem of overcrowding, lack of adequate budget, lack of separation of children from adult prisoners, long pre-trial detentions, poor sanitation in prisons and place of detentions, unavailability of sanitary pads for women inmates and the discrimination of women especially in the process of rehabilitation.<sup>96</sup> However, not much has changed since

the recommendations were issued in 2004. 'Prison and pretrial detention center conditions remained harsh and in some cases life threatening.'<sup>97</sup> For instance, juveniles are still incarcerated with adults. Gross overcrowding and inadequate food, water, sanitation, and medical care are still not uncommon.<sup>98</sup> Further, it was said that 'prisons do not adequately provide women-specific health and sanitary care services to women prisoners because of poor prison conditions and lack of policies to ensure women prisoners' health.'<sup>99</sup>

The Working Group on Extractive Industries, Environment and Human Rights Violations in Africa of the African Commission (WGEI), represented by Dr Solomon Ayele Dersso, undertook an advocacy visit to Ethiopia, from 16 to 17 December 2019.<sup>100</sup> During the visit, the WGEI held talks with different high level officials, amongst them the Minister of Mines and Petroleum, Commissioner of the Ethiopian Investment Commission, Chief Commissioner of the Ethiopian Human Rights Commission and a Board Member of the Ethiopian Human Rights Council. Following the visit, the African

Detention in Africa to the Federal Democratic Republic of Ethiopia 15-29 March 2004 (2004) 44-48.

97 United States Department of State 'Country reports on human rights practices for 2019: Ethiopia' (2019) 5 <https://www.state.gov/wp-content/uploads/2020/03/ETHIOPIA-2019-HUMAN-RIGHTS-REPORT.pdf> (accessed 12 November 2020).

98 As above.

99 BT Weldeyohannes 'Reforming prison to improve women-specific health and sanitary care conditions of prisons in Ethiopia' (2017) 24(101) *William & Mary Journal of Women and the Law* 101.

100 African Commission on Human and Peoples Rights 'Communique on the advocacy visit of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to the Federal Democratic Republic of Ethiopia' 23 December 2019 <https://www.achpr.org/pressrelease/detail?id=471> (accessed 14 November 2020).

96 Report of the mission of the Special Rapporteur on Prisons and Conditions of

Commission provided an elaborate list of recommendations including the need to: ‘put in place provisions for addressing gender-specific issues such as the personal safety and health of female workers particularly those working in industrial parks and in the horticulture sector’; ‘implement minimum living wage to ensure that the employment opportunities created from foreign investment are decent and sustainable’; ‘incorporate into the terms of license of investors obligations to contribute to local development activities in the areas of operation of their investment’; and submission of overdue state reports.<sup>101</sup> However, the researcher was not able to obtain any relevant information on steps taken to implement the recommendations.

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

The Maputo Protocol remains largely obscure both in terms of publicity and impact in Ethiopia. While this could be because Ethiopia ratified the Maputo Protocol only in 2018, many other factors account or continue to account for the Maputo Protocol’s trivial impact in the country. The following are a few:

- Even though the Constitution regards the Maputo Protocol as integral part of the law of the land, the reality is otherwise. For instance, lawyers and judges are not taking treaties like the Maputo Protocol as integral part of the law in the court rooms. This stalemate has considerably limited the huge impact the Maputo Protocol would have had both in terms of improving women’s rights and enriching the inadequate

human rights jurisprudence in Ethiopia.

- The provisions of the Maputo Protocol are not translated into local vernaculars nor published under the official legal gazette, undermining the actual and potential application of the Maputo Protocol by the judiciary and other government institutions. From this, it follows that there is limited publicity, visibility and awareness about the provisions of the Maputo Protocol among lawyers, judges, academicians, media practitioners and the general public. These accounts for the nominal impact of the Maputo Protocol in Ethiopia since it came into force.
- There are still some gaps in domestic legislation, which impede the implementation of the Maputo Protocol. Examples include: lack of specific legislation or policy regarding how to apply customary and religious laws during marriage and in the adjudication of family dispute; lack of comprehensive laws on gender-based violence, domestic violence and sexual harassment; decriminalisation of marital rape; allowing special dispensations to marriage under the legal age (might lower to the age of 16);<sup>102</sup> and failure to deal with HTPs, like FGM, effectively and efficiently.
- The masculine and patriarchal traditions of Ethiopian society, which perpetuate gender-based discrimination and violence against women, are at loggerheads with the Maputo Protocol. Ethiopian women, especially women living in rural areas, are still subjected to horrendous traditional practices and various forms of violence, restricting their social, economic, political and cultural participation and contribution within the country.

101 As above.

102 The Family Code (n 11) art 7(2); the Criminal Code (n 13) art 648.

- The African Commission has not undertaken any promotional or fact-finding mission to Ethiopia to specifically assess the enjoyment of rights by women in the country nor did it hold its session in the country since ratification of the Maputo Protocol. Dr Solomon Ayele Dersso, an Ethiopian, was the Chairperson of the African Commission until 2021. However, the researcher was not able to obtain any relevant information what role his position at the African Commission played in enhancing the influence of the Maputo Protocol and the African Commission in Ethiopia.

However unnoticed the Maputo Protocol is in Ethiopia, there are factors that may facilitate its effective implementation. These include the existence of a justiciable Bill of Rights and enabling subsidiary laws; the fact that courts are bound to consider human rights treaties like the Maputo Protocol when interpreting the Bill of Rights; the revision of Ethiopia's draconian laws such as CSO Proclamation 621/2009, which imposed draconian restrictions on NGO's funding and operations; and the presence of the AU Headquarters. Perhaps the most important factor that has the potential to enhance the impact of the Maputo Protocol is the appointment of Ethiopian women to high level political positions. The appointments, if they are not made as a token gesture, have a tremendous transformative potential to end Ethiopian women's experience of exclusion, marginalisation and invisibility, which have been at the root of their political, economic and social subjugation. It is important however to note that making public institutions more sensitive to gender requires more than upsurging the number of women in decision-making positions, particularly in a country where gender inequality is so

deeply entrenched. The country needs a strong governmental and non-governmental institutions and organisations that are equipped with adequate human and financial resources to promote gender equality in an effective and coordinated manner. This will ensure that they achieve equal results for basic human rights, opportunities, and access to goods and services; gender-sensitive public policies and services both at the national and regional levels; and programs and projects that fully integrate gender considerations into their key performance indicators.



# THE IMPACT OF THE MAPUTO PROTOCOL IN THE GAMBIA

*Basiru Bah\**



## 1 Introduction

The Gambia is the smallest country in mainland Africa and remains one of the poorest in the world. In 2019, the United Nations Development Programme (UNDP) ranked The Gambia 174 out of 189 on the Human Development Index countries and territories,<sup>1</sup> falling two positions since 2016. The country's standing improved in 2020 to 172.<sup>2</sup> The country is predominantly Muslim with over 95 per cent of the population professing the Islamic faith while the other 5 per cent compose of Christians and traditional African religions. The country attained independence on 18 February 1965 and has since witnessed various constitutional and legislative reforms.

The Gambia currently operates a tripartite legal system which allows for a simultaneous application of the common law, Sharia law and customary law. The basic law of the country remains the 1997 Constitution which is the supreme law of the land.<sup>3</sup> This Constitution was born after the coming into power of former President Yaya Jammeh through a *coup d'etat* in 1994 and abrogating the 1970 Constitution. An attempt to promulgate a new constitution following the fall of former president Jammeh in 2016 failed when National Assembly members rejected the Draft Constitution in Parliament. The 1997 Constitution provides for the protection of human rights in general under Chapter IV and enjoins horizontal and vertical application of the provisions of the bill of rights.<sup>4</sup> The rights of women to full and equal dignity, equal opportunities in politics, economic and social activities and equal treatment to men are also protected.<sup>5</sup> The Gambia has also enacted a series of legislation protecting the rights of women in addition to international and regional treaties ratified by The Gambia. The country has ratified and domesticated

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1 UNDP Human Development Report 'Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (2019) 302.

2 UNDP Human Development Report (2020) 'the next frontier: human development and the Anthropocene' 363 available at <http://hdr.undp.org/en/2020-report> (accessed 3 December 2021).

3 The Constitution of the Republic of The Gambia 1997 sec 4.

4 The Constitution of the Gambia (n 3) sec 17.

5 The Constitution of the Gambia (n 3) sec 28.

the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).

However, women and girls continue to suffer discrimination and gender inequalities. These inequalities and discriminatory practices continue to be aggravated by patriarchy, religious and traditional practices. Gender inequality in The Gambia remains steep as the country is ranked 148 out of 189 in the Human Development Report.<sup>6</sup> This is reflected in all sectors of the country as women continue to occupy the smallest percentage in decision making offices and lower positions in both public and private sectors. In the National Assembly, which is the law-making organ of the state, only 10.3 per cent of parliamentary seats are held by women even though more than half of the population of The Gambia are women.<sup>7</sup> This is significantly below the 30 per cent affirmative action target.<sup>8</sup> Political participation in the National Assembly and local government remains significantly poor. The 2017 legislative elections saw only three female candidates being elected to the National Assembly constituting a mere 5.66 per cent of the elected National Assembly members. A slightly higher number and percentage of 8 and 6.67 respectively was recorded in the 2018 local government elections. These numbers were a decrease from the 2008 and 2013 local councillors election when 14 and 10 women councillors respectively, representing 12.28 per cent in 2008 and 8.77 per cent in 2013 were elected.<sup>9</sup>

On the education aspect, only 30.7 per cent of adult women have reached at least a secondary level of education compared to 43.6 per cent of their male counterparts while female participation in the labour market is 51.7 per cent compared to 67.7 per cent for men.<sup>10</sup> This chapter analyses the impact of the Maputo Protocol in The Gambia.

## 2 Ratification of the Maputo Protocol

The President of the Republic has the power to negotiate and conclude international treaties on behalf of The Gambia.<sup>11</sup> This power is exercisable by the President or through his cabinet ministers. However, ratification remains under the jurisdiction of the National Assembly.<sup>12</sup> The procedure for transmitting the ratification of treaties involves the Ministry of Justice receiving the resolution of ratification from the National Assembly, which is then prepared for signature by the president and then deposited to the relevant treaty body through the Ministry of Foreign Affairs.

Through this procedure, The Gambia ratified the Maputo Protocol on 25 May 2005 with initial reservations on its articles 5 (elimination of harmful practices), 6 (marriage), 7 (separation, divorce and annulment of marriage) and 14 (health and reproductive rights).<sup>13</sup> Even though no reason was advanced for these reservations, it is believed that the decision was informed by the country's very conservative religious and cultural background. However, these

6 Human Development Report (n 1) 147.

7 UNDP Human Development Report 'briefing notes for countries: Gambia' 6.

8 The Republic of The Gambia 'National Gender Policy 2010-2020' 11. This is part of the objectives of the Gender Policy.

9 The Republic of The Gambia (n 8) 6.

10 Human Development Report (n 1).

11 The Constitution of the Gambia (n 3) sec 79(1)(c).

12 As above.

13 F Viljoen *International human rights law in Africa* (2012) 256.

reservations were lifted in 2006 by The Gambia just before the country hosted the African Union Summit.<sup>14</sup> Despite lifting the reservations, these rights continue to be either violated or legitimately curtailed by personal laws that serve as valid justifications for their limitation despite domestication into national legislation.

### 3 Government focal point

The Ministry of Justice of The Gambia is the government focal point for all human rights issues. The Ministry has a special Civil Litigation and International Law Department responsible for providing legal services to government departments, vetting of Gambia's international agreements, preparing instruments for ratification, ensuring adherence to Gambia's treaty obligations and responding to communications against The Gambia at international and African human rights treaty bodies.<sup>15</sup> The Ministry is responsible for preparing state reports to the African Commission on Human and Peoples' Rights (African Commission) and other international treaty bodies. The Ministry is also responsible for prosecuting violations of laws including those domesticating international human rights treaties. This is done through State Counsel under the Director of Public Prosecutions within the Attorney General's Chambers in the Ministry of Justice.<sup>16</sup>

The Ministry of Women, Children and Social Welfare is responsible for women affairs policy formulation,

resource mobilisation and serves as general overseer of the affairs of women in The Gambia. The creation of this ministry in 2019 represents a fundamental change in the institutional structure of the protection of the rights of women as the ministry is removed from the Office of the Vice-President. In collaboration with the Ministry of Justice and other stakeholders, the Ministry of Women, Children and Social Welfare continue to advance women's rights in The Gambia.

Other important government institutions in the implementation and enforcement of the Maputo Protocol, the Women's Act, 2010 and other related legislation include the National Women's Council and the National Women's Bureau. The National Women's Council which is established under section 57 of the Women's Act, is a body corporate responsible for the integration, implementation of gender and women's rights in all sectors of government, reviewing proposals on gender equality from ministries and government departments, ensuring gender equality in budget appropriation and cooperation with NGOs towards the achievement of gender equality among other things.<sup>17</sup> The Council also advises government on women related matters and is responsible for the preparation of periodic reports on the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The Women's Bureau is the administrative body of the Women's Council and runs the day-to-day activities of the Council.<sup>18</sup>

<sup>14</sup> As above.

<sup>15</sup> Attorney General's Chambers and Ministry of Justice <https://www.moj.gm/civil-litigation-international-law-department> (accessed 18 October 2020).

<sup>16</sup> The Constitution of the Gambia (n 3) sec 85.

<sup>17</sup> The Women's Act 2010 sec 66.

<sup>18</sup> The Women's Act (n 17) sec 70.



## 4 Domestication

The Gambia is a dualist common law state which requires the domestication of international law before it can be enforced by domestic courts. Though there is no specific legal provision to this effect, the practice is that international treaties are negotiated on behalf of The Gambia by the executive and subject to ratification by the National Assembly.<sup>19</sup> It only receives domestic judicial enforcement when it is domesticated into domestic law.<sup>20</sup> The body of laws created under section 7 of the 1997 Constitution does not include international law as part of the laws of The Gambia. As a result, many treaties that are ratified but not domesticated by the country remain largely unenforced at the domestic level.

The Gambia domesticated the Maputo Protocol by enacting the Women's Act, 2010. This legislation also implements the provisions of the National Policy for the advancement of Gambian Women and Girls and incorporates and enforces the provisions of CEDAW.<sup>21</sup> The Act encompasses a majority of the fundamental principles and rights provided by the Maputo Protocol. The Women's Act 2010 also expands on the rights of women in Chapter IV of the 1997 Constitution. These constitutional provisions recognise women's rights to non-discrimination, protection from deprivation of property, right to education in The Gambia and right to political participation. These rights are reflected in and expanded by the Act.

Even though The Gambia currently has no formal reservations to the provisions of the Maputo Protocol, there remain several impediments that continue to hinder effective protection and fulfilment of women's rights in The Gambia. The Gambia operates a tripartite legal framework which sees a simultaneous application of common law and principles of equity, Sharia law and customary law in the legal system. This has seen a significant increase in claw back clauses in the laws allowing important human rights provisions to be subjected to the personal laws of individuals. This means that despite the progressive provisions of the Women's Act 2010, women and girls find their rights curtailed by provisions in Sharia and customary law regarding marriage, divorce, and inheritance.<sup>22</sup>

Section 10 of the Women's Act provides that any existing law, regulation or practice that constitutes discrimination against women is null and void and not enforceable. However, the recognition of Sharia and customary law under section 7 of the 1997 Constitution allows for the application of principles and personal laws that are not compatible with the rights protected in the Maputo Protocol and the Women's Act. This conundrum is not cured by the anti-discrimination clause under section 33 of the Constitution. Instead, the clause subjects non-discrimination to the application of personal laws on marriage, divorce, burial and devolution of property on death and customary laws in respect of tribes to which they bind.<sup>23</sup> The implication of this limitation is that regardless of how good the domestic laws are, they can be curtailed

19 The Constitution of the Gambia (n 3) sec 79.

20 For example, the Children's Act 2005, the Women's Act 2010 all domesticate international treaties ratified by The Gambia.

21 Long Title Women's Act 2010.

22 See The Constitution of the Gambia (n 3) sec 7 which outlines the laws of The Gambia.

23 See The Constitution of the Gambia (n 3) sec 33(5)(c) and (d).

by provisions of Sharia and customary law as personal laws of individuals. Victims of these limitations will not have the constitutional basis to challenge the laws since section 33(5) subjects non-discrimination clauses to personal laws.

The High Court of The Gambia which has branches throughout the country has the jurisdiction to enforce the rights protected in the Act just like other rights protected in the 1997 Constitution. Section 12 of the Women's Act allows for any person acting on behalf of another person, any member of an interest group and anyone acting in the public interest to bring action for the enforcement of these rights before the High Court. The National Women's Bureau can also initiate proceedings on behalf of the National Women's Council in the High Court to enforce these rights or seek any other redress. Thus, unlike under section 37 of the Constitution which only recognises *locus standi* of the person who alleges that his or her rights has been, is being, or likely to be violated, or by someone acting on behalf of a detained person, the Women's Act opens up various avenues through which women can seek enforcement of the provisions of the Act.

A notable absence from the Women's Act 2010 is the lack of recognition and provision for the absolute right to abortion for women. This is despite The Gambia's obligation under the Maputo Protocol and the African Commission's General Comment on article 14 of the Maputo Protocol which buttressed the significance of legalising abortion to protect the physical and mental health of women who may find themselves entangled between the legitimate limits of the law and protecting

their right to reproductive health. The Act only provides for the right to medical abortion where a pregnancy endangers the life of the mother or the fetus. This is limited in scope contrary to article 14(2)(c) of the Maputo Protocol which provides for medical abortion in cases of assault, rape, and incest. The Criminal Code continues to criminalise abortion related acts<sup>24</sup> and child destruction<sup>25</sup> providing lawful instances of the latter only where said child destruction is meant for preserving the life of the mother. Consequently, the provisions fall short of the requirements of article 14 of the Maputo Protocol and may in turn trigger illegal and unsafe abortions which can lead to eventual complications or even death of the mother. This is in contravention of The Gambia's obligation to protect women's sexual and reproductive rights.<sup>26</sup> In any event, states are required to put in place enactments that allow for access to medical abortion when the pregnancy poses a threat to the physical and mental health of the pregnant mother.<sup>27</sup>

The Act initially did not ban the practice of female genital mutilation (FGM) and the practice remained widespread in The Gambia until 2015. A 2015 declaration on ban of FGM by the then President Yahya Jammeh resulted in a swift legislative action. An amendment to the Act<sup>28</sup> criminalised female circumcision and placed a three-year imprisonment and a fine of fifty thousand Dalasis (approximately 955 USD)

24 Act 25 of 1933 (as amended) secs 140-143.

25 The Constitution of the Gambia (n 3) sec 198.

26 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa para 20.

27 African Commission General Comment (n 26) para 38.

28 Women's (Amendment) Act, 2015.

or both the fine and imprisonment on both the principal offender and accomplices.<sup>29</sup> Even though this was a welcome development, women's rights advocates raised concerns on both the language of the amendment for failing to categorically criminalise FGM in all forms and also for the lenient punishment imposed on perpetrators. The Act and the amendment also failed to criminalise cross-border cutting and as a result, there have been various reports that persons from The Gambia travel to neighbouring Senegal to procure the performance of FGM on Gambian women and girls.

Even though prosecution of perpetrators has not been very common, *The State v Sunkaru Darboe and Saffiatou Darboe* at the Mansakonko High Court some 135 kilometres from Banjul served as a warning for persons involved in the practice. In this case, a woman who had subjected her child to FGM was arrested and arraigned before a court. However, the matter was withdrawn before judgment was entered largely due to insufficient evidence for the prosecution and social pressure. There has been very little arrest or prosecution based on the amendment since then.

Even though the Act provides for the implementation of policies that will ensure equality between men and women,<sup>30</sup> it remains too remote a possibility to achieve as women participation in politics and public offices remains far below the 30 per cent quota system that is targeted. Other enactments that incorporate provisions of the Maputo Protocol into domestic law include the Sexual Offences Act, 2013, the Tourism Offences Act 2003, the Domestic

Violence Act, Trafficking in Persons Act, 2007 and Children's Act, 2005. The Sexual Offences Act amends the law and procedure relating to the trial of rape and other sexual offences and for connected matters. In line with article 4 of the Maputo Protocol, the Sexual Offences Act punishes rape and related offences in a bid to protect women and girls from sexual violence and punish perpetrators.

Furthermore, the Tourism Offences Act prohibits unlawful sexual advances to children,<sup>31</sup> child sexual abuse<sup>32</sup> and procurement of a child for sex.<sup>33</sup> All these provisions provide domestic legal enforcement for some provisions of the Maputo Protocol. Similarly, the Domestic Violence Act provides protection for women and girls victims of domestic violence.<sup>34</sup> The Act criminalises domestic violence under part IV in accordance with the Maputo Protocol and establishes an Advisory Committee that is mandated to advise government on gender-based violence (GBV) related matters and promote strategies to eliminate GBV among other things.<sup>35</sup> The Trafficking in Persons Act 2007 provides a legal framework to prevent, suppress and punish those engaged in trafficking in persons. Women and girls being the primary victims of trafficking, the Act domesticates article 4 of the Maputo Protocol which requires state parties to ensure the protection of women's right to security of the person and for states to prevent and punish trafficking of women and girls.

The Children's Act, 2005 also provides detailed protection for children

29 As above.

30 Women's Act 12 of 2010 sec 15.

31 Women's Act (n 17) sec 5.

32 Women's Act (n 17) sec 6.

33 Women's Act (n 17) sec 7.

34 See the Long Title of the Act.

35 Sec 5 of the Women's Act.

generally. The Act prohibits child trafficking, exploitation, marriage, betrothal, and other harmful practices. Even though this Act does not specifically indicate that it domesticates provisions of the Maputo Protocol, these provisions provide for domestic enforcement of the prohibition of harmful social practices on women and girls enshrined in its article 5, the right to dignity in article 3, non-discrimination under article 2 and prohibition of child marriage under article 6.

An opportunity to make some improvements in the country's legal system was blown when the National Assembly rejected the Draft Constitution 2020. This Draft had undergone wide consultations and incorporated progressive provisions on the protection of women's rights. Section 55 thereof, for example, provided for women's rights to equal treatment with men, equal opportunities, protection from abuse and all forms of violence. Section 63 also protected the rights of elderly women to dignity and participation in public affairs. The Draft was meant to domesticate these important provisions of the Maputo Protocol, CEDAW and other international treaties that The Gambia is a party to.

## 5 Institutional reform

An important structural change in the cabinet setup which recently took place in The Gambia is the creation of a separate Ministry of Women, Children, and Social Welfare which consists of a workforce of more than 60 per cent women. The ministry used to be under the Office of the Vice President, but the recent changes put women affairs in a separate ministry. This development is hailed by many as a positive measure considering the fact that the Office of the Vice-Presi-

dent has too many responsibilities and may not be able to give enough attention to women affairs.<sup>36</sup> This ministry was 'part of the president's women empowerment drive to give prominence to the matters of women, children, and the vulnerable in society'.<sup>37</sup> It was further 'in line with the government's institutional reforms policy of realigning key sectors under the relevant institutions'.<sup>38</sup>

However, women's rights advocates are of the view that the congregation of women affairs, children and social welfare under one ministry may relegate women affairs to secondary position as these other mandates are also of great importance in The Gambia, thus the chance that the ministry may not give sufficient attention to women. The argument is that given the importance of the proper protection, promotion and fulfilment of women's rights, a ministry should be created that is solely responsible for women's matters.

In the 2021 Budget Appropriation, the Ministry of Women, Children and Social Welfare is allocated 92,878,464 Gambian Dalasis (approximately USD 1,808,733), representing a low 0.42 per cent of the entire budget.<sup>39</sup> This is significantly a lower amount compared to, for example, the sums allocated to the Office of the President (USD 12,218,963) or the Ministry of Transport, Works and Infrastructure (USD 38,452,191). As a result of this minimal resource allocation, the ministry is faced

36 This appreciation was shared by all interviewees.

37 'Fatou Kinteh appointed minister for women affairs' *Foroyaa* 27 February 2019 <https://foroyaa.net/fatou-kinteh-appointed-minister-for-women-affairs/> (accessed 10 October 2020).

38 As above.

39 Government of The Gambia Budget Appropriation Report 2021, 1.

with budget constraints as the resources must be distributed to women affairs, children, and social welfare related issues. In fact, the 2021 Budget is an improvement on the 2019, and 2020 ones which allocated a meagre 30,447,000 Gambian Dalasis (USD 592,930) and 73,568,000 Gambian Dalasis (USD 1,432,677) respectively.

Despite the financial challenges faced by the Ministry of Women, Children and Social Welfare, due to the spike in domestic violence cases, the ministry has undertaken positive initiatives in the protection of the rights of women and girls. For example, it opened a hotline for the reporting and handling of domestic and GBV cases. The '1313' hotline remains active and able to provide prompt response to victims of GBV. This ministry also works in collaboration with other stakeholders such as the Paradise Foundation (which provides shelter for victims of GBV) and the United Nations Population Fund (UNFPA) which has turned one of its libraries into shelter for victims.

The Women's Bureau which was created in 1980 and established under the Office of the Vice President remains in place with a minor change in terms of oversight. Since the creation of a separate Ministry of Women, Children and Social Welfare, the Bureau is now under this ministry with a similar role of being the executive arm of the National Women's Council created under section 56 of the Women's Act 2010 to protect the rights of women and children. The Bureau receives complaints of abuse and other human rights violations from women across the country, provides training for CSOs, women, police and security forces and other stakeholders on the rights of women and girls. Over

the years, the Bureau has received many complaints, though quite fewer than expected considering the number of legal issues that women face every year. On receipt of complaints of human rights abuses, the Bureau may refer some of the complaints to its partner Female Lawyers Association of The Gambia (FLAG), which can and does with support from the UNFPA, take legal action where necessary.

The Gambia Police Force (GPF) is one of the institutions that is directly involved in the protection of the rights of women and operates a welfare unit under the police force. As such, the Bureau works with the GPF's welfare unit through training and capacity building programmes. The GPF Academy which is responsible for recruiting officers into the Force, now uses a training manual prepared by the Bureau on sexual and GBV for police prosecutors.<sup>40</sup> As it is later discussed in this chapter, the creation of an independent National Human Rights Commission is also an important institutional addition as the body is mandated to promote human rights generally and receive complaints and provide recommendations accordingly.

## 6 Legislative reform

Since the ratification of the Maputo Protocol, The Gambia has domesticated the document by enacting the Women's Act 2010 and its subsequent amendments. Prior to the enactment of the Women's Act of 2010, scanty provisions relating to protection of women's rights were found in separate pieces of legislation, but the Act consolidated and improved the protection of women's

40 The Gambia Police Force *The SGBV handbook for prosecutors* 2019.

rights. The broad themes of the Maputo Protocol such as non-discrimination, access to justice, right to health and healthcare, and marriage and family rights among others are all incorporated in the Act.

A significant amendment to the Act was made in 2015 when FGM was criminalised. The amendment inserted sections 32A and 32B in the Women's Act 2010. Section 32A of the Act prohibits the practice in all its forms and any person found culpable is liable on conviction to a term of three years imprisonment or to a fine of 50,000 Dalasis (approximately USD 955) or both. Where the act results in the death of the victim, the perpetrator is liable to life imprisonment. The Act also imposes a legal obligation on persons to report that the act has been done or is being done or about to be done. A person who fails to do so will be liable on conviction to a fine of ten thousand Dalasis (approximately USD 191).<sup>41</sup> As was highlighted by the African Commission's mission to The Gambia,<sup>42</sup> even though a ban is legally in place pursuant to the amendment, enforcement of the ban is still a challenge as some sectors of society still believe in the practice of FGM.<sup>43</sup>

An important omission in the Women's Act as was noted earlier is the universal right to abortion. This is despite the inextricable and indivisible link between the right to 'exercise full control over one's fertility, to decide one's maternity, the number of children

and the spacing of births and to choose a contraception method.'<sup>44</sup> Abortion remains illegal except for situations where the keeping of the pregnancy endangers the life of the mother.<sup>45</sup>

Other important legislative enactments for the protection of women's rights came with the Sexual Offences Act 2013, Tourism Offences Act, Trafficking in Persons Act and the Domestic Violence Act 2013. The Sexual Offences Act, though did not explicitly state that it domesticates the Maputo Protocol, expanded on the protections that are afforded to women in general and victims of sexual violence. The Act also provides for an improved procedure in the trial of rape and related cases.<sup>46</sup> Several penalties are provided for the various degrees of rape including life imprisonment for instances where violence is used, transmission of sexually transmitted infections, where the victim is under 18 years or where the victim suffered grievous bodily or mental harm.<sup>47</sup> The Act also abolished the long standing 'cautionary rule' which required courts to treat evidence of complainants with caution.<sup>48</sup> This rule had the effect of attaching little or no weight to the uncorroborated testimonies of victims of sexual violence.

Further, the Children's Act 2005 also provides for some protection of the girl child. Section 19 of this Act, in line with the Maputo Protocol, prohibits harmful social and customary practices on girls. Sections 24 and 25 of the Act, subject to personal law also prohibit child marriage and child betrothal

41 Women's Act (n 17) sec 32B(2); Republic of The Gambia 'Initial Report Under the Protocol to The African Charter on Rights of Women' 138.

42 African Commission 'Report of the human rights promotion mission to the Republic of The Gambia 19-24 April 2017.'

43 As above 14.

44 African Commission General Comment 2 (n 26).

45 Criminal Code Act 25 of 1933 (as amended) secs 140-143.

46 The Sexual Offences Act 15 of 2013 sec 1(2).

47 The Sexual Offences Act (n 46) sec 4(1)(iii).

48 The Sexual Offences Act (n 46) sec 7.

respectively. In 2015, the Children's Act 2005 was also amended to totally criminalise child marriage and betrothals irrespective of personal law.<sup>49</sup>

Perhaps the most troubling failure in terms of law reform in the history of The Gambia is the rejection of its Draft Constitution of 2020 at the level of the National Assembly after the presentation of the draft by the Minister of Justice. Members of the National Assembly could not get the required votes for the draft to proceed to the Committee stage of the constitutional review process. This Draft was not only the most widely consulted document in The Gambia, but it also contained very progressive provisions on the protection and promotion of women's rights. During the drafting process, commissioners at the Constitutional Review Commission consulted and were guided by all the regional and global human rights instruments that The Gambia has ratified. The Draft contains provisions such as the reservation of 14 elected seats for women in the National Assembly,<sup>50</sup> gender mainstreaming generally and representation of women at the top executive of all public enterprises so that if the top official is a male, the deputy shall be a woman; if a top male resigns, dies in office or loses the position, his successor would be a woman.

## 7 Policy reform

National policies are formulated and implemented by governments around the world to attain and fulfil various state obligations and objectives. The

Gambia has various policies in place. Several of these policies contain obligations enshrined in both domestic and international legal instruments. Section 14 of the Women's Act 2010 outlines the government's obligations to eliminate all forms of discrimination against women in all institutions, agencies, and organs, in line with its obligations in both the Maputo Protocol and CEDAW. It further requires Ministries and Departments to take appropriate steps for the implementation of the Act. This implies that every Ministry or Department is supposed to conduct a gender audit of all laws and policies to further reinforce the principle of equality between men and women. All policies to be adopted should also bear these obligations in mind.

The National Development Plan (2018-2021) continues to be the blueprint of the development agenda of the current government. It outlines eight priority areas targeted at realising a vision of development and provides guidelines on how the development in these priority areas will be implemented by the state. Even though the Maputo Protocol is not specifically mentioned in the National Development Plan, among the priorities is 'restoring good governance, respect for human rights, the rule of law, and empowering citizens through decentralization and local governance'.<sup>51</sup> This priority has the potential of achieving some of the key themes of the Maputo Protocol and the Women's Act 2010.

Following the expiry of the Education policy of 2004-2015, the 2016-2030 Education Sector Policy was jointly adopted by the Ministries of Basic and

49 The Republic of The Gambia's combined report on the African Charter on Human & Peoples' Rights & initial report on the Protocol to the African Charter on the rights of women in Africa, 138.

50 Schedule 3 CRC Draft Constitution 2020.

51 The National Development Plan (2018-2021) strategic priority 1.

Secondary Education and the Ministry of Higher Education. This policy covers the entire education sector from primary to tertiary education. Even though the Maputo Protocol is not specifically mentioned, the policy is guided by, among other things, non-discriminatory and all-inclusive provision of education and gender equity.<sup>52</sup> The policy is aimed at 'improving access to quality education for all, particularly girls, and for greater gender equality'.<sup>53</sup> Despite the significant increase of girls' enrolment into basic education, a high percentage of girls continue to drop out of school before attaining secondary or tertiary education.<sup>54</sup>

The National Health Policy 2012-2020 was the last policy document used in The Gambia. Among its guiding principles is the need for gender equity and equality between men and women, health system reforms and respect for patient's rights. Yet, there remains a high number of incidents of maternal mortality in The Gambia especially in the rural areas and this situation continues to be compounded by a fragile health system.<sup>55</sup> This shows that at the expiry of this Policy, its objectives remain largely unattained. The Ministry of Health is in the process of adopting a new health policy but since April 2021, after the review of the first draft, there

have not been substantive developments.<sup>56</sup>

The 2010-2020 Gender Policy of the Gambia was adopted in fulfilment of recommendations that emanated from a mid-term review of the National Policy for the Advancement of Gambian Women (NPAGW) which was enacted in 1999. The Gender Policy is intended to make a shift in policy from 'women empowerment only' to the promotion of gender equality and equity.<sup>57</sup> The development of the Gender Policy was guided by provisions of the 1997 Constitution of The Gambia, best practices in women empowerment and the provisions of global conventions that the Gambia is a party to.<sup>58</sup> Consequently, the policy was informed by provisions of the Maputo Protocol among other international treaties. The Gender Policy serves as reference material and direction for implementation of development projects, resource allocation and providing a gender perspective. All these policies despite envisaging the furtherance of enforcing and applying the provisions of the Maputo Protocol, remain largely unimplemented and they continue to be curtailed by claw back provisions in both the 1997 Constitution and other laws subjecting the enjoyment of the rights of women to personal laws.

## 8 Court judgments

The Gambia operates a dualist legal system which requires domestication of international law before it can be

52 The Republic of The Gambia 'Education Sector Policy 2016-2013: accessible, equitable and inclusive quality education for sustainable development' 5.

53 Education Sector Policy 2016-2013: accessible, equitable and inclusive quality education for sustainable development (n 52) 2.

54 Education Sector Policy 2016-2013: accessible, equitable and inclusive quality education for sustainable development (n 52) 4.

55 UNICEF available at <https://www.unicef.org/gambia/maternal-and-child-health> (accessed 2 March 2021).

56 WHO Africa 'The Gambia Reviews the National Health Policy and Strategic Plan (2021-2030)' 29 April 2021 <https://www.afro.who.int/news/gambia-reviews-national-health-policy-and-strategic-plan-2021-2030> (accessed 6 December 2021).

57 The Republic of The Gambia 'National Gender Policy 2010-2020' 1.

58 National Gender Policy 2010-2020 (n 57) 4.



invoked as binding authority before the domestic courts. International treaties such as the Maputo Protocol need to be enacted into local legislation before they can be successfully invoked as binding authorities before the domestic courts. This has affected the direct use and enforcement of the Maputo Protocol before the domestic courts. However, this does not abdicate The Gambia's obligations under the treaty as the principle of *pacta sunt servanda*<sup>59</sup> continues to bind the Gambia to its obligations under the Maputo Protocol. Further, reliance on domestic law does not excuse failure to perform international treaty obligations.<sup>60</sup>

It is worth noting that The Gambian courts have, on several occasions, referred to and relied on decisions of the African Commission and recognised The Gambia's obligations under international human rights law.<sup>61</sup> This is an indication of the potential to rely on provisions of international law to give effect to domestic law, fill in gaps in domestic law and enforce basic human rights. Despite this potential, there is no record of any direct reference to the Maputo Protocol in both court judgments and legal arguments by lawyers.

The Women's Act remains the main piece of legislation for the protection of the rights of women but cases involving the enforcement of this Act remain minimal. The low number of cases on enforcement of this legislation is not entirely owing to lack of awareness by

lawyers of the legislation but to some other equally important factors. These include the application of personal law in matters of marriage, divorce, and inheritance,<sup>62</sup> lack of awareness of these rights by women, and unwillingness by victims of human rights violations to publicly proceed to court to enforce their rights. Section 7 of the 1997 Constitution allows for the application of both Sharia and customary law to members of certain groups. Most of the population being Muslims, coupled with the creation of *Cadi*<sup>63</sup> courts within the judicial system, means that many cases that would have resulted in invoking the provisions of the Women's Act or the Maputo Protocol in the conventional courts, are now under the jurisdiction of the Sharia *Cadi* courts. Several decisions on property, marriage, inheritance, and family related problems have been decided by these courts based exclusively on Sharia law. The Supreme Court of The Gambia affirmed the application of Sharia in these matters in *Isatou Secka v Susan Badgie*,<sup>64</sup> a matter that involved the validity of a polygamous marriage of a deceased Muslim man and subsequent sharing of his estate between his two surviving wives and children.

Exceptional cases involving rights of women have been decided before the courts and referred to the Women's Act 2010. In *Dawda Jawara v Matty Faye*,<sup>65</sup> an appeal case that was decided in the Supreme Court of The Gambia, counsel for the Respondent relied on the provisions of section 43(4) of the Women's Act to argue that the Respondent is enti-

59 Vienna Convention on the Law of Treaties of 1969 art 26.

60 Vienna Convention on the Law of Treaties (n 59) art 27.

61 See for example the Supreme Court decision of *Ousainou Darboe and Ors v IGP and Ors*, civil suit no SC 003/2016, *Mariam Denton v the Director General of the NIA and 5 Others* HC/24/06 MF/087/F1 and *Ousman Sabally v IGP* [1997-2001] GLR 878.

62 The Constitution of the Gambia (n 3) sec 7.

63 Islamic Courts administering Sharia law in matters of marriage, divorce, and inheritance for Muslim parties.

64 GSCLR (2014-2015) 102.

65 Unreported judgment of The Supreme Court of The Gambia civil suit no SC CA 023/2016.

tled to a share of the matrimonial property and that the provision is not subject to anyone's personal law. Even though the Supreme Court refused the application of section 43(4) of the Act on the basis that the property in question was acquired before the marriage, it ordered the full recovery of the expenses that the woman had incurred in the extensions and renovations carried out on the property. The use of the Women's Act in court can be enhanced by massive sensitisation of women on the rights incorporated in the Act and the possibility to enforce these rights before the domestic courts.

## 9 Awareness and use by civil society

The Maputo Protocol is well-known among Gambian based human rights non-governmental organisations (NGOs), and it remains one of the most important tools used by NGOs in advocacy and awareness creation. Since the advent of the current government of Adama Barrow, the NGO space has opened and as a result, the country has seen more proactive NGOs. Some of the most prominent NGOs operating in The Gambia are the Institute for Human Rights and Democracy in Africa (IHRDA), the African Centre for Democracy and Human Rights Studies (ACDHRS), Think Young Women (TYW), the Association of Non-Governmental Organisations (TANGO), Gambian Committee on Traditional Practices (GAMCOTRAP), the Foundation for Research on Women's Health, Productivity and the Environment (BAFROW), the Female Lawyers Association Gambia (FLAG), the Association for Promotion of Girl's and Women's Advancement in The Gambia, and the Forum for African

Women Educationalist The Gambia (FAWEGAM).

Both the IHRDA and the ACDHRS enjoy observer status before the African Commission.<sup>66</sup> The IHRDA is one of the most active litigants on human rights before the African human rights treaty bodies. It was the first to file a case based on the Maputo Protocol before the African Court on Human and Peoples' Rights (African Court) in Arusha. Even though the IHRDA has not filed a case against The Gambia based on the Maputo Protocol before any international, regional or domestic court, it has extensively used the document in advocacy, capacity building and awareness creation nationwide.<sup>67</sup> It has also conducted many trainings for the police and security sector, and other NGOs. In this way, the IHRDA continues to effectively use the Maputo Protocol to enhance its implementation and create awareness among stakeholders. For example, during one of the trainings organised by the IHRDA for police prosecutors, participants were enlightened on the use of provisions of the Women's Act, 2010 beyond just declaration of human rights of women but also for prosecution of violations of provisions of the Act by both corporate and natural persons based on sections 73 and 74 of the Act.<sup>68</sup>

Even though the IHRDA did not submit a formal shadow report on The Gambia's initial report under the Maputo Protocol, it was able to contribute to the process by directly reaching out to commissioners with notes on important

66 S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in V Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 38.

67 As above.

68 As above.

alternative dimensions of the situation in The Gambia.<sup>69</sup> Consequently, the IHRDA has used this technique to not only lobby for certain conclusions but also provide a more objective picture of the situation of the rights of women in The Gambia. Communication barriers between the African Commission and IHRDA however continue to affect effective follow-up on recommendations and concluding observations from the African Commission.

The FLAG is another NGO that is involved in advocacy and litigation for the enforcement of fundamental rights of women. FLAG uses the Maputo Protocol, the Women's Act 2010, the Children's Act, 2005 and other relevant legislation to fulfil its aims and objectives.<sup>70</sup> The association is a leading advocate for legislative reform in areas of gender equality, awareness creation and litigation.<sup>71</sup> FLAG provides free legal assistance to women in diverse areas and serves as a negotiating institution on behalf of women where necessary. In this regard, FLAG was the first institution to initiate proceedings on the Women's Act before the courts in *Matty Faye*.<sup>72</sup>

Another leading NGO engaged in the promotion of women's rights in The Gambia is the women led TYW. This organisation's work is largely based on the provisions of the Maputo Protocol and the Women's Act 2010. Its staff are conversant with the provisions of the Maputo Protocol and use it for advocacy, preparation, and provision of training materials and in the fight against discrimination against women general-

ly. The organisation has conducted massive sensitisation and advocacy programmes countrywide and organised trainings for other NGOs.<sup>73</sup>

Even though TYW has some lawyers in the organisation, it has not litigated cases in the field of women's rights in the domestic courts or regional human rights bodies. It is however in collaboration with other institutions in the consortium of the Network Against Gender Based Violence. This consortium has other members such as FLAG which can and do file cases on behalf of victims of human rights violations before the domestic courts. However, litigation of women's rights faces various challenges such as patriarchal influences and general societal backlashes for victims.<sup>74</sup> For these reasons, one of the cases that TYW referred to a law firm for litigation was withdrawn from the court after the victim was pressured by her family into abandoning the case.<sup>75</sup>

## 10 Awareness and use by lawyers

One major challenge that the protection of the rights of women face in The Gambia is lack of litigation to enforce these rights. Like CSOs in The Gambia, lawyers are generally aware of the Women's Act 2010 and many of them are conversant with the provisions of the Maputo Protocol. This is because it is part of the law curricula of the country and many lawyers that received training from abroad have specialisations on human rights and international law. The lack of litigation on the Maputo Protocol and the Women's Act is not owing to want of awareness by lawyers about these instruments, but instead a combi-

69 As above.

70 Email from FB Bah, Coordinator FLAG, 11 November 2020.

71 As above.

72 The *Faye* case (n 65).

73 The *Faye* case (n 65).

74 The *Faye* case (n 65).

75 The *Faye* case (n 65).

nation of general ignorance of the public about their rights, patriarchal influences and stereotypical challenges that continue to be associated with women taking up matters of their rights and interests to the courts.<sup>76</sup>

## 11 Incorporation into law school education

Human rights law has been an integral part of the University of The Gambia's Faculty of Law curriculum. This presence has improved over the years with expertise from the Centre for Human Rights, University of Pretoria making a huge impact in human resource capacity and curriculum development. Currently, human rights law is offered in the third year of studies at the Faculty of Law of the University of The Gambia. The Maputo Protocol as well as the African regional human rights system in general are sufficiently covered in the curriculum. Themes such as discrimination against women, sexual and GBV, sexual and reproductive rights and harmful traditional practices are recurrent discussions in the course.

Students at the University of The Gambia as well as graduates have a good understanding of the Maputo Protocol, its domesticating instrument as well as enforcement mechanisms. Some of these graduates have gone on to become judges, magistrates, state counsels, government departments' advisers, private legal practitioners and the current Attorney General and Minister of Justice is a graduate of the Faculty of Law, University of The Gambia. The impact of this collection within both the public and private sectors on the protection of women's rights can be massive considering the knowledge they have on

the Maputo Protocol. With the ongoing transition in The Gambia and the more favourable conditions for the protection of human rights there are more opportunities for the effective use of the knowledge of the Maputo Protocol in day-to-day enforcement of the law.<sup>77</sup>

Students also participate in various moot court competitions including the African Human Rights Moot Court Competition organised by the Centre for Human Rights, University of Pretoria. These activities help students to keep international treaties abreast and have interest in these treaties and their implementation. The recent launching of the Sir Dawda Jawara Moot Court Competition by the Human Rights Commission in collaboration with the Faculty of Law, University of The Gambia is another welcome development as this incentive has the potential of exposing students to a variety of human rights issues in The Gambia and beyond.

## 11 National human rights institutions

The 1997 Constitution of The Gambia does not provide for the establishment and operation of an independent national human rights institution. The closest office to a human rights institution under the Constitution is the Office of the Ombudsman which is provided for in section 163 of the Constitution and operationalised by virtue of an Act of the National Assembly.<sup>78</sup> The Office of the Ombudsman is vested with power to investigate discrimination against members of the public by any public department, authority or public body in

76 The *Faye* case (n 65).

77 Email from SA Ndasi, Legal Counsel National Agency for Legal Aid and former human rights law lecturer, University of The Gambia, 19 October 2020.

78 Ombudsman Act 3 of 1997.

the exercise of the administrative function of that authority or body.<sup>79</sup> Discrimination here covers the general grounds of discrimination found under Chapter IV of the 1997 Constitution and also the prohibition of discrimination as provided in the Women's Act. On these premises, it is plausible to argue that the Office of the Ombudsman can only have a human rights impact for the purposes of the Women's Act and the Maputo Protocol on issues of discrimination against women by public bodies. There is nothing in the Act establishing the Office or in the 1997 Constitution referring to grievances arising specifically from breach of other duties or legal obligations imposed by the Women's Act 2010 or the Maputo Protocol.

The most significant development in the protection of human rights in The Gambia is the establishment of the National Human Rights Commission (NHRC). This is an independent<sup>80</sup> human rights institution established in 2017 by virtue of the National Human Rights Commission Act<sup>81</sup> 2017 (NHRC Act). The NHRC is established with the distinguished role of promoting and protecting human rights in The Gambia. The NHRC is an independent legal entity which has standing before the Gambian courts.<sup>82</sup> In addition to having standing before the courts, the NHRC receives, hears, and determines complaints and enforces its decisions. Section 12 of the NHRC Act 2017 outlines the functions of the NHRC which include promotion and protection of human rights as well as to monitor, receive, investigate, and consider

human rights violations including by private persons and entities. The NHRC can also recommend appropriate remedial action to the government and seek redress on behalf of complainants and promote awareness and respect for human rights.<sup>83</sup>

Out of the five Commissioners at the NHRC, only two are women representing less than 50 per cent of the Commissioners.<sup>84</sup> However, in its 2019 Annual Report, the NHRC noted the prevalence of gender inequality despite the ratification and domestication of the Maputo Protocol and other women's rights protection legislation and treaties.<sup>85</sup> The NHRC therefore recommended the Government of The Gambia to take various measures including the institution through legislation of gender quota system in all elective bodies at local and national levels 'by allocating a minimum 30 per cent of seats to women' in both legislative and local government elections.<sup>86</sup>

## 12 Academic writing

The literature in The Gambia on the impact of the Maputo Protocol remains scanty as academic writing is very limited.<sup>87</sup> There have been various recent publications centered on rights of women enshrined in both the Maputo Protocol and the Women's Act by Dr Satang Nabaneh.<sup>88</sup> The publications

79 The Constitution of the Gambia (n 3) sec 163(1)(a).

80 Ombudsman Act (n 78) sect 16.

81 National Human Rights Commission Act 18 of 2017.

82 National Human Rights Commission (n 81) secs 3(2)(a) and 12(d).

83 National Human Rights Commission (n 81) sec 12.

84 See <https://www.gm-nhrc.org/commissioners> (accessed 1 March 2021).

85 The National Human Rights Commission 'Annual Report 2019' 29.

86 The National Human Rights Commission 'Annual Report 2019' (n 85) 30.

87 Ndasi (n 77).

88 Alumni of the LLM HRDA Class of 2012.

cover topics such as sexual and reproductive rights,<sup>89</sup> child marriage in The Gambia and political participation of women in The Gambia. She is also the author of the 2016 chapter of the impact of the African Charter on Human and Peoples' Rights and the Maputo Protocol in the Gambia.<sup>90</sup> The author is also a co-founder of an online legal resource centre – the Law Hub which helps provide free access to online legal resources of The Gambia.<sup>91</sup>

### 13 State reporting

The Gambia's record in terms of state reporting before the African human rights bodies is poor. The state tends to prioritise submission of reports to the UN Human rights system.<sup>92</sup> Even though it meets its obligations under the UN system, The Gambia submitted its combined report on the African Charter for the period of 1994-2018 and its initial report under the Maputo Protocol in 2019.<sup>93</sup> This report signifies a milestone in the state's endeavours to fulfil its obligations under the African human rights system. It is the first since The Gambia ratified the Maputo Protocol on 25 May 2005. In accordance with the African Commission's Guidelines for National Periodic Reports, this report reflects legislative and other measures taken by the Republic of The Gambia for the full realisation of women's rights as recognised in the Protocol.

The Report was prepared by the Ministry of Justice in collaboration and consultation with other ministries and stakeholders as an inter-ministerial task force was set up for this purpose. The preparation of the initial report has however been criticised on several grounds. One of the most aired concerns is the failure of the state to sufficiently consult and engage relevant NGOs that are involved in the promotion of the rights of women. This has resulted in an insufficient coverage of relevant themes in the Maputo Protocol and making reference to irrelevant instruments.

On the issue of non-submission of reports to the African Commission, it is noteworthy that the Ministry of Justice suffers from financial and human resource constraints for the preparation and submission of state reports to the African Commission. The preparation of reports requires the hiring of services of consultants which requires substantial amounts of money that may not be readily available to the ministry.<sup>94</sup> Unlike under the UN system – where the UN Office of the High Commissioner and other UN agencies do regular follow ups on due reports and provide support for states, under the African system, there is no such support and follow up.<sup>95</sup> Even though there is a pre-existing obligation on the state to protect, promote and fulfil rights, financial support and constant reminders from the UN serves as a catalyst for states to double their efforts in terms of meeting their reporting obligations.<sup>96</sup>

89 See S Nabaneh 'The Gambia's political transition to democracy: is abortion reform possible?' (2019) 21(2) *Health and Human Rights Journal* 167-179.

90 See Nabaneh (n 66).

91 See Law Hub-Gambia <https://www.lawhubgambia.com/> (accessed 2 November 2020).

92 Nabaneh (n 66) 87.

93 'Gambia submits human rights report to African Commission' *Foroyaa* 3 May 2021 <https://foroyaa.net/gambia-submits-human-rights-report-to-african-commission/> (accessed 6 December 2021).

94 As above.

95 As above.

96 As above.

## 14 Communications involving the state

There has not been any communication against The Gambia based on the Maputo Protocol before the African Commission or the African Court. There have been several communications against The Gambia before the African Commission primarily based on the African Charter. In *Dawda Jawara v The Gambia*,<sup>97</sup> the African Commission found The Gambia in violation of several articles of the African Charter and urged The Gambia to bring its laws in conformity with the document. In *Purohit & Moore v The Gambia*,<sup>98</sup> The Gambia was found in violation of several articles of the Charter and among other things recommended to repeal the Lunatics Detention Act.<sup>99</sup> Neither of these recommendations have been implemented.

The Economic Community of West African States (ECOWAS) Court also found The Gambia in violation of its obligations in several cases but just like those that were decided by the African Commission, the findings were not fully implemented by the government.<sup>100</sup> The general failure of the state to implement recommendations of these treaty bodies remains one the major pitfalls to protection of rights in The Gambia.

## 15 Special mechanisms and visits of the African Commission

There has been a limited number of promotional and fact-finding missions to The Gambia by special mechanisms mandate holders from both regional and global levels largely owing to The Gambia government's non-cooperation over the years.<sup>101</sup> The first ever and only human rights promotion mission undertaken by a delegation of the African Commission to The Gambia was in April 2017 lasting for five days from 19 to 24 April 2017. The mission was conducted in the form of interactive sessions with the authorities and stakeholders with the help of staff from the Ministry of Justice. The mission was aimed at strengthening collaboration between the African Commission and The Gambia, to promote the African Charter and other human rights instruments and engage in dialogue with the government regarding policy and legislative reform.<sup>102</sup> Even though the mission expressed delight in the progress made by The Gambia in human rights protection and promotion since the change of government, it expressed concerns over the low level of representation of women in parliament and other decision making bodies, challenges facing women and girls in accessing and enjoying equal rights as men including property rights, reproductive rights, protection from violence as well as violence due to patriarchy and customary practices.<sup>103</sup>

97 (2000) AHRLR 107 (African Commission 2000).

98 (2003) AHRLR 96 (African Commission 2003).

99 Lunatics Detention Act 3 of 1918 (as amended).

100 See *Chief Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008); *Musa Saïdykhan v The Gambia* ECW/CCJ/JUD/08/10.

101 Nabaneh (n 66) 90.

102 African Commission on Human and Peoples' Rights Report of the Human Rights Promotion Mission to The Republic of The Gambia 19- 24 April 2017.

103 As above.

## 16 Factors that may impede/enhance the impact of the Protocol

Since the ratification and subsequent domestication of the Maputo Protocol by The Gambia, there has been tremendous progress in protection of women's rights. The criminalisation of FGM, child marriage and betrothal and the adoption of several policies that are informed by the Maputo Protocol are welcome developments. The state's willingness to relax some of the restrictions on advocacy by women's rights groups and the general widening of civil society space has contributed to this progress.<sup>104</sup> The Gambia has also submitted its initial report on the Maputo Protocol and has also allowed and received a mission of the African Commission to The Gambia. A revived, growing and more vibrant civil society has also emerged in recent years.

However, several major impediments continue to slow the progress of positive impact of the Maputo Protocol in the Gambia. These include political, religious, cultural, and legal obstacles. There is a lack of political will on the part of the state to implement legislation, international and regional obligations on the protection of women's rights and decisions of human rights treaty bodies. Even though there is no decision against The Gambia based on the Maputo Protocol, previous decisions from the African Commission, the ECOWAS Court and other international human rights treaty bodies' recommendations and findings are not fully implemented. Progressive domestic legislation and policies also continue to

be mere texts that are not enforced and implemented by the state.

Cultural and religious beliefs continue to also contribute to the failure of the provisions of the Maputo Protocol to have a wide positive impact in The Gambia. The country being a predominantly African Muslim country, remains very conservative and hostile to some of the provisions of the Maputo Protocol such as those on property rights, sexual and reproductive rights, and matrimonial rights of women. The provisions of Sharia law and customary practices remain an integral part of the legal system thus serving as legitimate limitations to the rights of women.

The greatest conundrum that continues to hinder the application of the Maputo Protocol and indeed other human rights instruments is a legal one.<sup>105</sup> The 1997 Constitution of The Gambia provides for the application of Sharia personal laws in matters of marriage, divorce and inheritance for Muslims and also customary law to communities where it applies.<sup>106</sup> This provides a constitutional basis for the validity of practices that run counter to the letter and spirit of the Maputo Protocol as section 33 of the 1997 Constitution lays the constitutional basis for continued discrimination against women on the basis of personal laws. The Committee on the Elimination of Discrimination Against Women noted with concern the effect of personal law on the effective application of progressive human rights legislation in The Gambia such as the Women's Act 2010,

104 This was a common opinion of all the interviewees during the research.

105 As above.

106 See The Constitution of the Gambia (n 3) sec 7.



the Domestic Violence Act, 2013 and the Sexual Offences Act, 2013.<sup>107</sup>

Furthermore, many Gambian legislation are filled with provisions subjecting the protection of rights to personal laws thereby effectively nullifying these provisions. This is despite the obligation of the state to avoid the use of claw back clauses in its laws and reliance on domestic law to violate its obligations under international law. For example, sections 42, 43, 44 and 45 of the Women's Act respectively subject the right to acquire property, to choose matrimonial home, separation, divorce and annulment of marriage and rights of widows all to personal laws.

Lack of litigation challenging illegal actions and inaction of both the state and private individuals continues to affect the effective enforcement and implementation of the Maputo Protocol, the Women's Act, 2010 and other laws protecting and promoting the rights of women and girls in The Gambia. The mere enactment of laws is not enough to protect women's rights in a country. For instance, the various rights that are protected by the Women's Act 2010 continue to be violated daily as women are sexually abused, discriminated against and deprived of property based on cultural practices. However, lawyers, litigants and the courts remain less involved in proper litigation that could have helped curb violation of the rights of women. Section 74 of the Women's Act criminalises any contravention of the Act, thus giving prosecuting authori-

ties the legal basis to prosecute any person corporate or natural that violates the rights and other provisions in the Act. Nevertheless, very few cases have been decided initiated in the domestic courts.

For a better impact of the Maputo Protocol in The Gambia, there should be massive legislative and institutional reforms to harmonise domestic laws and bring them in line with international obligations and to improve women participation in decision making processes. There should also be affirmative action to ensure equal participation of women, massive sensitisation to raise awareness on the Maputo Protocol and general attitudinal change of society towards litigation.

107 United Nations Office of the Commissioner for Human Rights 'Committee on the Elimination of Discrimination Against Women considers the reports of The Gambia' available at <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16222&LangID=E> (accessed 18 October 2020).

# THE IMPACT OF THE MAPUTO PROTOCOL IN GHANA



*Ady Namaran Coulibaly\**

## 1 Introduction

### 1.1 Brief background and context of human rights in the country

Ghana is a relatively stable democratic country in West Africa. The country has an estimated total population of 30 million with women constituting about 51 per cent.<sup>1</sup> It has a young population with close to 60 per cent of the population under 25 years.<sup>2</sup>

The Constitution of Ghana guarantees the enjoyment of fundamental human rights, civil liberties and freedoms, and nurtures active civil society environment and media pluralism. State institutions such as parliament, the judiciary, Commissioner for Human Rights and Administrative Justice, police service, and many others have been empowered with some autonomous

status to ensure that rights, freedoms and liberties are enjoyed. Ghana is also a signatory to many international human rights treaties including the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol).

Ghana is considered as a beacon of democracy and good governance in Africa. The Global Peace Index 2020 ranks Ghana as the most peaceful country in the sub-region and third in sub-Saharan Africa.<sup>3</sup> On freedom of speech and press freedom, Ghana was ranked second in Africa in the 2020 World Press Freedom Index.<sup>4</sup> The country has made some significant gains in advancing human rights and particularly women's rights. In addition to the gains above, gender parity in school enrolment, access to health care, child and maternal health, access to potable water, women in public offices and leadership positions and social protection

\* BA Journalism (Ghana Institute of Journalism), MA Conference Interpreting (PAUGHSS), MPhil (HRDA) (UP); Bolingo Communications and Media Consult.

1 UNDP 'Women's Political Participation – a Catalyst for Gender Equality and Women Empowerment in Ghana' 2017.

2 USAID Ghana Country Development Cooperation Strategy (2020-2025) <https://www.usaid.gov/sites/default/files/documents/CDCS-Ghana-August-2025.pdf> (accessed 12 March 2021).

3 Institute for Economics and Peace 'Global Peace Index 2020: Measuring Peace in a Complex World' [www.visionofhumanity.org/wp-content/uploads/2020/10/GPI\\_2020\\_web.pdf](http://www.visionofhumanity.org/wp-content/uploads/2020/10/GPI_2020_web.pdf) (accessed 14 March 2021).

4 Reporters without borders '2020 World Press Freedom Index' <https://rsf.org/en/ranking> (accessed 23 September 2020).

programmes, amongst others, have improved.<sup>5</sup>

However, over the years, there have been concerns and interest about the full actualisation of the rights and freedom that the country has committed to. As indicated above, women constitute more than half of the Ghanaian population (51 per cent) and also make up the majority of voters with a proportion of 51.7 per cent.<sup>6</sup> Regrettably, women are often referred to as a 'vulnerable' or 'minority' group. Regrettably, women are often referred to as a 'vulnerable' or 'minority' group, and are underrepresented in decision making spaces. Women make up less than 15 per cent of legislators and less than 10 per cent of elected local government officials. Worst of all, women are subjected to horrendous practices such as witchcraft accusations and public lynching. Coupled with these are increases in cases of selective justice, police impunity and growing lack of public confidence in state institutions.<sup>7</sup> The 2020 Mo Ibrahim Index under the gender category described Ghana as 'slowly deteriorating' and then under the security and rule of law categories described Ghana as 'increasing deterioration'.<sup>8</sup> These have raised interest in the extent to which international and national human rights laws are enforced and protected. The next section studies the rights of women in Ghana.

5 'National Development Planning Commission Ghana Voluntary National Review Report on the Implementation of the 2030 Agenda for Sustainable Development' 2019.

6 Electoral Commission of Ghana, 2020.

7 US Bureau of Democracy, Human Rights and Labor 'Country Reports on Human Rights Practices: Ghana' 2019 <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ghana/> (accessed 12 March 2021).

8 Mo Ibrahim Foundation 2020 'Ibrahim Index of African Governance Index Report' 2020.

## 1.2 Overview of the status of women's rights in the country

Ghana has committed to many developmental and international human rights mechanisms for the development and the protection of the rights of women. These include African Union's (AU) Agenda 2063, the 2030 Agenda for Sustainable Development, the United Nations (UN) Convention on the Elimination of all forms of Discrimination Against Women (1980), the Beijing Platform for Action (1995), the African Charter (1986) and the Maputo Protocol (2003).

The 1992 Constitution of Ghana has made elaborate provisions for the realisation of women's rights. Generally, Chapter 5 guarantees fundamental human rights and freedoms. Articles 17 and 27 of the Constitution make provision for the promotion of equality and freedom from discrimination of all people.<sup>9</sup> More specifically, article 17(1) states that '[a]ll persons shall be equal before the law' and clause 2 provides that a person shall not be discriminated against on grounds of gender, and among others, race, colour, ethnic origin, religion, creed or social or economic status. Further, article 17(4) empowers parliament to pass laws to ensure that there is no discrimination.<sup>10</sup> Articles 13 and 15 of the Ghanaian Constitution are related to Maputo Protocol's article 4 on the protection of life and article 3 on the right to dignity, respectively. Article 26(2) of the Constitution prohibits harmful cultural practices as enshrined in article 5 of the Maputo Protocol.

9 The 1992 Constitution of Ghana.

10 The Constitution of Ghana (n 9) art 17.

The Constitution also states that Parliament shall 'enact legislation regulating the property rights of spouses',<sup>11</sup> which will provide for 'equal access to property jointly acquired during marriage',<sup>12</sup> adding that 'assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage'.<sup>13</sup> Similarly, article 7(d) of the Maputo Protocol provides that 'in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage'.

Article 27(1) of the Constitution of Ghana further provides that '[s]pecial care shall be accorded to mothers during a reasonable period before and after child-birth; and during those periods, working mothers shall be accorded paid leave'. This corresponds with article 13 of the Maputo protocol on economic and social welfare rights. Ghanaian women are entitled to at least 12 weeks of paid maternity leave under the country's Labour Act 2003 (Act 651). Article 13(i) of the Maputo Protocol provides that states parties shall 'guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors'.

In view of Ghana's commitment to the advancement of women, deliberate steps have been taken to establish a specific Ministry to direct and coordinate national efforts for the promotion of women's rights, known as the Ministry of Gender, Children and Social Protection (MoGCSP). The Ministry is mandated to coordinate and ensure gender equality and equity, promote the

survival, social protection and development of children, vulnerable and excluded persons with disability and integrate fulfilment of their rights, empowerment and full participation into national development.

The MoGCSP is faced with enormous challenges in accomplishing its mandate, considering that as of 2020, it was still allocated less than 1 per cent of the national budget. As it bears on its shoulders the huge task of ensuring the well-being and promotion of social welfare and realisation of the human rights of various vulnerable groups in the country, the Ministry is unable to implement programmes that are geared towards the implementation of women's rights as enshrined in the Maputo Protocol. Instead, the Ministry is compelled to spread the meagre funds it receives for the implementation of projects.

A paper issued by the Parliament of Ghana in 2017, titled 'Addressing gender imbalances in Ghana's Parliament' identified the following as causes for the low representation of women in leadership offices: social-cultural practices and beliefs which restrict the role of women to domestic responsibilities, thereby preventing women from actively participating in politics; women recording low levels of education as compared to men; and lack of financial support, especially for women in the informal sector.<sup>14</sup>

To reduce the monumental deficit of women in leadership positions, the Ghanaian government has introduced a policy to appoint at least 30 per cent of

11 The Constitution of Ghana (n 9) art 22(2).

12 The Constitution of Ghana (n 9) art 2(3)(a).

13 The Constitution of Ghana (n 9) art 2(3)(b).

14 Parliament of Ghana & Awuah 'Background Paper – Addressing Gender Imbalance in Ghana's Parliament' 2017, 2 [https://www.parliament.gh/epanel/docs/pub/Background%20Paper\\_2.pdf#viewer.action=download](https://www.parliament.gh/epanel/docs/pub/Background%20Paper_2.pdf#viewer.action=download) (accessed 12 March 2021).

women within public offices. However, that has not yet been implemented. Although short of the sub-Saharan regional average of 27.2 for women parliamentarians<sup>15</sup>, there has been some progress. The proportion of women in Ghana's current eighth parliament is 14 per cent, a marginal increase from the 13.4 per cent in the last parliament. As of February 2019, Ghana ranked 275th globally in terms of the percentage of women in parliament.<sup>16</sup> Concerning women elected as members of local government, the number has fallen from 11 per cent in 2009 to 5 per cent in 2017. The number of women candidates and running mates in Ghana's 2020 presidential elections increased from two in the 2016 election to five. Similarly, the proportion of women appointed as Metropolitan, Municipal District Chief Executives increased from 10.3 per cent in 2016 to 14.8 per cent in 2018.

Despite these steps, Ghana was ranked 107 in the 2020 Global Gender Gap Index which assesses gender disparities in the areas of economic, education, health and politics, going down 18 places from the 2018 ranking.<sup>17</sup> This might be due to several reasons. Although on the decline, obnoxious cultural and religious practices such as witch camps, *Trokosi* (a traditional religious servitude), and female genital mutilation (FGM) are still being practised in Ghana despite existence of laws banning these inhuman practices.<sup>18</sup>

For instance, in July 2020, a 90 year-old woman was publicly lynched on suspicion of witchcraft in Kafaba, a community in the Savannah Region of Ghana.<sup>19</sup>

## 2 Ratification of the Maputo Protocol

Ghana ratified the Maputo Protocol on 13 June 2007 with no reservations.<sup>20</sup> The year 2007 represented a watershed year for Ghana, as it marked 50 years of independence for the country. Ghana subscribes to the dualist tradition in international law, which means that the country must first ratify a treaty internationally and then proceed to incorporate it into domestic legislation before they can take effect. This is enshrined in article 75(2) of the 1992 Constitution which stipulates as follows:

A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by – (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.

15 Inter-Parliamentary Union 'Women in National Parliaments' 2019 <http://archive.ipu.org/wmn-e/classif.htm> (accessed 26 September 2020).

16 As above.

17 World Economic Forum 'The Global Gender Gap Report 2020' (2020) 9 [http://www3.weforum.org/docs/WEF\\_GGGR\\_2020.pdf](http://www3.weforum.org/docs/WEF_GGGR_2020.pdf) (accessed 26 September 2020).

18 GenCED 'Ghana scorecard on the Maputo Protocol' (2019) 19 <http://www.genced.org/wp-content/uploads/2019/02/ghana-scorecard-on-the-maputo-protocol.pdf> (accessed 29 September 2020).

19 E Adjetei 'Ghana: Outrage over the killing of a 90-year-old alleged witch' *Africa Feeds* 26 July 2020 <https://africafeeds.com/2020/07/26/ghana-outrage-over-the-killing-of-a-90-year-old-alleged-witch/> (accessed 29 September 2020).

20 African Union 'List of countries that have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 2019 <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 29 September 2020).

As explained in the Ghana Treaty Manual,<sup>21</sup> the process of ratification starts with the executive, where the ministry handling the subject matter, also known as the sponsoring ministry of the treaty, seeks advice from the Attorney-General and Minister for Justice in accordance with article 88 of the 1992 Constitution. This is to assess the obligations under the treaty and to find out if it conflicts with domestic laws in any way. The next step is the sponsoring ministry preparing a Cabinet memorandum for approval of the treaty, agreement or convention to be ratified by an Act of Parliament or resolution of Parliament. This is submitted to the Cabinet Secretary together with copies of the treaty, agreement or convention signed by the minister of the sponsoring ministry or signed by ministers where it is joint sponsorship. A decision is then taken at a Cabinet Meeting and the ministry is informed by the Cabinet Secretary with the Attorney-General's department (AG) in copy.

Following approval from Cabinet, the ratification may be done by an Act of Parliament or by Resolution of Parliament. Ratification goes through a set of parliamentary procedures. Once the ratification is done by parliament, a copy of the ratification is sent to the Ministry of Foreign Affairs for the appropriate instrument to be prepared. This is then sent to the President for signature and seal. The Ministry of Foreign Affairs then deposits the instrument to the appropriate depository and

sends copies to the sponsoring ministry and the AG.<sup>22</sup> The ratification process of the Maputo Protocol followed the same procedures. It was signed on 31 October 2003, ratified on 13 June 2007 and deposited on 20 July 2007.<sup>23</sup>

### 3 Government focal point on implementation

While the Ministry of Foreign Affairs is responsible for the ratification, the AG and Ministry of Justice is responsible for the implementation.<sup>24</sup> The Ministry of Gender and Social Protection is the ministry responsible for the implementation of the Maputo Protocol.

The AG, under the Office of the Attorney General and Ministry of Justice has two main divisions. These are the Civil and the Criminal Divisions. The Civil Division is responsible for assisting treaty ratifications and coordination of responses for Ghana's treaty obligations. In terms of channels of communication with the African Commission on Human and Peoples' Rights (African Commission), the flow of communication between the AG and the African Commission and participation by the AG in the African Commission's sessions has not been consistent. This was largely attributed to the fact that specific persons have not been assigned for this task. There are currently efforts under way to ensure the operationalisation of a committee that will

21 Attorney General and Ministry of Justice Ghana Treaty Manual (2009) <https://legal.un.org/avl/documents/scans/GhanaTreatyManual2009.pdf?teil=II&j> (accessed 4 March 2021).

22 As above. See also MG Nyarko 'The impact of the African Charter and the Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 95 at 98.

23 As Above.

24 African Union 'Report of the Promotion Mission to the Republic of Ghana' (2008) para 29 [https://www.achpr.org/public/Document/file/English/misrep\\_promo\\_ghana\\_2008\\_eng.pdf](https://www.achpr.org/public/Document/file/English/misrep_promo_ghana_2008_eng.pdf) (accessed 11 March 2021).

oversee the implementation of reporting obligations.

#### 4 Domestication or incorporation

Although Ghana has done well in signing and ratifying many international treaties, it has defaulted in domesticating these laws. For instance, during the AU Human Rights promotional visit to Ghana in 2008, Commissioner Bitaye reminded the Minister of Foreign Affairs and Attorney General and Ministry of Justice that despite Ghana's creditable record as a 'beacon of freedom in Africa' and also being one of the first countries to ratify the African Charter in 1989, it has not domesticated the African Charter.<sup>25</sup>

Similarly, over the years, researchers and institutions including Dankwa (1991),<sup>26</sup> Nyarko (2016),<sup>27</sup> the Africa Centre for International Law and Accountability (2017)<sup>28</sup> and Dzah (2020)<sup>29</sup> have lamented the failure of Ghana to domesticate most of the instruments that it has ratified, being a dualist country in terms of international law. For instance, Dzah (2020) describes Ghana as a 'dualist in pronouncement than in practice'.<sup>30</sup> That

notwithstanding, it is also important to acknowledge that Ghana has come far by way of incorporating and enforcing human and women rights. The African Charter and the Maputo Protocol are reflected in Ghana's laws, policies and programmes, and thus enforced accordingly.

It is important to recognise that the Maputo Protocol stands out as one of the progressive international instruments that provides a comprehensive guideline for promoting and actualising the rights and development of women. As a result, as noted by Garr and Danso<sup>31</sup> various governments have adopted policy measures that reflect the Maputo Protocol's provisions. To indicate this, the next paragraph proceeds to analyse how the various articles or elements of the Maputo Protocol have been incorporated in Ghanaian laws and policies.

Concerning the elimination of discrimination against women,<sup>32</sup> the government of Ghana has over the years passed various laws and established institutions to achieve this objective. For instance, article 17 of the Constitution provides for the promotion of equality and freedom from discrimination of all people.<sup>33</sup> More specifically, article 17(1) states that '[a]ll persons shall be equal before the law' and clause 2 states a person shall not be discriminated against on grounds of 'gender, race, colour, ethnic origin, religion, creed or social or economic status'. Any such discrimination against women can be punished in the courts. Further, article

25 African Union 'Report of the Promotion Mission to the Republic of Ghana' (2008) paras 28 and 58 [https://www.achpr.org/public/Document/file/English/misrep\\_promo\\_ghana\\_2008\\_eng.pdf](https://www.achpr.org/public/Document/file/English/misrep_promo_ghana_2008_eng.pdf) (accessed 11 March 2021).

26 E Dankwa 'Implementation of international human rights instruments: Ghana as an illustration' (1991) 3 *Annual conference – Africa Society of International and Comparative Law* 57-64.

27 Nyarko (n 22).

28 Africa Center for International Law and Accountability United Nations Third Universal Periodic Review Ghana, March 2017 Submission (2017).

29 GEK Dzah 'Transcending dualism: Deconstructing colonial vestiges in Ghana's treaty law and practice' in M Addaney and others (eds) *Governance, human rights, and political transformation in Africa* (2020).

30 As above.

31 EQ Garr & BJ Danso 'The state of human rights and women's empowerment in Africa: Focus on Ghana' *AU ECHO* (2016) 11-14.

32 Maputo Protocol art 2.

33 Maputo Protocol (n 32) art 17.

17(4) empowers parliament to pass laws to uphold the above.

The right to life, integrity and security of the person<sup>34</sup> and the right to dignity<sup>35</sup> are adequately guaranteed in the laws of Ghana. While the Constitution in articles 13 and 15 provides for the protection of life and dignity respectively, the Domestic Violence Act of 2007 (Act 732)<sup>36</sup> and the Criminal Code (Amendment) Act of 2003 (Act 646)<sup>37</sup> provide protection against gender-based violence (GBV) including acts of intimidation, harassment, psychological, physical and sexual abuse. Also, the establishment of the Domestic Violence and Victim Support Unit (DOVVSU) and the Domestic Violence (DV) Secretariat has increased attention and given some priority to addressing cases of abuse and violence against women and girls.<sup>38</sup>

Ghana adopted the Domestic Violence Act in 2007 (Act 732) which spells out details on what constitute violence, domestic violence, and types of violence. The Act also provides for protection orders and punishment in line with the gravity of the offence. This is further supported by an established

Domestic Violence Management Board. Further to this, there are over 130 special designated courts for the trial of domestic violence cases across the country.

It is important to note that Ghana's laws do not differentiate between national and international laws but are unified in the promotion and protection of human rights.<sup>39</sup> In article 1(2), the 1992 Constitution states clearly the supremacy of the Constitution and in article 12, it states that the human rights shall be applied by the institutions of state and enforced in the Courts accordingly. It goes further to state in article 40(c) that the government shall 'promote respect for international law, treaty obligations ...' and in article 40(d)(i) the state shall adhere to the African Charter of the AU. Clearly, the African Charter and the Maputo Protocol have legal recognition in Ghana, although not explicitly. The Supreme Court has also upheld the fact that just because Ghana has not domesticated certain international human rights, it does not mean that they cannot be enforced in the Court.<sup>40</sup>

## 5 Legislative reform or adoption

As explained in the previous section, the Constitution and other laws in Ghana contain several provisions that give effect to the Maputo Protocol. The Constitution and these other laws have not changed after the ratification of the Maputo Protocol but new legislation, policies and programmes are being guided by the Maputo Protocol.<sup>41</sup> Given that the provisions within the 1992 Constitution have been explained in

34 Maputo Protocol (n 32) art 4.

35 Maputo Protocol (n 32) art 3.

36 The Domestic Violence Act since 2007 (Act 732) provides details on what constitutes violence, the types of violence and the accompanying punishments. The Legal Instrument (LI) for the operationalisation the Act was passed in 2016.

37 Republic of Ghana Criminal Code (Amendment) Act, 2003 (Act 646). Amendment of Criminal Code, 1960 (Act 29). Para 97 to 103. The Criminal Code of the Republic of Ghana 1993. 'The Criminal Code (Amendment) Act, 1993.' (accessed 7 March 2021).

38 Ministry of Gender, Children and Social Protection (2020) Ghana National Action Plan 2 (2020-2025): Building Inclusive Secured and Peaceful Societies for Women and Girls (2020) <https://gnwp.org/wp-content/uploads/Ghana-NAP-2-2020-2025.pdf> (accessed 7 March 2021).

39 The Constitution of Ghana (n 9).

40 *NPP v Inspector General* [1996-97] SCGLR 729 761. See also Nyarko (n 22).

41 Garr & Danso (n 31).



previous sections, the focus in this section is on laws that address the provisions of the Maputo Protocol.

The Labour Act, of 2003 (Act 651) contains provisions that ensure the right to equal pay for equal work, in line with article 13(b) of the Maputo Protocol which calls on states parties to promote the right to equal remuneration for jobs of equal value for women and men. Furthermore, the Domestic Violence Act, of 2007 (Act 732)<sup>42</sup> criminalises violence against women and spells out the details on what constitute violence, domestic violence, and types of violence. A legal instrument (LI) to operationalise the Domestic Violence Act has been passed since July 2016; which in effect helps in smooth administration of the Domestic Violence Act. This legislation provides protection against GBV including acts of intimidation, harassment, psychological, physical and sexual abuse. This responds to article 4 of the Maputo Protocol – the right to life, integrity and security of the person.<sup>43</sup>

The country has also adopted an FGM Amendment Act (Act 484) and the Criminal Code (Amendment) Act of 2007. Since the enactment of these legislations, considerable success has been achieved in eliminating FGM from most parts of the country.<sup>44</sup> This is in line with article 5 of the Maputo Protocol which seeks to eliminate harmful

practices against women. Moreover, the Human Trafficking Act of 2005 (Act 694) which was passed to address the trafficking of mostly women and children and the Criminal Code (Amendment) Act of 2003 (Act 646)<sup>45</sup> respond to articles 4 and 5 of the Maputo Protocol.

The Children's Act of 1998 (Act 560), under section 14 puts the minimum age of marriage at 18, and children between 16 and 18 years may marry under parental consent. This addresses the related section in article 6 of the Maputo Protocol, despite it not criminalising the marriage of a child below 18 years, thereby allowing child marriages in certain instances. Similarly, the Intestate Succession Law of 1985 (PNDCL 111) was passed to address the challenges faced by spouses when either of them died without leaving a will disposing of his or her estate. It responds to article 7 of the Maputo Protocol, which requires that women enjoy the same rights as men in the case of separation, divorce or annulment. However, some of these provisions do not meet international standards. To rectify this shortcoming, the Property Rights of Spouses Bill 2013 which seeks to enhance property or estate distribution upon dissolution of marriage or death of a spouse, is awaiting adoption by Parliament at the time of writing.

## 6 Policy reform or formulation

Generally, the government of Ghana has not explicitly adopted or amended its policies or plans to give effect to the

42 The Domestic Violence Act since 2007 (Act 732) provides details on what constitutes violence, the types of violence and the accompanying punishments. The Legal Instrument (LI) for the operationalisation the Act was passed in 2016.

43 Maputo Protocol (n 32) art 4.

44 EQ Garr 'Female Genital Mutilation in Ghana: Feasibility Studies' (2009) Study conducted for International Action Against the Circumcision of Girls and Women (INTACT). eV., see also *28 too many* (2018). Ghana: the Law and FGM.

45 Republic of Ghana Criminal Code (Amendment) Act of 2003 (Act 646). Amendment of Criminal Code of 1960 (Act 29) paras 97 to 103, Criminal Code of the Republic of Ghana. 1993. 'The Criminal Code (Amendment) Act, 1993.'

Maputo Protocol. Nevertheless, several policies have been formulated that take into account provisions of the Maputo Protocol even if the latter has not been expressly mentioned in them. As indicated by Garr and Danso (2016),<sup>46</sup> since the Maputo Protocol came into force, it has given direction to institutional, policy and program development in Ghana.

For instance, the National Human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) and Sexually transmitted infections (STI) Policy of Ghana mentions the African Charter.<sup>47</sup> Relevant to the Maputo Protocol, the policy seeks to promote the wellbeing of people, prevent discrimination on the grounds health or HIV status, reduce mother to child transmission of HIV, and guarantees the rights of affected people.

The policies that implicitly take account of the Maputo Protocol include Ghana's Medium-term Plans. These are the Ghana Poverty Reduction Strategy (2002-2005), the Growth and Poverty Reduction Strategy (2006-2009), Ghana Shared Growth and Development Agenda (GSGDA) I (2010-2013) and the GSGDA II (2014-2017) and the 'Agenda for Jobs, Creating Prosperity and Equal Opportunity for all' (2018 to 2021).

In the current (2018-2021) Medium-term Development Plan, key policies that implicitly respond to the Maputo Protocol include the policy of free education for all Ghanaian children up to senior high school and redefining basic education to include secondary education which has made it possible for more girls to access education. These

girls' education would have been truncated for financial or cultural reasons. This reflects article 12(1)(a) and 12(2) of the Maputo Protocol on the right to education and training. The National Health Insurance Scheme (NHIS) has been restructured to improve women's access to health services particularly pregnant women and nursing mothers who can now walk into any public health centre and access health care services for free. The plan also seeks to introduce a quota system of at least 30 per cent active participation of women in public appointments and this responds to article 9 of the Maputo Protocol on the promotion of women's participation in political and decision-making positions.

There is also the Child and Family Welfare Policy, which was issued by the Ministry of Gender, Children and Social Protection in February 2015. The primary objective of the Policy is to help formulate child and family welfare programmes and activities which can prevent and protect children from all forms of violence, abuse, neglect and exploitation.<sup>48</sup> This policy responds to articles 2 (elimination of discrimination against women), 3 (right to dignity), 4 (right to life, integrity and security), 5 (elimination of harmful practices) and 12 (right to education and training) of the Maputo Protocol.

The Ghana's National Action Plan (2020-2025) for the implementation of UN Security Council Resolution 1325 (2000) on Women, Peace and Security, does not expressly mention the Maputo Protocol or the African Charter, but it is in response to UN Resolution and other international protocols and agreements.

<sup>46</sup> Garr & Danso (n 31).

<sup>47</sup> Government of Ghana. National HIV and AIDS, STI Policy (2013) 5.

<sup>48</sup> Ministry of Gender Children and Social Protection 'Child and Family Welfare Policy' (February 2015).

It addresses some provisions in the Maputo Protocol, namely article 4 on the right to life, integrity and security of person, article 10 on right to peace, and article 11 on the protection of women in armed conflicts.

The Ministry of Gender, Children and Social Protection (MoGCSP) also released Ghana's National Gender Policy titled 'Mainstreaming Gender Equality and Women's Empowerment into Ghana's Development Efforts' in May 2015. The policy is driven by five objectives, namely, women's empowerment and livelihood, women's rights and access to justice, women's leadership and accountable governance, economic opportunities for women, and gender roles and relations.<sup>49</sup> Similarly, this policy responds to many articles of the Maputo Protocol (2, 3, 4, 9, 12 and 13).

Additionally, both the Social Protection Policy and the Justice for Children Policy were issued by the MoGCSP in November 2015. The Social Protection Policy seeks to mainstream gender and disability issues in social protection in keeping with the policy objectives of the National Gender Policy.<sup>50</sup> The Justice for Children Policy seeks to 'establish a well-structured and coordinated Justice for Children system that promotes the well-being of children, prevents violence exploitation and abuse, protects children from harm and promotes justice for children'.<sup>51</sup> These address articles 5 and 8 of the Maputo Protocol.

The National Health Policy (NHP), revised in January 2020, has five policy objectives:<sup>52</sup>

- (i) To strengthen the healthcare delivery system to be resilient;
- (ii) To encourage the adoption of healthy lifestyles;
- (iii) To improve the physical environment;
- (iv) To improve the socio-economic status of the population; and
- (v) To ensure sustainable financing for health.

This implicitly gives effect, to a large extent, to article 14(2)(a) of the Maputo Protocol, which calls upon states to provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.

## 7 Impact on the judiciary

Generally, international human rights treaties such as the Maputo Protocol are not referred to in courts in Ghana. However, as noted by Nyarko,<sup>53</sup> there have been instances where the courts have had to resort to the African Charter. He cites three cases: (1) *New Patriotic Party v Inspector General of Police*, in which, the Supreme Court upheld the application of the plaintiff based on provisions including the African Charter; (2) In the case of *Ocansey and Others v The Electoral Commission of Ghana and Another*, although, the Court did not find a violation of the African Charter, it commented on it; and (3) In *Asare and Others v Ga West District Assembly & Another*, similarly, the court made refer-

49 MoGCSP 'National Gender Policy' (May 2015) viii.

50 MoGCSP 'Ghana National Social Protection Policy' (November 2015) 27.

51 MoGCSP 'Justice for Children Policy' (November 2015) 17.

52 Ghana's Ministry of Health 'National Health Policy' (January 2020) 8.

53 Nyarko (n 22).

ences to articles in the African Charter in its ruling.<sup>54</sup>

Also, a major case relating to women's spousal rights, *Mensah v Mensah*, was decided by the Supreme Court in 2012 based on the equality principle.<sup>55</sup> However, despite mentioning the CEDAW, there was no mention of the Maputo Protocol.

In the *Commissioner, Commission on Human Rights and Administrative Justice (CHRAJ) & 2 Ors v Ghana National Fire Service & Attorney General*, decided by the Human Rights Division of the High Court of Accra,<sup>56</sup> it is worth noting that the Maputo Protocol was mentioned by CHRAJ in its statement of case as first Applicant. In this case, two women were fired by the Ghana National Fire Service (GNFS) because they got pregnant prior to having served for three years.<sup>57</sup> CHRAJ filed the case on behalf of these women as part of its mandate as enshrined in section 9 of the Commission on Human Rights and Administrative Justice Act of 1993 (Act 456). In making its argument for the case, CHRAJ cited international human rights instruments Ghana had ratified, including articles 2(c) and (d) of the

Maputo Protocol.<sup>58</sup> In the judgment, the Judge noted the following:<sup>59</sup>

... this appears to be the first time the issue of discrimination on the ground of gender has come up for determination by this Human Rights Division of the High Court. Accordingly, resort to international human rights jurisprudence and that of other democratic jurisdictions will be necessary, and hopefully, helpful in the circumstances.

In its ruling, the Court cited key human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), CEDAW, and article 17 of Ghana's 1992 Constitution in which equality before the law and protection from discrimination are assured as fundamental human rights or freedoms. The Court ruled in favour of the first Applicant, stating that Regulation 33(6) of the Conditions of Service of the GNFS is discriminatory in effect, unjustifiable, illegitimate and illegal. The Court also ordered that the two women be reinstated by the GNFS, and that the latter pay the women a compensation in the sum of 50 000 Ghana Cedis (about USD 8260 at the time of the ruling).

The outcome of this landmark case constitutes a milestone for the promotion of women's rights in Ghana, in terms of domestic case law and awareness creation within the judiciary on the elimination of all forms of discrimination against women. It also calls for a

54 See Nyarko (n 22) at 104 and 105 for the full details of the cases.

55 *Mensah v Mensah*, S.Ct, Civil Appeal No J4/20/2011.

56 Judgment of the High Court, Accra, Human Rights Division, in Suit No HR 0063/2017 delivered on 23 April 2018.

57 Statement of Claim, para 2.12, in *The Commissioner, CHRAJ & 2 Ors v Ghana National Fire Service & Attorney General* Suit No HR 0063/2017.

58 Article 2(c) of the Maputo Protocol calls upon states to 'integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life'; and art 2(d) invites states to 'take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist'.

59 (sgd.) AK Yeboah, JA, Justice of the Court of Appeal – Judgment of the High Court, Accra, Human Rights Division, in Suit no HR 0063/2017 delivered on 23 April 2018.

review of internal policies of government and private institutions, most of which are discriminatory against women, especially when it comes to women's reproductive health rights.

## 8 Awareness and use by civil society

Drawing on the rights and freedoms guaranteed in the 1992 Constitution, the civil society space in Ghana is very liberal and has been conducive for rights-based activism and policy advocacy. As a result, the country has a vibrant and relatively balanced civil society organisations (CSOs) landscape. The CSOs have in various ways also championed the realisation of the rights and freedoms in the Constitution. For instance, the inspiration for the passage of the Domestic Violence Act came from the work of a coalition of women's rights organisations in 2005 who initiated national level public discussion on the problem of domestic violence.<sup>60</sup>

CSO engagement on the Maputo Protocol in Ghana seems robust, although this is being spearheaded by only few organisations. In 2020, the Women in Law and Development Africa (WiLDAF) embarked on a consultation with stakeholders, including government institutions in a bid to produce a report for Ghana on the Maputo Protocol by 2021. WiLDAF had previously coordinated the preparation of the Shadow Report to sixth and seventh Periodic Report of Ghana on CEDAW, which was submitted to the UN Committee on the Elimination of

Discrimination Against Woman in October 2014.<sup>61</sup>

The Institute for Democratic Governance (IDEG) in 2014 conducted a study to audit and monitor compliance of the Government of Ghana to 16 policy frameworks of the AU in order to establish the extent of compliance and facilitate a dialogue on addressing challenges to implementation.<sup>62</sup> These 16 instruments included the Maputo Protocol. The study observed that citizens need to be informed about the treaties and the contribution of such treaties to their well-being in order to hold their government accountable for implementation of the treaties. It concluded that most citizens did not know about the protocols and there was the need for public education. It later disseminated the report and engaged the Ministry of Foreign Affairs to popularise the AU protocols, accordingly.

In the assessment of compliance to the Maputo Protocol, the study found that Ghana's effort was geared towards combating the marginalisation of women, ensuring equal access to property jointly owned by married couples through the introduction of the Property Rights of Spouses Bill and the Intestate Succession Amendment Law, elimination of violence against women as well as the elimination of harmful cultural practices. The study concluded that much was being done to address the various provisions of the Maputo Proto-

61 WiLDAF 'NGO Shadow Report to 6th & 7th Periodic Report of Ghana on CEDAW' [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GHA/INT\\_CEDAW\\_NGO\\_GHA\\_18396\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GHA/INT_CEDAW_NGO_GHA_18396_E.pdf) (accessed 30 October 2020).

62 IDEG Study to Audit and Monitor Compliance and Implementation of Protocols, Conventions and Decisions of the African Union Member States: Ghana (2014).

60 Nyarko (n 22).

col, but more could be done by way of enforcing the existing laws and also, resourcing relevant ministries to implement the policies meant to realise the objectives of the Maputo Protocol.<sup>63</sup>

Another CSO engagement on the Maputo Protocol is a scorecard on the Maputo Protocol published by the Gender Centre for Empowering Development (GenCED) in January 2019. In the scorecard, GenCED states that the document was produced with the collaboration and inputs of the MoGCSP and the Gender Department of the Ministry as well as the CHRAJ.<sup>64</sup> The scorecard examined Ghana's implementation of two articles of the Maputo Protocol, namely, article 4 on the rights to life, integrity and security of the person and article 13 on economic and social welfare rights.<sup>65</sup> The scorecard found that Ghana has the necessary laws and institutional framework in place as required by the Maputo Protocol and is implementing and realising most of the objectives of the same. However, much needs to be done by way of enforcing the current laws, resourcing the institutions to implement policies and speeding up the passage of new laws that would ensure the full realisation of the rights in the Maputo Protocol.

To a large extent, although CSOs have the capacity to champion advocacy for awareness creation and accountability of government in the implementation of the Maputo Protocol, the majority of CSOs in Ghana hardly focus on promoting the implementation of the Maputo Protocol at national and sub-

national levels. This is also because funding for the CSO sector in Ghana is on the decline for many reasons. First, the sector is largely dependent on donor funding for its activities and secondly the country has attained a lower middle-income status because it has huge oil resource exploration potential and has experienced relative political stability. In addition, one of the key messages of Ghana's President, His Excellency Nana Addo Dankwa Akufo-Addo has been 'Ghana Beyond Aid'. Coupled with these factors, most CSOs in Ghana do not have core-funding. Instead, they have limited project-based funding which does not give them the scope to carry out such advocacy consistently.

## 9 Awareness and use by lawyers and judicial officers

As rightly noted by Nyarko,<sup>66</sup> various law schools in Ghana teach international law and as such some lawyers will have knowledge of the Maputo Protocol. Secondly, human rights lawyers and women lawyers in women's rights advocacy organisations have over the years demonstrated knowledge of the Maputo Protocol in their advocacy for policy and legal reforms. However, as to the explicit application of the Maputo Protocol in their cases in law courts, very little is known. The Ghana Legal Information Institute has a website with a repository of cases from the Supreme Court, the Court of Appeal and the High Court of Ghana. However, none of the cases mention the Maputo Protocol. Also, as discussed above, Nyarko<sup>67</sup> finds that so far only three cases in the courts have referred to the African Charter. These point to a generally low, or even inexistent, application of the

63 As above.

64 GenCED 'Ghana scorecard on the Maputo Protocol' (2019) 19 <http://www.genced.org/wp-content/uploads/2019/02/ghana-scorecard-on-the-maputo-protocol.pdf> (accessed 29 September 2020).

65 As above.

66 Nyarko (n 22).

67 As above.

Maputo Protocol in Ghana's court cases system.

The above development is disturbing since, as far back as 2007 and 2008, AfriMap, Open Society Initiatives for West Africa and IDEG<sup>68</sup> and Justice of the Supreme Court<sup>69</sup> have attributed the lack application of the Maputo Protocol and other international laws to limited knowledge by judges on international laws and have advocated for such training and capacity building.

## 10 Higher education and academic writing

Almost all the traditional public universities offer degree courses in law. These universities include the University of Ghana, Legon, the University of Science and Technology (KNUST), University of Cape Coast, the Ghana Institute of Management and Public Administration (GIMPA). Many private universities also offer law courses. These include Central University, Mountcrest University College, Zenith University College and Kings University College.

While most of these universities teach international law, which includes the Maputo Protocol, it is important to note that in some of the universities the course on international law is not compulsory.<sup>70</sup> Therefore, some law students may not have knowledge of international human rights.

The University of Ghana, Legon, which is the nation's first and largest university, officially inaugurated its Centre for Gender Studies and Advocacy (CEGENSA) in March 2006, with the aim of ensuring mainstreaming of gender equity 'in all aspects of the institutional culture of the university and Ghanaian society through high-quality research, teaching, learning and advocacy'.<sup>71</sup> In achieving its objectives, CEGENSA developed an Affirmative Action Policy, a Gender Policy and a Sexual Harassment Policy for the University, and offers two gender courses, namely 'Gender Issues in Africa's development' and 'Gender and Culture in Africa Studies Program'. These courses are taught at the undergraduate level, and only provide basic information on key gender concepts, and not on international human rights instruments.<sup>72</sup>

The establishment of gender units and gender centres in some universities in Ghana is a laudable initiative for two reasons. First, it provides a platform for the introduction of courses on women's rights instruments, including the Maputo Protocol. Second, it promotes gender mainstreaming in the culture of universities and educational institutions, especially in relation to the drafting of gender policies including policies on rape and sexual harassment. This is in line with article 12(1)(c) of the Maputo Protocol which calls upon states parties to 'protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices'.

68 AfriMap, Open Society Initiatives for West Africa (OSIWA) and The Institute for Democratic Governance (IDEG) 'Ghana: Justice sector and rule of law' (2007) 4; see Nyarko (n 22).

69 E Hanson 'Judges asked to sharpen skills in human rights matters' *Ghanaweb* 31 March 2008 [http://www.ghanaweb.com/public\\_agenda/article.php?ID=9713](http://www.ghanaweb.com/public_agenda/article.php?ID=9713) (accessed 30 September 2015); see Nyarko (n 22).

70 Nyarko (n 22).

71 CEGENSA 'A centre for change' [www.cegensa.ug.edu.gh](http://www.cegensa.ug.edu.gh). (accessed 30 October 2020).

72 As above.

Furthermore, academic research on the Maputo Protocol is low, if not absent, in law faculties and other university departments. For instance, out of 10,765 research articles available on the University of Ghana digital collections website as of October 2020, only one article made mention of the Maputo Protocol. Out of 6,143 doctoral and masters' theses available on the same website, only two masters theses submitted by students of the Legon Centre for International Affairs and Diplomacy (LECIAD)<sup>73</sup> was based on the Maputo Protocol.

## 11 Impact on independent human rights institutions

The CHRAJ was established in 1993 to protect human rights and to promote good governance. The human rights mandate empowers CHRAJ to protect the human rights enshrined in the 1992 Constitution.<sup>74</sup> Article 218 of the Constitution of 1992 gives the CHRAJ the mandate to investigate complaints of violations of fundamental human rights and freedoms. CHRAJ was also granted Affiliate Status during the 56th Ordinary Session of the African Commission in 2015.

The CHRAJ's human rights mandate enjoins it to monitor the implementation of international human conventions, such as the Maputo Protocol, that have been ratified by Ghana. CHRAJ has submitted its initial report to the African Commission, covering

2015 to 2017.<sup>75</sup> As part of its public education and outreach engagements, it focused on women's rights and gender discrimination covering the right to inheritance by women and children, dehumanising and harmful widowhood rites and domestic violence.<sup>76</sup>

Accordingly, CHRAJ applies the African Charter and Maputo Protocol in its programmes and engagements. In its reports, CHRAJ refers to some of the obligations of Ghana in terms of the African Charter and Maputo Protocol and follows up on decisions of the African Commission and makes recommendations to government based on its obligations.<sup>77</sup>

The National Commission for Civic Education (NCCE) is another independent state institution established to promote democracy and good citizenship through educating citizens on their rights and obligations.<sup>78</sup> The Research Department of the NCCE has carried research focusing on women, some of which includes research on witchcraft and human rights of women in Ghana published on September 2010, and a study on the role of women in traditional governance in Ghana, published in November 2011.<sup>79</sup>

## 12 State reporting

The Ministry of Foreign Affairs is responsible for reporting on Ghana's obligations and implementation of international treaties ratified by the country, including on the Maputo Protocol. The

73 The two studies are: Faisal Mutari, 'The Declaration on the Elimination of Violence Against Women and Women's Right in Ghana: a study of the implementation of the 2007 Domestic Violence Act' July 2018 and Ruth Minikuubu Kaburi, 'States and the protection of women in Africa: the perceptions of women survivors of domestic violence in Ghana July 2018'.

74 The 1993 CHRAJ Act 456.

75 CHRAJ 'Initial Report to the African Commission on Human and Peoples' Rights' (2018) 2.

76 As above.

77 Nyarko (n 22).

78 Art 231 of the Constitution.

79 NCCE 'Research Reports' available at <https://www.nccegh.org/publications/research-reports> (accessed 30 October 2020).



Attorney General and the Ministry of Justice and the sector Ministry, the MoGCSP play key roles in the development of the report. Information is not readily available on the process of preparing state reports to the African Commission. However, the discussion could draw on the experience of Ghana's report to the CEDAW Committee, as suggested by Nyarko.<sup>80</sup>

... the process commences with a consultative meeting of Ministries, Departments and Agencies (MDAs) and Civil Society Organisations (CSOs). A Drafters Committee is then constituted after which a request is made to various human rights institutions and the judiciary to provide information on their sectors. A Lead Consultant is then engaged to compile the report. The draft report is submitted to a validation workshop to enable MDAs, CSOs and development partners to discuss and comment on the draft report before it is finalised.

Ghana has so far submitted two reports to the African Commission on the implementation of the African Charter. The first report was submitted in 1993 for the period 1990 to 1992. The second report was submitted in 2001 for the period 1993 to 2000. Since then, no report has been submitted.

The AG was alerted of Ghana's outstanding reports in 2008. Various committees including inter-ministerial committees were put in place to ensure timely reporting, but they have been unsuccessful due to several challenges, namely: lack of funds and logistical support for the coordination of the Committee, the need for technical support in terms of capacity building for personnel of the AG's Department in drafting of state reports and poor coordination.

80 Nyarko (n 22) 109.

Despite this bleak outlook as concerns the status of Ghana's reporting obligations on the Maputo Protocol and the African Charter, the country has submitted three reports as part of the Universal Periodic Review (UPR) of the UN Human Rights Council (HRC). These reports were reviewed by the Human Rights Council during the first cycle in 2008, the second cycle in 2012 and the third cycle in 2017. Ghana also has, through its MoGCSP, submitted its report On Beijing+25 covering a five-year period (2014 to 2019).<sup>81</sup> From this, one can conclude that Ghana seems to perform better when it comes to meeting its reporting obligation for global human rights instruments, but records significant drawbacks as pertains the fulfilment of its reporting obligation for regional human rights instruments, such as the African Charter and the Maputo Protocol.

### 13 Communications

The African Commission has received six communications against Ghana.<sup>82</sup> None of the communications alleged violations of the Maputo Protocol. The AG, which is in charge of relating to the African Commission and ensuring that Ghana fulfils its reporting obligation, is the mechanism responsible for follow-up of communications and implementation of recommendations.

81 The report is available here [https://www.uneca.org/sites/default/files/uploaded-documents/Beijing25/ghana-beijing25\\_report.pdf](https://www.uneca.org/sites/default/files/uploaded-documents/Beijing25/ghana-beijing25_report.pdf) (accessed 30 October 2020).

82 *Dr Kodji Kofi v Ghana* Communication 6/88; *Coordinating Secretary of the Free Citizens Convention v Ghana* Communication 4/88; *International PEN v Ghana* Communication 93/93; *Abubakar v Ghana* (2000) AHRLR 124 (African Commission 1996); *Alfred B Cudjoe v Ghana* Communication 221/98; *Tsatsu Tsikata v Ghana* Communication 322/06.

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

The African Commission held one of its sessions in Accra, Ghana in 2008, a year after Ghana had ratified the Maputo Protocol. According to sources at the AG, no other promotional visits have been embarked upon by special mechanisms of the African Commission. Ghana has also had a commissioner on the African Commission called Professor Emmanuel Victor Oware Dankwa for 12 years (1993 to 2005) who was Vice-Chair, Chair and Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa.

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

Several hurdles prevent Ghana from maximising the opportunities available to strengthen the impact of the Maputo Protocol. The following are some of the critical factors that are impeding the impact of the Maputo Protocol in Ghana.

### **15.1 Awareness in key sectors**

African regional instruments seem not to enjoy high levels of visibility and awareness in several sectors of the country, including within government institutions, as compared to other global human rights instruments. As a result, there is a lack of knowledge about the Maputo Protocol. An example of this is the judiciary, where judges have cited other human rights instruments in determining cases, but not the Maputo Protocol.

### **15.2 Civil society engagement**

CSOs in Ghana, just like government institutions, seem more active on global spaces rather than African spaces when it comes to human rights instruments. However, CSOs that work at the international level with either the UN or AU are aware of the Maputo Protocol and use it in their advocacy efforts. CSOs that have very little interaction with these international platforms are unable to use the Maputo Protocol in their work to influence the promotion of women's rights in the country.

### **15.3 Capacity building**

Government officials occupying key positions require capacity building to participate in activities of the African Commission including meeting reporting obligations. Such capacity-building efforts must be sustained, considering periodic change in government which usually implies that new officers are appointed to head government institutions. Change in government also leads to change in priorities for government sectors.

### **15.4 Clarity on reporting obligation**

There is lack of clarity among government institutions on the state's channel of communication with the African Commission and the specific institution in charge of meeting Ghana's reporting obligations. Such lack of clarity impacts negatively on the capacity of state institutions to collaborate among themselves, and also the capacity of CSOs to engage state institutions. The AG ought to provide the much-needed clarity on this issue, so as to ensure synergy in its efforts and the activities of CSOs and other government institutions geared

towards the implementation of the Maputo Protocol.

### **15.5 Funding**

Lack of funding constitutes a major challenge when it comes to building the capacity of the government and CSOs to take active roles in engaging with the Maputo Protocol. The meagre budget allocation to the MoGCSP constitutes a major challenge in terms of the Ministry's ability to tackle head on, gender issues which require urgent attention. Similarly, the AG's Department is unable to fulfil its mandate on regional human rights instruments due to lack of resources. Further, most donor funding is linked to activities of the UN and other global instruments. This situation creates discrepancies which are evident in how often the state meets its reporting obligations towards international instruments versus the complete lack or delay in meeting reporting obligations towards the Maputo Protocol and the African Charter. Basically, engaging in processes for regional instruments loses its appeal when funds are non-existent.

### **15.6 The role of the media**

Many Ghanaian media practitioners do not make reference to the Maputo Protocol and regional human rights instruments when writing or reporting on women's issues, a situation which might be a reflection of the low level of engagement, advocacy and use of such instruments by CSOs. The Ghana Journalists Association (GJA) yearly awards has a category for 'Human Rights Reporting, Women and Children', which could provide an opportunity within the media landscape to sensitise journalists on reporting women's rights from a human rights perspective, with the inclusion of provisions of the Mapu-

to Protocol. It is necessary to educate the media about the Maputo Protocol since they need to understand the latter before being able to use it in their work.

## **16 Conclusion**

Although Ghana has made some progress when it comes to women's rights, the implementation of the Maputo Protocol has not been effective. The full and effective implementation of the Maputo Protocol has been impeded by several factors mentioned above, including the lack of domestication and failure of the legal system to use the Maputo Protocol in deciding cases relating to the violation of women's rights. State officials within government institutions, lawyers, judges and CSOs who are supposed to use the Maputo Protocol, have very little and often no knowledge of the same. In addition, due to the lack of clarity within government Ministries as to who is the main institution responsible for reporting, Ghana has defaulted in its reporting obligations on the African Charter and the Maputo Protocol to the African Commission. The Maputo Protocol is an important instrument that should be domesticated, implemented more explicitly and placed at the forefront of advocacy on women's rights in Ghana. If Ghana is to excel in the development of women and the protection of their rights, there must be allocation of both human and financial resources for this purpose.

# THE IMPACT OF THE MAPUTO PROTOCOL IN KENYA

*Josephat Kilonzo\**



## 1 Introduction

On 27 August 2010, the Kenyan people ushered in a transformative Constitution which engenders their aspiration for a society that is founded on essential values of human rights, equality, democracy, freedom, social justice, and the rule of law.<sup>1</sup> In particular, the Constitution has outlined numerous gains for women in matters such as elimination of gender discrimination, citizenship, gender equity with the electoral and political sphere, protection of women's land and property rights, and equal rights during and after dissolution of marriage.

Importantly, the Constitution recognises Kenya's place within the international community and its commitment to the obligations that accrue from international treaties and customary law. The Constitution provides that 'the general rules of international law shall form part of laws of Kenya'<sup>2</sup> and that 'any treaty or convention ratified by Kenya shall form part of the laws of

Kenya' under the Constitution.<sup>3</sup> Due to the prevailing constitutional dispensation in Kenya, the international obligations arising from the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) have to be adhered to by the country to the extent that the Maputo Protocol forms part of the laws of Kenya.

The country has significantly progressed in the protection of the rights of women as contemplated under the Maputo Protocol. Notably, since 2016, the judicial system is showing a better appreciation of Kenya's obligations under the Maputo Protocol while the civil society, human rights institutions and academics, among others, continue to take positive steps towards protecting the rights of women as demonstrated in this report. Although the government has taken systematic measures through enactment and implementation of legislation and policy, there are significant

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1 The Preamble of the Constitution of Kenya 2010.

2 Constitution of Kenya 2010 art 2(5).

3 Constitution of Kenya (n 2) art 2(6). See also Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority*; Initiative for Strategic Litigation in Africa (ISLA) Petition 3 of 2018, para 135 'The Supreme law in Kenya is the Constitution and if any general rule of international law or Treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails.'

challenges and gaps that hinder the full realisation of the rights under Maputo Protocol.

## 2 Ratification of Maputo Protocol<sup>4</sup>

As a show of commitment to human rights promotion and protection, Kenya ratified the African Charter on Human and Peoples' Rights (African Charter) on 23 January 1992 and deposited the instruments of ratification on 10 February 1992. While Kenya signed the Maputo Protocol on 17 December 2003, it ratified it on 6 October 2010, and deposited the instruments of ratification on 13 October 2010. The country ratified the Maputo Protocol in October 2010 against the backdrop of lobby groups' pressure.<sup>5</sup> This was barely two months after the promulgation of the Constitution.

The government took seven years to ratify the Maputo Protocol since it had certain concerns on some of its provisions such as article 10 that requires governments to reduce their military

budget so as to use the resources to facilitate women's development.<sup>6</sup> Further article 14(2)(c),<sup>7</sup> being interpreted as potentially allowing abortion, is outlawed by article 26 of the Constitution of Kenya of 2010.<sup>8</sup> Kenya thus entered a reservation on this provision as it was contrary to the country's Constitution. The Kenya National Commission on Human Rights (KNCHR) which is the body mandated to ensure the protection and promotion of human rights in Kenya, has advocated for the Kenyan government to lift its reservation on article 14(2)(c) of the Maputo Protocol in its yearly reports to the President of Kenya.

## 3 Domestication<sup>9</sup>

Pursuant to article 2(6) of the Constitution, the Maputo Protocol forms part of the Kenyan law. In its usage, it plays second fiddle to the Constitution because the latter is the supreme law of Kenya.<sup>10</sup> The Constitution contains a progressive bill of rights that espouses a

4 This section largely reflects the contents of C Bosire and others 'The impact of the African Charter and the Maputo Protocol in Kenya' in Centre for Human Rights *The impact of the African Charter and the Maputo Protocol in selected African states* (2012); ST Griffith & P Ogendi 'The impact of the African Charter and the Maputo Protocol in Kenya' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) because the history of ratification of Maputo Protocol by Kenya has not changed.

5 The ratification of the Maputo Protocol by Kenya coincided with the 'Africa Women's decade' which was organised by the African Union and was hosted in Nairobi. FIDH 'Kenya: Concrete steps required to demonstrate government's will to respect women's rights' 11 October 2010 <http://www.fidh.org/Kenya-Concretesteps-required-to-demonstrate> (accessed 12 November 2020).

6 Griffith & Ogendi (n 4) 116.

7 'State Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes the right to decide whether to have children, the number of children and the spacing of children.' See also, the General Comment 2 on art 14(1)(a)(b)(c) & (f) and art 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa available at [https://www.achpr.org/public/Document/file/English/achpr\\_instr\\_general\\_comment2\\_rights\\_of\\_women\\_in\\_africa\\_eng.pdf.pdf](https://www.achpr.org/public/Document/file/English/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf.pdf) (accessed 3 March 2021).

8 Parliament of the Republic of Kenya 'National Assembly Official Report' 13 April 2005, 644-646.

9 This section largely reflects the contents of Bosire and others (n 4) because the history of domestication of Maputo Protocol by Kenya has not changed.

10 Constitution of Kenya (n 2) art 2(1) 'the Constitution is the supreme law of the Republic.' See also Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority*; Initiative for Strategic Litigation in Africa (ISLA) Petition no 3 of 2018, para 135

litany of justiciable rights. For instance, article 43 on socio-economic rights adds Kenya to a list of few countries in Africa to recognise justiciability of socio-economic rights in the constitution.<sup>11</sup>

The adoption of the 2010 Constitution was the culmination of a long struggle to embed constitutional reforms, respect for the rule of law and human rights in Kenya. The African Charter and other human rights instruments such as the Maputo Protocol informed the political and constitutional reform agenda in the run up to the adoption and promulgation of the Constitution in 2010.<sup>12</sup> The African Charter provisions were incorporated in the repealed constitution through a raft of amendments and political truce actions such as the introduction of multi-party democracy in 1992,<sup>13</sup> gender considerations in nominating members of parliament,<sup>14</sup> and the addition of 'sex' as one of the grounds for prohibition of discrimination.<sup>15</sup> Suffice to add that these rights form part and parcel of the current Kenyan Constitution.

Many present-day statutory laws borrow heavily from the Maputo Protocol. They include the Protection Against Domestic Violence Act 2015, Marriage Act 2014, Matrimonial Property Act 2014 and Kenya National Commission of Human Rights Act 2011. The other treaty that continues to influence legislation and policy is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>16</sup> There is also a litany of policy formulations as illustrated below that greatly draw inspiration from the Maputo Protocol.

#### 4 Legislative reform or adoption

As already noted, the promulgation of the Constitution of Kenya heralded a new era for the promotion and protection of human rights in Kenya. Ever since the promulgation of the Constitution on 27 August 2010, there have been numerous developments on the legislative front aimed at mainstreaming gender values that directly and indirectly contribute to the realisation of the rights in the Maputo Protocol.

The Constitution of Kenya 2010 enshrines within its articles many of the aspirations and provisions that are captured in the Maputo Protocol. Prior to the adoption of the Constitution, the Maputo Protocol was a trigger for wide ranging reforms in various sectors of the Kenyan legal structure. The enactment of the Sexual Offences Act 3 of 2006 that affords protection to victims of sexual offences was a milestone towards the implementation of the Maputo

'The Supreme law in Kenya is the Constitution and if any general rule of international law or Treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails.'

11 South Africa and Ghana remain some of the few countries that recognise socio-economic rights within their constitutions. See JC Mubanguzi 'Constitutional protection of socio-economic rights' (2006) 2 *African Journal of Legal Studies* at 1 as quoted in Griffith & Ogendi (n 4).

12 GK Kuria 'The rule of law in Kenya and status of human rights' (1991) 16 *Yale Journal of International Law* 217. See also Bosire and others (n 4) 67.

13 Sec 1A of the 1969 Constitution (Act 5).

14 Sec 82(3) of the 1969 Constitution.

15 Statutes such as the Children's Act make direct reference to the UN Convention on the Rights of the Child. Sec 7(2) of the Act provides that: 'Every child shall be entitled to free basic education which shall be compulsory in accordance with Art 28 of the United Nations Convention on the Rights of the Child'.

16 The Protection against Domestic Violence Act 2 of 2015 [https://ke.boell.org/sites/default/files/uploads/2015/08/protectionagainststdomesticviolenceact\\_2015\\_1.pdf](https://ke.boell.org/sites/default/files/uploads/2015/08/protectionagainststdomesticviolenceact_2015_1.pdf) (accessed 12 November 2020). See also Griffith & Ogendi (n 4) 116.

Protocol. The Act substantively defined the whole spectrum of rape and simplified the rules of evidence to afford better protection to the victims of this heinous crime that robs the victims of their dignity.

At the time of the adoption of the Constitution in 2010, many of those opposed to its passage among them the Catholic Church based their opposition on its provisions on abortion. Article 26(4) of the Constitution provides that abortion is not permitted unless in the opinion of a trained health professional there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other law. The contest was delicately balanced to capture the aspirations of the Maputo Protocol and the religious protest it had attracted in Kenya. Section 6 of the Health Act of 2017 provides for the right to reproductive health which includes the right to be 'informed about and have access to reproductive health services including to safe, effective, affordable, and acceptable family planning services.' The recent attempts to introduce a Reproductive Health Bill into the Senate have, however, met opposition from quarters such as the National Council of Churches of Kenya.<sup>17</sup> Based on the opposition facing the adoption of the Reproductive Health Bill, it is evident that challenges to realisation of reproductive health as contemplated under Maputo Protocol still exist.

In addition to pieces of legislation such as Human Immunodeficiency Virus (HIV) Prevention and Control Act of 2006 and the Environmental Coordi-

nation and Management Act of 1999 which were enacted prior to the promulgation of the Constitution, some of the pieces of legislation adopted under the new constitutional dispensation that give effect to Maputo Protocol include the Prohibition of Female Genital Mutilation Act 2011, Land Act 2012, Land Registration Act, Marriage Act 2014, Matrimonial Property Act 2014, the Protection Against Domestic Violence Act 2015, the Legal Aid Act 2016, the Community Land Act 2016, and the Health Act 2017.

The Prohibition of Female Genital Mutilation Act 2011 seeks to root out the culture and practice of female genital mutilation.<sup>18</sup> Despite the enactment of the Act, clandestine practices of female genital mutilation in several communities such as the Abakuria, Abagusii and the Maasai still subsist to date.<sup>19</sup> The Marriage Act 2014 and the Matrimonial Property Act 2014 promote the equality of women and men during and after the dissolution of marriage in line with article 45 of the Constitution and the Maputo Protocol.

The Protection Against Domestic Violence Act 2015 provides a framework of ensuring safety for women who are the major victims of domestic violence while at the same time ensuring that the violators of the victims' human rights are brought to book. Unfortunately, the regulations that are envisioned under the Act to give effect to its provisions have not been adopted thus leaving an enforcement gap. Further, the government is yet to allocate enough resources for the full implementation of

17 The Bill was introduced in the Senate by Nakuru County Senator Susan Kihika but faced a lot of opposition by various actors under the auspices of it allowing immorality, abortion etc.

18 The Prohibition of Female Genital Mutilation Act 32 of 2011.

19 S Kimani et al 'Female genital mutilation/cutting: Emerging factors sustaining medicalization related changes in selected Kenyan communities' (2020) 15(3) *PloS One*.

the Act. The Legal Aid Act of 2016 provides an avenue for women, especially indigent and vulnerable women, to access justice. However, regulations that are required to give effect to the Act are yet to be adopted.

The Land Act 2012 and Land Registration Act are progressive acts that provide for the protection of women's interest in land. However, the Land Laws (Amendment) Act of 2016 watered down the protection of women's rights to land and property. Pursuant to the Land Laws (Amendment) Act of 2016, spousal rights over matrimonial property are no longer considered as overriding as was the case initially under section 28 of the Land Registration Act. Section 93 of the Land Registration Act which provided for the requirement of spousal consent before charging or transfer of land was deleted and replaced with another phrasing that reads as follows:

... if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

However, even if the law has changed, the practice has not changed in terms of the requirement to provide spousal consent in case one intends to charge or transfer land. While these amendments appear subtle, they are a clawback on rights of women to land and property.

The Community Land Act of 2016 and Community Land Regulations of 2017 are progressive as regards women's right to land. Section 30 of the Act provides that women, men, youth, minorities, persons with disabilities and marginalised groups 'have right to equal

treatment in all dealings in community land.' Notably section 30(5) of the Act provides that 'every man or woman married to a member of a community shall gain automatic membership of the community.' These provisions are progressive and instrumental to the protection of rights of women to land and property considering that in Kenya, 70 per cent of land is communal land.

Despite the progress on legislative enactment and reform, there have been futile attempts by the Parliament of Kenya to legislate on the two thirds agenda that seeks to ensure that parliament does not have more than two thirds from one gender.<sup>20</sup> Whipping by political parties and a litany of court orders have not served the intended purpose of enacting a law that will help in the implementation of the constitutional decree. In 2021, the Chief Justice Honourable David Kenani Maraga was served with six petitions all seeking him to advise the president to dissolve parliament on grounds that it had failed to enact the law within the stipulated time-frame. Invoking article 261(7) of the Constitution, the Chief Justice transmitted the advice to the president reigniting yet another court battle that moved to the High Court of Kenya for determination.<sup>21</sup> The whole gender issue was reduced to a battle of wits as to what the word 'shall' means as used in article 261(7) of the Constitution of Kenya. At

20 The Chief Justice's advice on the dissolution of parliament dated 21 September 2020 notes the failed attempts made by the Parliament of Kenya to legislate on the two thirds act. Despite whipping from within and without parliament by the political party leaders this has not come to pass.

21 Business Daily, Judge freezes Maraga's Parliament dissolution advisory 25 September 2020 <https://www.businessdailyafrica.com/bd/economy/judge-freezes-maraga-s-parliament-dissolution-advisory-2371660> (accessed 3 March 2021). The cases are still pending before the High Court of Kenya as at 3 March 2021.



the time of writing, the matter was still pending in the High Court of Kenya.

Following the divisive 2017 election in Kenya and the handshake that brought about a truce between the two main contenders in the race, President Uhuru Kenyatta and former Prime Minister Raila Amolo Odinga, that birthed the Building Bridges Initiative (BBI), there have been a number of recommendations made by the BBI Committee.<sup>22</sup> Some of the recommendations require policy formulations, legislative interventions and even a referendum to amend the Constitution. Some of the proposed policies will have far reaching effects on the realisation of the rights of the Maputo Protocol and indeed several constitutional requirements. The requirement to enact a National Policy Guide on Citizen Education will equip the citizens, including women, with skills, expansion of knowledge and in the end improve the quality of life of Kenyans.

## 5 Policy reform or formulation

In the ordinary Kenyan legislative journey, policy formulation is a critical stage. Various government departments and agencies formulate policy statements that inform a legislation of a substantive Act with the exception of self-executing policies. There are various policies that cover rights enshrined in the Maputo Protocol. The following policies and their impact on the realisation, protection, promotion and safeguarding of women rights are worth mentioning.

The Kilimanjaro Campaign that was launched in the year 2015 with a focus on mainstreaming Global and Regional Movement on Women Land Rights has led to the adoption of the Rural Women's Land Rights Charter by the Ministry of Lands of the Republic of Kenya. The Charter that was adopted in the year 2016 espoused the concerns, issues and aspirations of women living in rural Kenya with regards to land. Land-based livelihoods are at the centre in rural Kenya and therefore a denial of this essential commodity is tantamount to subjecting the women to starvation. The Charter identified ten reform areas that formed key recommendations necessary for securing the land rights for women living in rural areas. The recommendations are: involvement of women in land governance from the local level, enacting of policy on women and rights, engendering of land administration and governance, strengthening women's access to ownership of land, regulation of acquisitions of land that affects women, access to formal and informal justice to women concerning their land rights, social inclusion for women with disability and those suffering from such endemic diseases as HIV/AIDS to land, protection of land rights activists for women who are subject of ridicule, and accountability in the delivery of the demands as captured in the charter. The mainstreaming and realisations of these aspirations will ensure that women have access to land through individual and joint titling and thus accord them an invaluable source of livelihood.

Kenya adopted the National Policy on Gender and Development in 2019.<sup>23</sup> The policy was spearheaded by the Ministry of Public Service, Youth and Gender and the National Gender and

22 Available at [www.bbi.go.ke](http://www.bbi.go.ke); Final 19 October 2020 Designed Steering Committee Report Formatted Edition (filesusr.com) (accessed 3 March 2021).

23 Sessional Paper 2 of 2019.

Equality Commission. The policy seeks to create a just, fair and transformed society free from gender-based discrimination in all spheres of life. The policy seeks to ensure that women are involved in key aspects of labour and employment, education, health, land, housing, agriculture, environment and natural resources, peace and security, governance, information and communications technology (ICT) and respect for human rights. The policy has tasked both the national and county governments and other state agencies, organs and independent commissions and offices with ensuring its implementation, integration and realisation of the policy.

Kenya launched the Kenya National Action Plan on International Women's Day 2016. The Action Plan was launched on 8 March 2016. It was primarily created to provide a framework for the steady implementation and realisation of the United Nations Security Council Resolution 1325 (UNSCR 1325). The Action Plan encompasses the pillars of participation and promotion, prevention, protection and relief and recovery. The Action Plan will ensure that women do not suffer the greatest violations during conflicts and victims of events such as the post-election violence in Kenya are accorded the necessary physical and psychological medical support. It also aims to save the women from the scourge of lack of financial independence that leaves them vulnerable to atrocities such as domestic violence.

Lack of awareness and access to the judiciary is also a key hindrance towards achieving justice for all. In this regard, the Alternative Justice Systems Baseline Policy and Policy Framework were adopted in August 2020. This policy is a momentous step towards the

transformation of the judiciary that the Constitution of Kenya 2010 set out to achieve. The policy seeks to ensure expeditious justice for all Kenyans, including women.

The Ministry of Energy in Kenya also adopted a Gender Policy. The Policy that was launched in November 2019 seeks to, among others, raise awareness on gender, change attitudes and inculcate a gendered work culture in this very important sector. The energy sector is a key element in the development agenda of any country. This policy is therefore timely in ensuring that equal opportunities are available to all practitioners and Kenyans. The policy will go a long way in providing a framework for all state and non-state agencies to mainstream gender in all the projects that they undertake under the energy sector. The policy follows in the footsteps of its role models and partners such as the African Union, the New Partnership for Africa's Development (NEPAD) and the Economic Community of West African States (ECOWAS) Centre for Renewable Energy and Energy Efficiency that have gender policies as part of their working structures.

In addition, the National Policy for the Prevention and Control of HIV/AIDS and Sexually Transmitted Infections (STIs) which was adopted under the HIV Prevention and Control Act of 2006 in 2016, focuses on the prevention of HIV Infections among key populations in Kenya.<sup>24</sup> These policies are human rights based and acknowledge and seek to enforce key provisions of various international instruments on prevention of infections of the above diseases.

24 The Policy was launched in March 2016 by the Ministry of Health.

The Ministry of Lands formulated the National Land Policy in 2009 with the aim of guiding the country towards efficient, sustainable and equitable use of land for prosperity and posterity.<sup>25</sup> Arising from the policy, several acts concerning land such as the Land Act, the Land Registration Act and the enabling regulations have been enacted. The Land Registration Act for instance recognises the important role that land plays for critical economic, social and cultural development. The act entails overriding interests towards any transaction on land and, among others, requires several consents such as spousal consent to sell, transfer and charge land. These legal requirements that derive their lifeline from the National Land Policy of 2009 have gone a long way in ensuring equality, equity and according women a lifeline to unleash their economic and social potential.

In realisation of the toll and the seriousness of sexual violence in Kenya and committed to implementing the right to the dignity of women, Kenya drafted the National Guidelines on Management of Sexual Violence in Kenya,<sup>26</sup> to give general guidance on management of sexual violence in Kenya. These Guidelines have a keen focus on medical, psychological and legal needs of the survivors of sexual violence. Sexual violence robs the victims, mostly women and children, of their dignity and therefore the guidelines offer grounds for ensuring comprehensive care for the victims.

The state has also enacted the National Housing Policy,<sup>27</sup> which is a right step in implementing the Constitu-

tional requirement in article 43 on accessible and adequate housing and to reasonable standards of sanitation. The Policy that is updated from edition to edition seeks to enable low income households to access housing, basic services and infrastructure necessary for healthy living in urban and pre-urban areas. The policy also seeks to provide a framework for slum upgrading. Suffice to note that a vast majority of single mothers have low income status, dwell in the slum areas like Kibera within the Nairobi City County and cannot afford decent housing. The policy comes in handy and helps in the realisation of one of the Big Four Agenda of the President of Kenya. Despite the policy and other progressive measures to enhance the right to housing and property rights, women and other members of their families still face forced evictions. In the recent past, and during the global coronavirus pandemic, women and children were evicted in the Kariobangi and Ruai areas of Nairobi City County despite court orders in the form of injunctions against the intended evictions.

Article 43 of the Constitution of Kenya provides for several socio-economic rights. Among the rights are the rights to highest attainable standards of health, food, social security, clean and safe water, accessible and affordable housing. In this regard, President Kenyatta developed the Big Four Agenda that is geared towards creating jobs that will ultimately improve the people's standards of living and enable them to meet their basic needs. The key themes of the agenda are enhancing manufacturing, food security and nutrition, universal health coverage and affordable housing. However, the prospect of realising the Big Four Agenda is hindered by many challenges such as corruption, delays and the COVID-19 pandemic.

25 Sessional Paper 3 of 2009 on National Land Policy.

26 3rd Edition published in 2014.

27 Sessional Paper 3 of 2016.

## 6 Court judgments

Courts in Kenya continue to build up judicial philosophy that borrows more from the provisions of the Maputo Protocol when deliberating on legal issues surrounding the rights of women in Kenya. Various judicial officers have, therefore, invoked and relied on the provisions of the Maputo Protocol while deliberating over issues such as political representation, equality, discrimination of women, abortion, maternal health care and human dignity as demonstrated in this part.

In March 2017, following a petition presented by the *Center for Rights Education and Awareness and 2 others v Speaker the National Assembly & 6 others*, the High Court issued a declaration that the National Assembly and the Senate had failed in their constitutional obligation to bring into force the constitutional principle that not more than two thirds of the members of the two houses, the National Assembly and the Senate, should be of the same gender.<sup>28</sup> The court arrived at this decision having been persuaded by the Kenya Human Rights Commission which invoked Kenya's international obligations to uphold equality in political representation entrenched in article 9(1)(a) of Maputo Protocol.

Regarding discrimination, the provisions of the African Charter played an important role in a petition that was brought before the High Court of Kenya in 2016 challenging the constitutionality of the criminalisation of homosexual conduct. However, the petitioners were unsuccessful in arguing that the criminalising sections (162 and 165) of the

Penal Code contravened assorted rights entrenched under the African Charter including the rights to elimination of discrimination on the grounds of sexual orientation.<sup>29</sup>

In May 2018, the Federation of Women Lawyers, while relying on article 7 of the Maputo Protocol, moved the High Court to challenge the constitutionality of section 7 of the Matrimonial Property Act (MPA) in Kenya. On the one hand, section 7 of the Act provided for the division of matrimonial property solely on the grounds of contribution, but also based on the principles of gender equality. On the other hand, article 7 of the Maputo Protocol contemplates that both men and women shall enjoy the equitable sharing in property owned jointly as a result of the marriage. As such, the court was tasked with establishing whether section 7 of the MPA was unconstitutional. The Constitutional Court in its deliberation proceeded to dismiss the petition on a finding that section 7 of the MPA was constitutional.<sup>30</sup>

With regard to maternal health care, the High Court of Kenya, early in 2018, also awarded damages of Kshs. 2,500,000 (about USD 22,500) to the petitioner in *J O O v Attorney General & 6 others* based on the declaration that the petitioner's right to dignity was violated. The court relied on different provisions<sup>31</sup> of the Maputo Protocol to establish that the verbal abuse meted against the petitioner when they sought mater-

28 *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* (2017) eKLR

29 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* para 65 & 400.

30 *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* (2018) eKLR para 59.

31 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art 2(1), 3(4), 4(1), 4(2)(b), 5, 14(1).

nal health care from the fifth respondent (Bungoma County Referral Hospital) in that case contravened the right of respect of dignity that is inherent to all human beings.<sup>32</sup> Further, in *Federation of Women lawyers & 3 others v Attorney General & 2 others*, the High Court upheld the provisions of the Maputo Protocol regarding the right of women of reproductive age to safe abortion in the event the pregnancy threatens the life and health of the mother or the foetus. The decision was also accompanied by the orders for compensation of the family of a victim who lost her life because of unsafe abortion.<sup>33</sup>

The High Court in *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (2017) affirmed the equality between men and women relying on article 27 of the Constitution and article 8 of Maputo Protocol which provides that 'women and men are equal before the law... and that states should take appropriate measures to ensure effective access by women to judicial and legal services including legal aid.'<sup>34</sup> The Petitioners in this case argued that based on the two-thirds gender principle under article 27(8) of the Constitution 'there should have been another female judge recommended for appointment to the Supreme Court instead of Hon. Justice Lenao-la.'<sup>35</sup> The nomination of Justice Lenao-la to the Supreme Court meant that of the seven judges constituting the Court,

five would be men and two would be women.

However, the High Court held that considering other provisions of the Constitution, the Judicial Service Commission Act 2011 and the Supreme Court's jurisprudence, the Judicial Service Commission was not in breach of the Constitution following the recommendation of Honorable Justice Lenao-la as a judge of the apex court.<sup>36</sup> The High Court stated:<sup>37</sup>

It would have been ideal to recommend a woman for appointment, but that is not to say an ideal situation is the same as a clear breach of the Constitution or the law on the two-thirds gender. Even if one applied a mathematical formula to the question at hand, the result would invariably have been the same, that two-thirds is 5 while one-third is 2. The number of judges being uneven, the figure can only be approximate and not exact. The 1st respondent cannot be blamed for that.

Further, in the case of the *Coalition on Violence Against Women & 11 others v Attorney General & 5 others*,<sup>38</sup> which related to violence against women during the 2007-2008 post-election violence in Kenya, the High Court in December 2020 held that sexual violence was an infringement on the right to life under article 4 of the Maputo Protocol. The court relied on *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty* 1996 AIR 922 where the Supreme Court of India held that rape violated the right to life. The High Court held that the petitioners' rights to life, prohibition of torture,

32 *J O O (also known as J M) v Attorney General & 6 others* (2018) eKLR.

33 *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others* (n 31); *East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* (2019) eKLR.

34 *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (2017) eKLR para 31.

35 *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (n 35) para 22.

36 *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (2017) eKLR para 41.

37 As above.

38 *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* (2020) eKLR; Petition No 122 of 2013.

protection of law were violated 'during the 2007-2008 post-election violence, as a result of the failure of the Government of Kenya to protect those rights and awarded damages for the violations.'

Whether or not litigating parties have been keen to invoke the provisions of the Maputo Protocol during litigation, the courts in Kenya have been keen to uphold the provisions of the Maputo Protocol. However, in many other instances that warrant the same, some of the courts have failed to invoke the Maputo Protocol while deliberating on issues it covers comprehensively as they considered the provisions of the Constitution to be sufficient.

## 7 Awareness and use by civil society

Various non-governmental organisations (NGOs) in Kenya have been active in advocating awareness and actively participating in the promotion of rights protected under the Maputo Protocol. The Centre for Rights Education and Awareness (CREAW), CRADLE the Children Foundation, and the Independent Medical Legal Unit (IMLU) fall among eight other NGOs in Kenya that currently have observer status with the African Commission on Human and Peoples' Rights (African Commission).<sup>39</sup> First, they participated in the last state reporting procedure by the government of Kenya where they submitted shadow reports on Kenya's compliance with the African Charter and the Maputo Protocol. In addition, the NGOs educate and create awareness among citizens, inspire community-led activism and mobilise with affiliated

networks to advance the protection of women rights as contemplated under the Maputo Protocol.

Owing to the concluding observations issued by the African Commission on Kenya's state report, the NGOs have been keen to hold Kenya accountable to implement the recommendations to ameliorate the rights of women in Kenya. For instance, CREAW in 2017 was active in holding the government of Kenya accountable for implementing the constitutional principle in Kenya that guarantees political representation of women in both elective and appointive positions in the country.<sup>40</sup> The same role has also been played by other NGOs that do not enjoy observer status with the African Commission such as the Federation of Women Lawyers in Kenya (FIDA-Kenya) Women's Link World Wide and Article 19 East Africa.<sup>41</sup>

Apart from holding the government accountable, civil society has also been actively involved in protecting and promoting awareness of the rights of women throughout the country through publications, programs and initiatives targeted at improving the state of women rights in Kenya. For instance, the Women's Empowerment Link in Kenya has been actively involved in promoting the education of girls in Kenya while fighting violence against women through advocacy for the development of policies and legislation. In addition they push for the enforcement of existing legislation through court

39 African Commission 'NGOs Granted Observer Status' <https://www.achpr.org/states/detail?id=25> (accessed 12 November 2020).

40 *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (29).

41 *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* (2019) eKLR

processes.<sup>42</sup> The NGO, under the same mission also dedicates 16 days of activism every year to undertake activism campaigns throughout the country.<sup>43</sup>

The Kenya Land Alliance which advocates for women's land and property rights relies on the Maputo Protocol either directly or indirectly in its programming and advocacy work. The Kenya Human Rights Commission (KHRC) also relies on the Maputo Protocol directly or indirectly in community trainings, capacity-building workshops, monitoring and documenting human rights violations, and creation of platforms to increase protection of women's rights violations.

While there is a level of awareness about Maputo Protocol among civil society organisations in Kenya, there is still room for improvement. Civil society organisations at the grassroots level often focus on domestic law and may not have a high level of awareness about the Maputo Protocol compared to those who work at the regional level.

## 8 Awareness and use by lawyers

Public Interest litigation is a fertile area of practice in Kenya. This development can largely be attributed to the impetus created by the promulgation of Constitution of Kenya 2010 which is an anchor for public interest litigation.<sup>44</sup> The practitioners in this area rely on the provisions of the Maputo Protocol to advance their arguments and make their cases, albeit, to a limited extent. In *Centre for Rights and Education Awareness*

& 2 Others v Speaker of the National Assembly & 6 Others 2017,<sup>45</sup> the advocates argued that the Parliament of Kenya had failed to enact law to implement the requirement that not more than two thirds of elected and appointed members should be of one gender. The petitioners argued that the Constitution espouses the equality in law of women and men, who are entitled to enjoy equal opportunities in the political, social, and economic spheres. The state is required to enact and adopt affirmative action programs and policies to redress any disadvantages suffered by individuals or groups because of past discrimination.

In *Re Estate of CCBH (Deceased)* 2017<sup>46</sup> the applicants cited the provisions of article 2 of the Maputo Protocol. The applicants averred that Kenya is bound by, among others, the Maputo Protocol and the CEDAW to respect, protect, and enforce the rights of children to inherit from their parents without discrimination of any kind without regard to their gender. In *JOO (also known as JM) v Attorney General & 6 Others*,<sup>47</sup> the petitioner argued that she was a woman from a low-income background and thus could not afford maternal care at a private hospital in Bungoma County. In their submissions, the petitioners and *amicus curiae* submitted, relying on the Maputo Protocol and CEDAW, that the state is morally obligated and legally mandated to take appropriate measures to eliminate discrimination against women in the field of healthcare to ensure on a basis of equality of men and women, access

42 Women's Empowerment Link 'Elimination of Violence against Women and Girls' <https://wel.or.ke/elimination-of-violence-against-women-and-girls/#1542034290604-3739a91f-0d4b> (accessed 16 March 2021).

43 As above.

44 Art 22 of the Constitution of Kenya (n 2).

45 *Centre for Rights and Education Awareness & 2 Others v Speaker of the National Assembly & 6 Others* (n 29).

46 *Re Estate of CCBH (Deceased)* (2017) eKLR.

47 *JOO (also known as JM) v Attorney General & 6 others* (n 33).

to health care services including those related to family planning.

In the earlier cases like the *Satrose Ayuma v the Registered Trustee of Kenya Railways Staff Retirement Scheme*,<sup>48</sup> the petitioners' advocates relied on the Maputo Protocol to make their case against the state's decision to evict squatters living in land belonging to the former Kenya Railways without proper guidelines and the provision of alternative areas of settlement.

While there is progress, the use of the Maputo Protocol provisions by lawyers is not a complete success. Due to biases of practice and lack of awareness on how to best apply the provisions of the Maputo Protocol, many lawyers still do not rely on the Maputo Protocol in the practice of law. Awareness needs to be created to better protect, fulfil and promote the realisation of the rights in the Maputo Protocol.

## 9 Incorporation in law school education

Kenya, through the Council of Legal Education (CLE), has accredited twelve law schools<sup>49</sup> that offer Bachelor of Laws Degree, with the University of Nairobi and Strathmore Law School being accredited to offer Master of Laws. The former also offers Doctor of Philosophy Degrees in Law. Human

Rights as a course is taught in all these universities at different stages. Courses on gender are also taught in all the universities. At the University of Nairobi, the course Human Rights Law is taught as a compulsory subject in third year. Additionally, in fourth year, human rights is one of the five thematic areas of specialisation. Students who opt for this specialisation are exposed to in-depth study, research and information that prepares them for postgraduate specialisation. At the postgraduate level, the Centre for Human Rights and Peace Studies established at the university since September 2012 offers, among others, a multi-disciplinary course in human rights. There are also aspects of human rights taught in a number of other core units such as Constitutional Law that focuses on the progressive Bill of Rights, the different chapters of the Constitution and International Humanitarian Law, amongst others.

At the same university, the curriculum includes Equality Law. This unit is offered as a compulsory subject for students in fourth year. It exposes the students to the aspects of equality and equity between men and women. One of the core instructors of this course unit is Dean Emeritus Professor Kameri-Mbote, an advocate of women empowerment. The course is also taught by Mr Lawrence Mute, a Commissioner of the African Commission. Additionally, Gender and the Law is also offered in fourth year as an elective. Reliance on the provisions of the Maputo Protocol is core to the teaching of the two courses. Gender and the Law as a unit focuses on the impact of gender on the dominant constructions of citizenship, nationhood, nationality and belonging. The unit also puts into perspective to what extent men and women are able to effectively exercise their citizenship

48 *Satrose Ayuma and 11 Others v the Registered Trustee of Kenya Railways Staff Retirement Scheme and 2 Others*, Constitutional Petition No 65 of 2010.

49 These include the University of Nairobi with three campuses in Nairobi, Mombasa and Kisumu; Kenyatta University, Moi University, Strathmore University, Riara University, Kisii University, Jomo Kenyatta University of Science and Technology, Mount Kenya University, Catholic University of East Africa, African Nazarene University, Egerton University and Kabarak University.



rights, the barriers that exist to the effective exercise of these rights and the measures that can be adopted as responses. Additionally, Equality Law focuses mainly on the theoretical dimensions of the twin doctrines of equality and non-discrimination, analysing the equality jurisprudence of the Kenyan Courts historically and comparatively and equipping the students to think critically about the possibilities and limits of using law to address various manifestations of inequality and discrimination.

Human rights law exposes the students to the philosophical and historical aspects of human rights, the United Nations and African human rights systems. Inter-American and European systems are expanded on in later years of undergraduate and postgraduate studies. The students are also exposed to the agencies and various structures available for the protection, promotion, safeguarding of human rights including those provided for in the Maputo Protocol at the national, regional, and global fora.

In Jomo Kenyatta University of Science and Technology law school, the course International Human Rights Law is taught *in tandem* with International Humanitarian Law. At Moi University's School of Law, the course International Human Rights Law is taught under the Gender Studies module in the third year. In both universities as is the case with the University of Nairobi, human rights is also taught as part of the Constitutional Law, Public International Law although not to a considerable depth as compared to when it is taught as a subject of its own in upper years of study in both the undergraduate and postgraduate studies. The Strathmore Law School offers the courses International Human Rights Law, International

Humanitarian Law and Gender. The units equip the students with the philosophical and historical aspects of human rights and analyse the jurisprudence arising from within and without Kenya.

## 10 Academic writing on the Maputo Protocol

Unlike the period before 2016 when there was little reference to the Maputo Protocol by Kenyan academics,<sup>50</sup> in the post-2016 period, various academics have demonstrated their appreciation of the role of the Maputo Protocol in Kenya based on studies published in different authoritative periodicals. Hence, there has been more reference to the Maputo Protocol in academic writings discussing human rights issues.

In a study advocating for the transformation of laws governing access to safe abortion in Kenya, Jaldesa and five other authors appraise the role that the ratification of the Maputo Protocol could potentially play in transforming the access to safe abortion practices.<sup>51</sup> They observe that the Maputo Protocol played an essential role in creating awareness among the Kenyan public regarding the protection of reproductive rights and the authorisation of safe abortion if continued pregnancy is fatal.<sup>52</sup> As such, they perceive that the coming into force of the Maputo Protocol influenced the endorsement of the Constitution by the people of Kenya during the 2010 referendum, leading to inauguration of the Constitution that entrenched these principles.

50 See Griffith & Ogendi (n 4) 125.

51 G Jaldesa and others 'Advocacy towards changes on laws governing access to safe abortion in Kenya' (2014) 4(9) *Gynecology & Obstetrics* 2.

52 As above.

In 2018, Kameri-Mbote published her research making observations on the role of constitutions in creating the pathways to gender equality.<sup>53</sup> She raises concerns that despite the formal recognition of gender equality and non-discrimination in Kenya through formal laws such as the Constitution and the Maputo Protocol, gender equality is yet to be fully realised in Kenya. She attributes this problem to the inconsistency between formal and informal norms, considering the impact of informal norms especially in pluralistic legal contexts such as Kenya.<sup>54</sup> This is attributed to the realities of the fabric of Kenya's society where customary laws are still deeply embedded in the day to day lives of individuals. As such, she advocates for civil education and the constructive engagement of formal and the informal tenets of customary law to ensure the society is removed from tenets that go against acceptable norms of equality as contemplated by the formal laws. Kameri-Mbote, while writing on the fallacies associated with equality and inequality in legal discourses, conducts an exegesis of human rights regimes in Kenya as well as in Africa regarding the extent to which they protect equality. However, she notes that even though international laws such as the Maputo Protocol contemplate that all men and women are born equal, the nature and influence of power relations make inequalities inevitable among human beings.<sup>55</sup> Hence, she observes that it is the role of the judiciary to actualise the realisation of the robust exposition of rights that the

Kenyan legal regime depicts. Otherwise, it is not enough to have a progressive constitution if the rights enshrined in it are not enforced for the benefit of the holders of these rights, for instance, women, when it comes to the right to equality.

Biegon appraises the state of gender equality in political processes in Kenya by contrasting the legal dispensation establishing gender equality in Kenya while contrasting the same with the actual state of affairs. He observes that even though Kenya undertook to make positive steps towards promoting the participation of women in political processes, the country is yet to enact such laws that would guarantee the realisation of this undertaking.<sup>56</sup> He notes that the failure by the Parliament of Kenya to implement the constitutional two-third gender rule accounts for the finding that Kenya is yet to seal the gender gap when it comes to political representation in Kenya.

Kinyanjui and Kameri-Mbote in a 2018 study also investigated the efficacy of Kenya's constitutional promise of gender equality and non-discrimination.<sup>57</sup> From their findings, they concluded that even though the Constitution and the Maputo Protocol guarantee equal treatment of individuals regardless of their gender, the same guarantee does not apply to the enjoyment of opportunities.<sup>58</sup> As such, they argue that gender equality can only be realised when the formal recognition of equal treatment is supported by other

53 P Kameri-Mbote 'Constitutions as pathways to gender equality in plural legal contexts' (2018) 5 *Oslo Law Journal*.

54 Kameri-Mbote (n 54) 40.

55 P Kameri-Mbote 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' (2013) *Inaugural Lecture University of Nairobi* 4.

56 J Biegon *Gender equality and political processes in Kenya* 2 and 53.

57 SM Kinyanjui & P Kameri-Mbote 'The constitutional promise: Realising the right to gender equality and non-discrimination in Kenya' (2018) 19 *East African Law Journal*.

58 As above.

considerations that entail positive measures to guarantee substantive equality.

Muigua appreciates the critical role of the Maputo Protocol in his academic works that contemplate the essential role of gender equity in the achievement of inclusive development in Kenya.<sup>59</sup> In this regard, he argues that as long as Kenya's legal and institutional framework facilitates the participation of women in planning and management, the Maputo Protocol can guarantee gender equity as well as inclusive development.<sup>60</sup>

From a research conducted on pharmaceutical trade policies as they relate to access to medicine in Kenya, Ogendi makes the following findings.<sup>61</sup> First, that even though the African Charter cements the right to health with the support of various regional and national laws in Kenya, he anticipates that the right to health as conferred by these instruments can only be safeguarded by integrating trade policies with human rights impact assessment as a routine.<sup>62</sup> This, according to Ogendi, would ensure that pharmaceutical trade practices do not undermine the right of women and other Kenyans to health care by limiting access to medicines.

In a study published by the Economic and Social Rights Review, Wekesa attempts to establish the role that Maputo protocol plays in the realisation of the right to clean and safe

water in Kenya.<sup>63</sup> He observes that the African Charter and Maputo Protocol do not guarantee the right to clean and safe water.<sup>64</sup> Rather, the Maputo Protocol alludes to clean and safe water as conditions that are critical to women's right to health. As such, it is apparent that more reference has been made to the Maputo Protocol in research work pursued by different academics since 2016 as a slight, but significant, improvement from the preceding period between 2012 and 2016.

## 11 National human rights institutions

Article 59 of the Constitution of Kenya 2010 creates the office of the Kenya National Commission on Human Rights (KNCHR). The KNCHR is obligated to promote a culture of human rights in Kenya. It is tasked with a duality of roles both as an overseer and advisor on the promotion and protection of human rights. In its performance of the roles, it investigates violations and alleged violations of human rights and secures justice for the victims of those violations.

KNCHR is guided by the Paris Principles<sup>65</sup> developed and approved by the United Nations that guide the establishment and functioning of independent national human rights institutions. Towards this end and clothed under the Paris Principles, KNCHR is the principal state organ charged with ensuring compliance with global and regional human rights treaties and conventions ratified by the Republic of Kenya. The

59 K Muigua 'Attaining Gender Equity for Inclusive Development in Kenya' (2015) <http://kmco.co.ke/wp-content/uploads/2018/08/Attaining-Gender-Equity-for-Inclusive-Development-in-Kenya-20th-May-2015.pdf> (accessed 12 November 2020).

60 As above.

61 PO Ogendi 'Pharmaceutical trade policies and access to medicines in Kenya' (2019) 19 *African Human Rights Law Journal* 698.

62 As above.

63 M Wekesa 'Right to clean and safe water under the Kenyan Constitution 2010' (2013) 14(1) *ESR Review*.

64 As above.

65 Adopted by the United Nations General Assembly as Resolution 48/134 on 20 December 1993.

KNCHR is established at the end of the Bill of Rights of the Constitution and therefore constitutionally mandated and morally obligated to see to it that the human rights therein provided for and which to a large extent are captured in the Maputo Protocol are safeguarded, protected, promoted and achieved.

The KNCHR has endeavoured to increase and create awareness of human rights while striving to hold the government accountable in its obligation to promote and protect human rights in Kenya. It often gives its status update to the President and Parliament of the Republic of Kenya.<sup>66</sup> In the status report, the KNCHR has often advocated for the adoption of various protocols to the African Charter to expand the regime for the realisation of the Maputo Protocol. In its 2017/2018 Financial Year Report, the KNCHR urged the government of the Republic of Kenya to lift its reservation on article 14(2)(c) of the Maputo Protocol on termination of pregnancies.<sup>67</sup>

KNCHR has been at the forefront of the fight to ensure that affirmative action enshrined in various Acts and the Constitution is achieved. In the financial year 2016/2017, the Evaluation Report on Public Service Compliance with Values and Principles in articles 10 and 232 of the Constitution enforced the Access to Government Procurement Opportunities (AGPO) and indicated that the benefits accruing from the AGPO scheme had not hit their maximum. The KNCHR therefore has been championing for the full implementa-

tion of the AGPO affirmative action so as to avail enough resources to women, youth and people with disabilities.

Of great interest towards the realisation of the rights in the Maputo Protocol is the establishment of the National Gender and Equality Commission (NGEC). The NGEC was established pursuant to article 59 of the Constitution of Kenya and the National Gender and Equality Commission Act.<sup>68</sup> NGEC derives its mandates from articles 27, 43 and 59 of the Constitution of Kenya as well as Chapter 15 of the Constitution. The National Gender and Equality Commission Act of 2011 under section 8(c) provides that the NGEC is principally mandated to ensure the following:

... compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities and children.

The establishment of the NGEC post the 2010 Constitution is a critical and fundamental step in ensuring proper articulation of the women agenda and realisation of the provisions and aspirations of the Maputo Protocol.

## 12 State reporting

Since its combined 8th to 11th Periodic Report submitted in November 2015, Kenya is yet to submit another periodic report before the African Commission at the time of writing. In the 2014 report, the African Commission commended Kenya for the ratification of the Maputo Protocol in a decision that the government formalised ten years ago in Octo-

66 See art 254(1) of the Constitution and sec 53 of the Kenya National Commission on Human Rights Act 2011 (Revised 2012).

67 Kenya National Commission on Human Rights Annual Report and Financial Statements 2017/2018, 29 knchr.org (accessed 3 March 2021).

68 National Gender and Equality Commission Act 2011.

ber 2010.<sup>69</sup> Regarding the rights of women, the African Commission commended steps taken by the government of Kenya to introduce free maternal health care in public hospitals in an initiative that also saw the increase in the number of hospitals in the country from 167 to 275 as of the year 2012.<sup>70</sup>

The African Commission also found it commendable that the government of Kenya has been taking positive steps to alleviate women in Kenya from harmful and retrogressive practices such as female genital mutilation and gender-based violence through the establishment of the National Gender-Based Violence Campaign and the Anti Genital Mutilation Board respectively.<sup>71</sup> The African Commission also took note of such steps taken towards women empowerment such as the introduction of the UWEZO Fund Initiative and the commencement of the drafting of the Guidelines to Safe Abortion.

Despite the improvement in the participation of women in political representation, the African Commission was still concerned with the poor level of inclusion of women in decision-making.<sup>72</sup> As such, it maintained that there was room for improvement as regards gender equality in Kenya. The African Commission also registered its concerns regarding persistent retrogressive cultural practices such as female genital mutilation and early marriage.

In the 2015 report, the African Commission reported that Kenya had been decent in discharging its reporting obligation. However, its performance regarding cooperation with the African Commission has been called to question following the observations that Kenya, in its last report, did not provide comprehensive responses to questions invoked by the body. The African Commission, therefore, reported that poor cooperation fetters the accurate assessment of Kenya's level of compliance with its obligations under the African Charter. Further, it also took note of the fact that Kenya was yet to implement State Reporting Guidelines under the Maputo Protocol in its reporting, hence making it difficult to appraise the level of compliance.

Following those observations, the African Commission recommended that Kenya implements the constitutional principle that not more than two thirds majority of members in elective or appointive bodies as contemplated under the Constitution.<sup>73</sup> Further, it recommended that the government takes positive steps to end retrogressive traditional practices that cause harm against women such as female genital mutilation and early marriages. The African Commission also contemplated that as the government of Kenya finalises the Guidelines on Safe Abortion, it ought to expedite the legislative process on safe abortion. For efficacy in the assessment of its compliance with its obligations, the African Commission recommended that Kenya complies with

69 African Commission on Human & Peoples' Rights '*Concluding Observations and Recommendations on the 8th to 11th Report of the Republic of Kenya*' 2015 [https://www.achpr.org/public/Document/file/English/kenya\\_concluding\\_observations\\_8th\\_to\\_11th\\_periodic\\_report\\_.pdf](https://www.achpr.org/public/Document/file/English/kenya_concluding_observations_8th_to_11th_periodic_report_.pdf) (accessed 12 November 2020).

70 As above.

71 As above.

72 As above.

73 Article 27(6) of the Constitution of Kenya (n 2).

State Reporting Guidelines established under the Maputo Protocol.<sup>74</sup>

Since these recommendations were suggested to Kenya in 2016, the state is yet to implement the constitutional principle on the two-thirds gender rule. It is on this basis that the Chief Justice invoked article 261 of the Constitution by issuing an advisory to the President to dissolve Parliament in anticipation that the president shall do the same.<sup>75</sup>

Kenya is also yet to finalise the Guidelines on Safe Abortion as the completion of the same is dependent on the success of the Reproductive Health Care Bill<sup>76</sup> that at the time of reporting is yet to be subjected to the first reading in the Senate. The government has taken positive steps towards protecting women from retrogressive practices that cause harm to women and young children by criminalising such harmful acts and violence against women through constitutional protection<sup>77</sup> as well as through the enactment of the Prohibition of Female Genital Mutilation Act,<sup>78</sup> the Children Act,<sup>79</sup> and the Protection Against Domestic Violence Act.<sup>80</sup>

As at 2021 Kenya was among 18 African states that are late by three or more reports with Kenya being late by

three reports.<sup>81</sup> In March 2021, the country submitted its 12th to 13th combined report which is expected to be reviewed by the African Commission during its 69th Ordinary Session from 15 November to 6 December 2021.<sup>82</sup>

Notably, towards the end of 2019, the NGEAC together with stakeholders such as Ministry of Foreign Affairs, the Attorney General's Office and civil society organisations developed a draft scorecard for the implementation of Maputo Protocol. The scorecard is intended to enhance comprehensive reporting on Kenya's progress on the implementation of Maputo Protocol.

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

In Kenya, there are several factors that either enhance or impede the impact of Maputo Protocol and the African Charter. Factors that enhance the realisation of the rights outlined in the Maputo Protocol and the impact of the African Commission include:

- (a) the Constitution which has provided the requisite environment for the promotion and protection of the rights contained in Maputo Protocol;
- (b) the national human rights institutions such as the KNCHR and NGEAC which are actively involved in promotion and protection of human rights;
- (c) the judiciary which more often than not has been keen to enforce human

<sup>74</sup> *Concluding Observations* (n 69).

<sup>75</sup> *Margaret Toili & 6 others v Speaker of the National Assembly & 20 others* para 18 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/09/Copy-of-CJs-Advice-to-President.pdf> (accessed 12 November 2020).

<sup>76</sup> The Reproductive Healthcare Bill, 2019. Retrieved <http://www.parliament.go.ke/sites/default/files/2020-02/Reproductive%20Healthcare%20Bill%2C%202019.pdf> (accessed 12 November 2020).

<sup>77</sup> Article 29(c), 43(3) & 53(d) of the Constitution.

<sup>78</sup> Prohibition of Female Genital Mutilation Act 2011 sec 19.

<sup>79</sup> Children Act 2001 sec 119(1)(h).

<sup>80</sup> Protection Against Domestic Violence Act 2015 sec 3(a)(ii) & 19(1)(g).

<sup>81</sup> African Commission 'State Reports and Concluding Observation' <https://www.achpr.org/statereportsandconcludingobservations> (accessed 12 November 2020).

<sup>82</sup> Website of the African Commission available at <https://www.achpr.org/states/statereport?id=135> (accessed 7 October 2021).

rights as provided for under the Constitution and the Maputo Protocol;

- (d) civil society organisations which are equally engaged in the advocacy and protection of human rights; and
- (e) institutions of higher learning and scholars who are keen to teach and research on rights outlined under the Maputo Protocol.

However, several factors exist to impede the realisation of rights provided for under the Maputo Protocol and the impact of the African Commission. These factors include:

- (a) The reservations made by Kenya at the time of ratification of Maputo Protocol;
- (b) Continued manifestation and practice of certain cultural practices such as female genital mutilation;
- (c) Failure to link the rights outlined in Maputo Protocol to women's struggles especially in situations where vulnerable women do not know the procedures of claiming their rights;
- (d) Failure of the state to pass legislation and policies as well as delays in allocation of resources to ensure the realisation of rights provided under Maputo Protocol; and
- (e) Lack of gender disaggregated data which makes it a challenge to promote and protect women rights in certain instances.

# THE IMPACT OF THE MAPUTO PROTOCOL IN LESOTHO



*Itumeleng Shale\**

## 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 Baisokoli and another v Maseru City Council and Others* CC/1/2004 (*Baisokoli* 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'epo 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-archive/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).





# THE IMPACT OF THE MAPUTO PROTOCOL IN MALAWI

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## 1 Introduction

The Republic of Malawi is a landlocked country bordered by Zambia, Tanzania, and Mozambique. In 2020, the estimated population of Malawi was 19.3 million,<sup>1</sup> about 52 per cent being women.<sup>2</sup> Malawi is an agriculture-based economy where about 90 per cent of the land is held under customary systems.<sup>3</sup> In 2019, Malawi was ranked 142 out of 193 on the UNDP's Gender Inequality Index,<sup>4</sup> reflecting inequality in achievement between women and men in reproductive health, empowerment, and the labour market.

Malawi ratified the African Charter on Human and Peoples' Rights (African Charter) on 17 November 1989 and the Maputo Protocol on 20 May 2005. Between 1989 and 2005, Malawi adopted the 1994 Constitution, which included a fully justiciable Bill of Rights. The 1994 Constitution was the basis upon which the Maputo Protocol was ratified. In addition, it contained provisions on the ratification and domestication of international instruments.<sup>5</sup> The Bill of Rights<sup>6</sup> enshrines, among others, the protection of human rights and freedoms, the right to life, liberty, human dignity and personal freedoms. Section 20 of the Constitution provides for the right to equality and non-discrimination. It proscribes discrimination of any person on several grounds, including sex.

Additionally, section 24 of the Constitution provides for women's right to full and equal protection of the law, including passing laws to eliminate customs and practices that discriminate

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1 World Population Review (2020) <https://worldpopulationreview.com/countries/malawi-population> (accessed 7 November 2020).

2 NSO 2008 Census Gender Report.

3 EW Chirwa 'Land Tenure, Farm Investments and Food Production in Malawi' (2008) 18 *Research Programme Consortium on Improving Institutions for pro-poor growth* <https://assets.publishing.service.gov.uk/media/57a08bb2e5274a31e0000cf4/IPPGDP18.pdf> (accessed 29 March 2021).

4 UNDP Human Development Report 'The next frontier: Human development and the Anthropocene' (2020).

5 S Chisala-Tempelhoff & SS Bakare 'The impact of the African Charter and the Maputo Protocol in Malawi' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) at 151.

6 The Constitution of Malawi 2004 chap 4.

against women.<sup>7</sup> The Constitution further contains principles of national policy, the first of which is gender equality.<sup>8</sup> Through this principle, the state is mandated to achieve gender equality by ensuring the full participation of women in all spheres of Malawian society based on equal opportunities with men; the implementation of the principles of non-discrimination; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

In keeping with the spirit and prescriptions of the Maputo Protocol, Malawi has made various amendments and adopted a myriad of legislation to give effect to the provisions of the Maputo Protocol. One of the most notable changes made to the Constitution was raising a child's age from 15 to 18.<sup>9</sup> The African Committee of Experts on the Rights and Welfare of the Child made a landmark decision on the child's age in Malawi. This decision spurred, in earnest, the continuity of the efforts to raise the age of the child in Malawi. On 14 February 2017, the Constitutional Amendment Act No 36 was passed by Malawi's National Assembly, amending the Constitution to state that 18 years should be the minimum age of marriage. This change was prompted by a challenge filed by the Institute for Human Rights Defenders and Development in Africa (IHRDA) on behalf of Malawian children aged between 16 and 18 years against the Malawian Government challenging the definition of a child under section 23(5) of the Malawian Constitution.<sup>10</sup> Following

this amicable settlement, there were concerted lobbying efforts for the amendment by civil society organisations, traditional and religious leaders, UN agencies, and government Ministries and regional human rights mechanisms in a bid to strengthen legal protections against child marriage.

Further, the legal framework had been changing over time through court pronouncements such as the 2015 *Kashuga* case<sup>11</sup> where the High Court declared that for purposes of criminal justice, a child is anyone aged below 18 years old and declared section 2 of the Child Care, Justice and Protection Act invalid because it afforded special protection only to children under 16 years of age. As well as through statutes such as the Marriage, Divorce and Family Relations Act (2015) that sets the minimum age for marriage at 18 years old. The Constitution is therefore evolving and meeting new challenges as they arise.

Since the last report in 2016,<sup>12</sup> the Malawian Courts have been instrumental in upholding various rights and declaring some state acts as unconstitutional. For example, the Supreme Court of Malawi upheld rights to freedom of association and assembly when faced with a challenge to nationwide protests that called for the resignation of the Chairperson of the electoral commission.<sup>13</sup> On the other hand, 2020 mainly

7 The Constitution of Malawi (n 6) sec 24.

8 The Constitution of Malawi (n 6) sec 13(a).

9 Constitutional Amendment Act Number 36 (2017).

10 *IHRDA on behalf of children of Malawi v The Republic of Malawi* Communication 4/Com/001/2014 ACERWC.

11 *The State v the Second Grade Magistrates Court (Thyolo) and Malawi Prisons Service ex Parte Stanford Kashuga* (4 February 2015) Miscellaneous Civil Cause Number 129 of 2012.

12 Chisala-Tempelhoff & Bakare (n 5) 149.

13 *The Attorney General v Gift Trapence, Timothy Miambo, and Malawi Human Rights Defenders Coalition* (6 August 2019) Civil Cause Number 556 of 2019.

saw numerous constitutional challenges against the presidential election results of May 2019,<sup>14</sup> against a decision to ban phone-in radio programmes by the Malawi Communications Regulatory Authority,<sup>15</sup> the denouncement of rape, and extortion by members of the Malawi Police Service,<sup>16</sup> the unconstitutionality of a nationwide lockdown by the state,<sup>17</sup> and against a threat to judicial independence when the President attempted to oust the Chief Justice and de-facto Deputy Chief Justice.<sup>18</sup>

Women in Malawi have limited control and access to productive resources, limited power and access to opportunities for participation in the country's development, women are concentrated in the informal sector. There is little or no participation of women in government programmes, high incidences of violence against

women, and the feminisation of poverty and high rates of human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS).<sup>19</sup> While steps are being taken toward amendment and enactment of laws that will be in line with one of the main aims of the Maputo Protocol 'to take concrete steps to provide further attention to the human rights of women to eliminate all forms of discrimination and of gender-based violence (GBV) against women,'<sup>20</sup> the prevalence of violence against women and girls remains high. Civil society has been very active in mobilising protests against the rampant physical and sexual violence against women and girls and has been involved in implementing programmes on prevention and service delivery concerning violence against women and girls. Thus, civil society remains a critical voice in the realisation of women's rights.

The inherent dignity and worth of each human being need to be recognised. The state is implored to recognise and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.<sup>21</sup> The Constitution also provides that the only justifiable limitations to the rights enshrined in the Constitution are those that are necessary to ensure peaceful human interaction in an open and democratic society; the limitations must be prescribed by law, reasonable, and ought not to negate the rights in question.<sup>22</sup>

- 14 *Prof Arthur Peter Mutharika and Electoral Commission v Dr Saulos Klaus Chilima and Dr Lazarus M Chakwera* MSCA Constitutional Appeal Number 1 of 2020.
- 15 *The State v Malawi Communications Regulatory Authority* (on the application of The Registered Trustees of National Media Institute of Southern Africa and 3 others) – Constitutional Case Number 3 of 2019.
- 16 *The State v The Inspector General of Police, the Clerk of the National Assembly and the Minister of Finance ex-parte MM and 18 others* – Judicial Review Cause Number 7 of 2020 (High Court of Malawi, Lilongwe District Registry) before the Honourable Justice Kenyatta Nyirenda.
- 17 *The State (on application of Esther Cecilia Kathumba, Monica Chang'anamuno, Church and Society Programme the Livingstonia Synod of the Church of Central Africa Presbyterian & Prophet David F Mbewe) v President of Malawi, Ministry of the Malawi Government Responsible for Health, Inspector General of the Malawi Police Service, Commander of the Malawi Defence Force, Attorney General & Malawi Council of Churches* – High Court of Malawi, Constitutional Reference Number 1 of 2020.
- 18 *The State (on behalf of Human Rights Defenders Coalition, Association of Magistrates in Malawi, and Malawi Law Society) v The President of the Republic of Malawi and the Secretary to Government/Chief Secretary to the Government and the Women Lawyers Association as Amicus Curiae* Judicial Review Case Number 33 of 2020.

19 Malawi Country Report (2016) Progress Report on the Implementation of the United Nations Security Council Resolutions on Women, Peace and Security in East and Southern Africa.

20 Preamble of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

21 The Constitution of Malawi (n 6) sec 12(d).

## 2 Ratification of the Maputo Protocol

The Maputo Protocol was ratified on 20 May 2005 with no reservations entered by Malawi. The role of ratification is placed on the President, who may delegate such powers to ministers, ambassadors and high commissioners. This power encompasses the process of negotiating, signing, entering and acceding international agreements.<sup>23</sup> In practice, the Ministry of Foreign Affairs and International Relations is tasked with the practical aspects of ratification. Upon recommendations from relevant stakeholders or international actors, the Ministry of Foreign Affairs assesses Malawi's ability to commit to the obligations under the treaty and whether there is a need to make declarations or reservations. After that, the Treaties and Legal Affairs Department drafts an instrument of ratification/accession, which is then forwarded to the Ministry of Justice and Constitutional Affairs. If approved, the draft instrument is transmitted to the President for their consideration and signature. Once the President's signature is appended, the Ministry of Foreign Affairs sends the signed instrument for depositing at the relevant depository.

The government of Malawi ratified the Maputo Protocol, an instrument dedicated to women's rights, which considered the African perspective. Malawi had already ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), whose principles are also espoused in the Maputo Protocol.<sup>24</sup> However, Malawi needed to subscribe to a justiciable regional charter with

implementation mechanisms in proximity.

## 3 Government focal point

Implementation of the Maputo Protocol is through a multi-stakeholder process and roles. The Ministry of Gender plays a leading role in monitoring the implementation of provisions of the Maputo Protocol. The Human Rights Section of the Ministry of Justice and Constitutional Affairs compiles the state party report on Malawi's implementation of the Maputo Protocol. The Human Rights Commission is the enforcement agency of the Gender Equality Act. The Law Commission is responsible for the review of all laws, including gender insensitive laws.<sup>25</sup>

The focal members of the implementation of state responsibilities under the Maputo Protocol are relatively informed about the contents and usefulness of the Maputo Protocol. The Ministry of Justice and Constitutional Affairs considers the channel of communication with the African Commission to be satisfactory. However, it was noted that the state's responsibilities in relation to the Protocol could be improved by promoting the institutionalisation of the responsibilities.

<sup>22</sup> The Constitution of Malawi (n 6) sec 44.

<sup>23</sup> The Constitution of Malawi (n 6) sec 89(f).

<sup>24</sup> Republic of Malawi *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples' Rights 2005-2013*.

<sup>25</sup> Republic of Malawi *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples' Rights 2005-2013*.

#### 4 Domestication

The Maputo Protocol is a persuasive source of law in Malawi. International law is both a direct and indirect source of law.<sup>26</sup> After gaining political independence in 1964, Malawi adopted a new constitution that recognised statutory law, common law, and customary law as constituting the laws in force, subject to their conformity with the Constitution.<sup>27</sup> Although there is no consolidated Act of Parliament domesticating or incorporating the Maputo Protocol, some acts of parliament have domesticated aspects of the Maputo Protocol. For example, the Constitutional Amendment raises the minimum age of marriage to 18 years. Similarly, the Marriage Divorce and Family Relations Act emphasises the rights and equality of spouses by increasing the scope of what is recognised as a valid marriage to include marriages by repute and permanent cohabitation.<sup>28</sup> The Act also recognises direct and indirect contributions made by either spouse towards the acquisition of matrimonial property and insists on equitable distribution of that property at the dissolution of a marriage.<sup>29</sup>

International agreements entered into after the commencement of the Constitution form part of the law as long as they are approved by an Act of Parliament.<sup>30</sup> The approval by an Act of Parliament may be done in two ways: 1) through the enactment of a law that transforms the international agreement into domestic law, or 2) through the incorporation of provisions/clauses

from the international agreements into pieces of legislation.<sup>31</sup> Malawi has mainly done the latter through legislative reforms such as the Trafficking in Persons Act 2015, the Marriage Divorce and Family Relations Act 2015, Access to Information Act 2016, the HIV and AIDS (Prevention and Management) Act, and the Constitutional Amendment Act of 2017 which raised the age of a child from 15 to 18.

The Courts have recourse to international instruments in the determination of cases.<sup>32</sup> Malawi is a common law country, and determinations by the Courts form part of the law.<sup>33</sup> By extension, once international instruments are referred to by the High Court and the Supreme Court, their interpretations become binding upon the lower courts.

Malawi's Bill of Rights already guarantees the rights in the Maputo Protocol. However, there have been some changes to the Bill of Rights since the ratification of the Maputo Protocol. Most notable is the raising of the age of marriage from 15 to 18 years.<sup>34</sup> Provisions of the Maputo Protocol have also been incorporated into various law, such as the Gender Equality Act,<sup>35</sup> to eliminate harmful cultural practices<sup>36</sup> and uphold the rights to equality and non-discrimination enshrined in the Maputo Protocol.<sup>37</sup> The Prevention of

26 Chisala-Tempelhoff & Bakare (n 5) 149.

27 The Constitution of Malawi (n 6) sec 200.

28 Marriage, Divorce and Family Relations Act 4 of 2015 sec 12.

29 Marriage, Divorce and Family Relations (n 28) sec 74.

30 The Constitution of Malawi (n 6) sec 211.

31 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019).

32 *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995-2013* (n 24).

33 The Constitution of Malawi (n 6) sec 200.

34 Constitutional Amendment Act 36 (2017).

35 Gender Equality Act 3 of 2013.

36 Maputo Protocol art 5.

37 Maputo Protocol art 2.

Domestic Violence Act<sup>38</sup> and the Marriage, Divorce and Family Relations Act<sup>39</sup> give effect to articles of the Maputo Protocol in protecting and promoting equal rights and partnerships in marriage. The HIV/AIDS (Prevention and Management) Act,<sup>40</sup> the Deceased Estates (Wills, Inheritance and Protection) Act,<sup>41</sup> and the Trafficking in Persons Act are also relevant.<sup>42</sup>

## 5 Legislative reform or adoption

Although Malawi did not conduct a compatibility study before the ratification of the Maputo Protocol, it was considered an important document to ratify in line with Malawi's Constitution and Bill of Rights and CEDAW, which it had already ratified in September 1987.

As stated above, since the last study was conducted, Malawi has adopted

numerous pieces of legislation to incorporate various provisions of the Maputo Protocol. The concluding observations from the African Commission on Malawi's Initial and Combined Reports of 2013 encouraged Malawi to: enact a legislative framework for affirmative action for women, review laws and policies on abortion, amend the Prevention of Domestic Violence Act to include marital rape as a punishable offence, to raise the minimum age of marriage to 18 years, pass the Access to Information Act, decriminalise defamation and other laws limiting the right to freedom of expression, adopt a law protecting human rights defenders, pass the education Bill, review the definition of non-discrimination in the Disability Act to include reasonable accommodation.<sup>43</sup>

The most significant reform was the constitutional amendment in 2017 which changed a child's age to 18 years (section 23(6)). The Amendment also raised the age of marriage to 18 years (section 22(6) of the Constitution). This was in line with the recommendations made by the African Commission to adopt measures to effectively end early/child marriage and harmonise domestic laws and international standards on the minimum age of marriage.<sup>44</sup>

In terms of legislative measures, the Prevention of Domestic Violence Act (PDVA),<sup>45</sup> the Marriage Divorce and Family Relations Act (MDFRA),<sup>46</sup> the Gender Equality Act (GEA)<sup>47</sup> and the

38 Prevention of Domestic Violence Act 5 of 2006.

39 Marriage Divorce and Family Relations Act 4 of 2015 – the Long Title of the Act describes it as 'An Act to make provision for marriage, divorce, and family relations between unmarried couples, their welfare and maintenance, and that of their children; and connected matters.'

40 HIV and AIDS (Prevention and Management) Act 9 of 2018.

41 Deceased Estate, Wills, Inheritance and Protection Act 14 of 2011 – Long title of the Act describes It as 'An Act to provide for the making of wills and the devolution of property under a will; the inheritance to the estates of persons dying without valid wills; the protection of deceased estates; the administration of deceased estates; the prosecution of offences relating to deceased estates; the civic education of the public; the functions of courts in relation to deceased estates and for other connected matters.'

42 Trafficking in Persons Act 3 of 2015 – Long title of the Act describes it as 'An Act to make provision for the prevention and elimination of trafficking in persons; to provide for the establishment of the National Coordination Committee against Trafficking in Persons for the coordination and management of matters related to trafficking in person; and to provide for matters incidental thereto and connected herewith.'

43 African Union *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14-16.

44 *Concluding Observations and Recommendations* (n 42) 15.

45 Prevention of Domestic Violence (n 38).

46 Marriage, Divorce and Family Relations (n 28).

47 Gender Equality (n 35).

HIV and AIDS (Prevention and Management) Act (HIV Act)<sup>48</sup> contain provisions that criminalise different forms of violence and harmful practices against women including domestic violence,<sup>49</sup> marital rape during court-sanctioned judicial separation,<sup>50</sup> sexual harassment<sup>51</sup> and harmful cultural practices,<sup>52</sup> and forced HIV testing.<sup>53</sup> Despite these developments, there are still gaps with respect to compliance with the recommendations from the African Commission; for example, the laws have not been amended to criminalise marital rape and decriminalise safe abortions.

The PDVA makes provision for the prevention of domestic violence and the protection of persons affected by domestic violence through the issuance of protection orders, occupation orders and tenancy orders. The Malawi Law Commission has completed the review of the PDVA. A Bill was submitted to the Ministry of Justice and Constitutional Affairs.<sup>54</sup> The Criminal Procedure and Evidence Code (CP&EC) was amended in 2010 to provide stronger protections for children during trial, especially where they are victims of sexual abuse.<sup>55</sup> The CP&EC allows proceedings to be held in camera, does not require a victim to face her abuser

and encourages a victim-friendly approach during criminal proceedings.<sup>56</sup>

The Penal Code was amended in 2010, and it raised the age of defilement (sexual assault of a female child) from 13 years to 16 years of age.<sup>57</sup> Further, the Penal Code provides a blanket offence and punishment for all perpetrators of defilement without considering same-age consensual sex.<sup>58</sup> While the Penal Code aims to prevent sexual assault on young girls, the perpetrators also include young boys who are minors and have sex with their peers. Sexuality is broad and diverse, and the punishment for an abusive adult ought not to be like that of an experimenting teenager in a consensual relationship. This argument always elicits a heated debate on whether defilement changes its gravity when the perpetrator is the same age as the victim/survivor and when the sex is consensual. This is based on the overarching principle that minors, despite engaging in sexual acts with peers, cannot consent to sexual activity. On a related note, the High Court, on 14 July 2021, heard the case of an adolescent child of 15 years old who was arrested and charged with the offence of defilement due to having a consensual sexual relationship with another child. The applicant filed an application for crimi-

48 HIV and AIDS (n 40).

49 Prevention of Domestic Violence Act 5 of 2006 sec 2 defines domestic violence as 'any criminal offence arising out of physical, sexual, emotional or psychological, social, economic or financial abuse committed by a person against another person within a domestic relationship'.

50 Marriage, Divorce and Family Relations (n 27) sec 62.

51 Gender Equality (n 35) sec 6.

52 Gender Equality (n 35) sec 5.

53 HIV and AIDS (n 40) sec 14.

54 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 84.

55 Criminal Procedure and Evidence Code Cap 8:01 of the Laws of Malawi sec 81A.

56 Criminal Procedure and Evidence Code Cap 8:01 of the Laws of Malawi sec 81A – 'Where a victim of a sexual offence is to give evidence in any proceedings under this Code, the court may, of its own motion, upon application made by a party to the proceedings, or a victim of a sexual offence, make one or more of the following orders – (b) that a screen, partition or one-way glass be placed to obscure the witness's view of a party to whom the evidence relates, but not so as to obstruct the view of the witness by the magistrate or the judge and jury'.

57 Penal Code Chapter 7:01 of the Laws of Malawi sec 138.

58 As above – 'Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.'



nal review. He argues that the defilement provision in the Penal Code is overly broad and criminalises both abusive acts against children and non-exploitive consensual sexual conduct between adolescents.<sup>59</sup>

Human trafficking disproportionately affects women and girls, who make up to 70 per cent of trafficking cases and 90 per cent of victims trafficked into the sex industry worldwide.<sup>60</sup> The African Commission implored Malawi to expedite the enactment of what was then the Trafficking in Persons Bill.<sup>61</sup> Malawi enacted the Trafficking in Persons Act<sup>62</sup> that provides for the prevention and elimination of trafficking in persons. Trafficking in children attracts a sentence of 21 years imprisonment.<sup>63</sup> This sentence contradicts the Childcare, Justice and Protection Act's<sup>64</sup> provision on child trafficking that attracts a maximum sentence of life imprisonment.

Similarly, offences related to harmful practices are contained in three pieces of legislation, namely the Child Care Justice and Protection Act (CCJPA), the Gender Equality Act (GEA) and the HIV and AIDS (Prevention and Management) Act (HIV Act). The CCJPA proscribes any person from subjecting a child 'to a social or customary practice that is harmful to the health or general development of the child'.

Contravention of this provision attracts imprisonment for ten (10) years.<sup>65</sup> The GEA then prohibits the commission, engagement in, the subjection of another and encouragement of the commission of a harmful practice and makes it punishable by K1,000,000.00 and five years' imprisonment. The HIV Act criminalises practising a harmful practice and the permission or encouragement of another person to practice a harmful practice. These offences attract five years imprisonment and a fine of K5,000,000.00.<sup>66</sup> Each statute provides different definitions of what harmful practices are, depending on their context, and provides different sentences for that context. This can either be construed as a strong stance against harmful practices, however defined, but might also bring about confusion. For example, a female child is subjected to a harmful practice as defined by the GEA but is also exposed to HIV in terms of the HIV Act. Such a scenario would give discretion to the prosecutor as to which charge should be brought against an accused person.

Malawi is a nation that is heavily dependent on agriculture, which makes land a very precious resource.<sup>67</sup> Most of this land is held under customary and lineage-based systems of inheritance. In 2016, the Land Act<sup>68</sup> was amended. The Land Act abolishes land formerly known as customary land. The land now consists of two categories 1) public land, which comprises government land and unallocated customary land; and 2)

59 *Alex Jimu v the State* Criminal review Case 5 of 2021.

60 American College of Obstetricians and Gynaecologists, Human Trafficking (2019) <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2019/09/human-trafficking> (accessed 15 July 2021).

61 African Union, *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 16.

62 Trafficking in Persons (n 42).

63 Trafficking in Persons (n 42) sec 15.

64 Child Care, Justice and Protection Act 22 of 2010.

65 Child Care, Justice and Protection (n 64) sec 83.

66 HIV and AIDS (n 40) secs 4 and 5.

67 EW Chirwa 'Land Tenure, Farm Investments and Food Production in Malawi' (2008) <https://assets.publishing.service.gov.uk/media/57a08bb2e5274a31e000cf4/IPPGDP18.pdf> (accessed 29 March 2021).

68 Land Act 2 of 2016.

private land, which comprises leasehold land and customary estates. In the same year, Malawi also enacted a Customary Land Act<sup>69</sup> that further entrenches the equalisation of inheritance of customary land between the sexes despite lineage base.<sup>70</sup> These pieces of legislation ignore lineage-based systems of landholding prevalent in Malawi, most of which benefit women and girls under matrilineal systems of landholding.

The Deceased Estates Wills, Inheritance and Protection Act (DEWIPA)<sup>71</sup> prioritises the nuclear family in inheritance. It protects the nuclear family's interests in intestate property from the extended family. A revolutionary addition brought by the DEWIPA was the criminalisation of unlawful possession of a deceased estate, also known as 'property grabbing' that attracts a fine of K1,000,000.00 and ten (10) years imprisonment. This underscores the widows' rights<sup>72</sup> and the right to inheritance<sup>73</sup> provided in the Maputo Protocol.

Malawi has enacted legislation that protects numerous articles of the Maputo Protocol but still falls short in some areas, for example, the lack of criminalisation of marital rape. The MDFRA criminalises marital rape where spouses are judicially separated (judicial separation is court-sanctioned).<sup>74</sup> The African Commission, however, recommended that marital rape be unconditionally criminalised.<sup>75</sup>

Additionally, the continued criminalisation of abortion<sup>76</sup> and limited

grounds for legal abortion have not been expanded despite the high maternal mortality rates caused by unsafe abortions in Malawi.

## 6 Policy reform and formulation

There are several policies, action plans and strategies that have been adopted to give effect to the Maputo Protocol. The Malawi Growth and Development Strategy (MGDS III) is the overarching policy aimed at enhancing national productivity to boost global competitiveness while strengthening the nation's ability to deal with natural shocks and disasters.<sup>77</sup> The MGDS III provides a policy and strategic framework to sector policies and strategies with the main aim of fostering economic development. Article 13<sup>78</sup> of the Maputo Protocol encourages states parties to provide equal opportunities for women in work, career advancement and economic opportunities. The MGDS, therefore, contains five priority areas that address cross-cutting themes to be mainstreamed, these are gender; women and youth development; empowerment of persons with disabilities; management of HIV and AIDS and nutrition; environmental management; disaster risk reduction and resilience building; peace, security, and good governance. All these cross-cutting themes have specific target areas for women and the holistic improvement of women's circumstances.

69 Customary Land Act 3 of 2016.

70 Customary Land (n 69) secs 3, 13, and 20.

71 Deceased Estate, Wills, Inheritance and Protection Act 14 of 2011.

72 Maputo Protocol art 20.

73 Maputo Protocol art 21.

74 Marriage, Divorce and Family Relations (n 28) sec 62.

75 African Union *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14-16.

76 Penal Code Cap 7:01 of the Laws of Malawi secs 149 and 150.

77 Malawi Government *Malawi Growth and Development Strategy III (MGDS III)* (2017-2022) <https://www.afidep.org/publication/malawi-growth-development-strategy-mgds-iii-2017-2022/> (accessed 16 July 2021).

78 Maputo Protocol art 13.

Malawi has a National Gender Policy (NGP), effective from 2015 to 2020. The core objective of the NGP is to strengthen gender mainstreaming and women empowerment at all levels to facilitate the attainment of gender equality and equity in Malawi. This NGP is set for review and renewal but has addressed the concluding observation from the African Commission targeted at affirmative action for women. The NGP specifically aims to 'reduce gender inequalities and enhance participation of women, men, girls and boys in socio-economic development processes'.<sup>79</sup>

Malawi adopted a Sexual and Reproductive Health Rights Policy (SRHR Policy). A reading of the SRHR policy shows that it is in line with the Maputo Protocol,<sup>80</sup> the policy was adopted to guide Malawi's provision of integrated sexual and reproductive health services. The SRHR Policy focuses on reducing incidences of harmful practices and domestic violence among women, men, and young people, among other thematic areas.<sup>81</sup> It also ensures that victims of harmful practices and domestic violence have access to legal recourse and counselling. This policy is complemented by the National Plan of Action to Combat Gender-Based Violence in Malawi, effective 2014 to 2020. It provides guidance to Government, civil society, academia, private sector, and development partners to address GBV within their programmes in a coordinated, holistic, participatory, accountable, and multi-sectoral fashion. The Plan of Action is the blueprint for all actions taken by the Government to

reduce the prevalence of violence against women.

Malawi adopted a National Economic Empowerment Policy (NEEP) in 2017 that contains a plan for women's empowerment. The NEEP aims to build women's entrepreneurial skills, review legislation to improve women's development, access to credit, land, markets, and information. The rationale was that:

there still remains a big challenge to build the capacity of women entrepreneurs to give them the requisite business skills and confidence to enable them to actively participate in the economic empowerment programme. Initiatives should also be undertaken to improve the women's access to technology, their understanding of local and international markets to enhance their businesses and exploit opportunities. Empowerment initiatives should also aim at promoting the access to information and communication technologies such as internet/email, therefore widening their information sources to support their businesses.

## 7 Impact on the judiciary

Little mention of the jurisprudence of the African Commission and the African Court is made in Malawian jurisprudence. However, the incorporation of provisions of the Maputo Protocol in Malawi's Bill of Rights and other legislation allows jurisprudence to develop in a commensurate manner with the spirit of the Maputo Protocol.

79 Malawi Government, *National Gender Policy* (2015) 15.

80 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa Article 14 – Health and Reproductive Rights.

81 National Gender Policy (n 79) 22.

One of the Concluding Observations made by the African Commission was on the elimination of harmful traditional practices.<sup>82</sup> In 2016, the Magistrate Court in Nsanje convicted Eric Aniva for indulging in harmful practices contrary to section 5 of the Gender Equality Act. He was accused of knowingly having unprotected sexual intercourse with over 100 women while he was HIV positive. The Court sentenced him to 2 years imprisonment with hard labour. The case has set a precedent for the prosecution of those who engage in harmful practices.

Another one of the Concluding Observations made by the African Commission was to strengthen initiatives to combat HIV and AIDS and expedite the conclusion of a human rights centred pending legislation on HIV and AIDS. In *EL (a female) and the Republic*,<sup>83</sup> the High Court overturned the applicant's conviction for the offence of unlawfully (negligently) doing an act likely to spread a dangerous disease contrary to section 192 of the Penal Code. The appellant, knowing her serostatus, breastfed someone else's child and, upon her conviction, was incarcerated with her 14 month old child who was also living with HIV. The Court stated as follows:

However, this court after noting the various material provided by the experts as well as upon its own reading of the various available jurisprudence, research and material, is of the view that negligent infection of a deadly disease through breast-feeding should not be put in the same category or class of intentional

infections. The law must be sensitive to various issues including the lack of knowledge on how HIV is transmitted. Most importantly, the circumstances of the accused must also play a role. Unquestionably, the law should still ensure the traditional standard of proof applies and should be established by prosecutors. Fundamentally, in this human rights era, the law should remember to uphold the accused person's rights to privacy, dignity and due process ...

The circumstances in this case demanded leniency, especially when the tests revealed that the Complainant's child tested negative. Incidentally, that the facts themselves barely showed any wrongdoing on her part. Further that the Appellant also had a small breastfeeding child who if she had not been breastfeeding on that day and had her breasts exposed would not have led to her finding herself in this situation. The court should have remembered that Malawians courts have always upheld the principle of the best interests of the child...

The custodial sentence for an offence which was a misdemeanor and not a felony was grossly excessive. I would like to state that these statements I have made herein are conscious that the victim in the lower court was a five (5) month old baby. However, this court's main function is to ensure justice is administered. Thus having undertaken numerous prisons visits, this court very much knows the state of such prisons and incarcerating a woman with her child should always be the last resort for any court especially where the offence is a misdemeanor. In this regard, courts in Malawi should really take into account the guidelines set by the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

The Maputo Protocol guarantees equal economic and other opportunities and career advancement for women.<sup>84</sup> The Malawian Bill of Rights in Section 20 of the Constitution provides for a similarly couched right. In a September 2016 determination,<sup>85</sup> the High Court ruled

82 African Union, *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14.

83 *EL (Female) v The Republic*, High Court of Malawi, Zomba District Registry, Criminal Case 95 of 2016 (unreported).

84 Maputo Protocol art 13.

that arresting sex workers was discriminatory and embarrassing to the detained women. Nineteen women labelled sex workers were arrested during a raid at a rest house. The women were brought before a Fourth Grade Magistrates Court where they entered a group plea of guilty, were convicted and sentenced to a fine of K7,000.00 each (about \$10) in default of which they were to serve 6 months imprisonment. Upon review, the Court held that section 146 of the Penal Code that criminalises 'living off the earnings of prostitution does not target sex workers themselves but those who exploit them'. The court went further and stated that the arrest of the 19 women was unconstitutional as it was

based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support such a charge but was made merely to embarrass, label and harass the 19 women.

The High Court consequently set aside the conviction and sentences.<sup>86</sup>

On 7 July 2020, the High Court declared that the corroboration rule in sexual offences was contrary to the right to non-discrimination and the procedural rule that prohibits a mandatory number of witnesses per case.<sup>87</sup> The Maputo Protocol mandates reforms of existing discriminatory laws and practices.<sup>88</sup> Although the rule on corroboration had been a long-standing practice, the High Court declared that it had no place in Malawi's current constitutional dispensation and legal theory. The judge based her decision on the additional

burden placed on women to provide extra evidence to prove their allegations of sexual assault. The Court said:<sup>89</sup>

It therefore comes as no surprise that over the years this practice which is blatantly discriminatory against women has lodged itself firmly in our jurisprudence and enjoyed elevated status not simply as a practice but an immutable rule.

...

In view of our current Constitutional dispensation, the practice requiring corroboration in sexual offences based on the fact that women are unreliable witnesses, must be called out for what it is. It is discrimination against women based on their sex and or gender and cannot be sustained. Section 20 of the Constitution expressly forbids discrimination on any ground, including sex and gender.

Further, the practice requiring corroboration is also unlawful. It is in direct contravention of section 212 of the Criminal Procedure and Evidence Code which provides as follows:

Subject to this Code and any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact.

These words competently sum up the effect of the practice requiring corroboration when viewed against both section 20 of the Constitution and section 212 of the Criminal Procedure and Evidence Code and it is for this reason that the appellant's insistence on corroboration in this case and every other case of this nature must be disregarded so that the practice is relegated once and for all, to its rightful place which is to non-observance.

...the practice requiring corroboration has no place in contemporary legal theory... If the circumstantial evidence in a case can

85 *R v Pempho Banda and 18 others*, High Court of Malawi, Zomba District Registry, Review Case 58 of 2016 (unreported).

86 As above.

87 *Steven Kaliyati v R* Criminal Appeal 109 of 2018.

88 Maputo Protocol art 8.

89 The *Kaliyati* case.

prove beyond reasonable doubt all the element of the offence, it is not necessary for a trial court to look at any further evidence to corroborate the complainant's version of events.

The African Commission recommended that Malawi undertake reforms to protect women and children from physical, mental and sexual abuse by persons or institutions entrusted with their care. On 13 August 2020, the High Court declared that the actions of the Inspector General of Police, the Clerk of the National Assembly and the Minister of Finance had flouted their duties towards 18 women who were sexually assaulted and raped by members of the Malawi Police Service.<sup>90</sup> The police officers had been deployed to M'bwatalika and Mpingu to keep the peace following unrest in the area after the fatal injuring of Superintendent Usman Imedi. The Court found that the Inspector General of Police (the IG) had failed to put in place a credible system of ensuring that the officers of the Malawi Police Service (MPS) acted following the law, the conduct of officers of the MPS who sexually assaulted and raped women was unlawful, unreasonable and ultra vires the police powers. The IG failed to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the Applicants including of all other women and girls that were sexually molested, harassed, assaulted or raped by MPS officers, and finally that the MPS did not provide for the protection of public safety and rights.<sup>91</sup>

On 31 August 2020, the High Court declared that educational qualifications are marital property that can be divided at the dissolution of marriage.<sup>92</sup> Article 7(d) of the Maputo Protocol provides for equitable sharing of joint property deriving from the union. The Malawian Constitution and the Marriage, Divorce and Family Relations Act reiterate the same. In making the determination, the High Court stated thus:

It is in the court's discretion to order compensation to the Petitioner on the basis of her contribution to the Respondent's educational qualifications be it financially and in kind. ...

How would then the couple share these qualifications? It is indeed understandable that the Respondent acquired these qualifications while he was married to the petitioner. Moreover, the Petitioner might have contributed either financially or in kind to the pursuance of his tertiary education.

The Court ordered that, among other remedies, the wife's contribution to her husband's qualification be assessed and that she be compensated based upon that contribution.

On women's rights to property, on 19 March 2020, the High Court also made a declaration on the lineage-based inheritance of land by women. This pronouncement cements the lamentations on the Land Act, and Customary Land Act discussed earlier. In this matter, the Claimant was asked to vacate a piece of customary land that she inherited from her father's family. Being an area that practised matrilineal land inheritance, it was determined that the Claimant ought to return to her own

90 *The State v The Inspector General of Police, The Clerk of the National Assembly and the Minister of Finance ex parte MM and 18 others*, High Court of Malawi, Lilongwe District Registry, Judicial Review Cause 7 of 2020 (unreported).

91 As above.

92 *Ellen Tewesa v Chimwemwe S Tewesa*, High Court of Malawi, Principal Registry, Matrimonial Cause 9 of 2012 (unreported).

mother's land. The High Court held that this 'approach to customary law might, once again, end up with unfair and unconstitutional consequences.'<sup>93</sup> The court stated:<sup>94</sup>

The appellant had used the land for such a long time, after taking over the use from her parents, she had a right to occupancy and use over the land. Dispossessing her over the land based on the type of marriage system would, in my view, be repugnant to the constitutional right to own property.

## 8 Awareness and use by civil society

The African Commission categorises Malawi as a state with 0-5 NGOs granted Observer Status.<sup>95</sup> The Centre for Human Rights and Rehabilitation (CHRR) and Centre for the Development of People (CEDEP) are two of the organisations that have observer status. In 2014 and 2015, they submitted shadow reports to the African Commission in response to Malawi's Initial and Combined Periodic Report of 2013.<sup>96</sup> The Paralegal Advisory Service Institute (PASI) attended the 65th Ordinary Session of the African Commission held in 2019. PASI's focus is on the rights of detained persons, and they have conducted numerous projects on the provision of paralegal services to detained persons. As a result, PASI was granted Observer Status in 2019. The Centre for Human Rights Education Advice and Assistance (CHREAA) attended the 60th Ordinary Session of the African Commission held in May

2017. CHREAA focuses on prisoner's rights and the rights of detained persons. CHREAA was also granted observer status by the Commission and submitted a shadow report to the Commission.

It should be noted, however, that the NGOs that have observer status from Malawi have been incorporated into the government task forces responsible for the preparation of the State Party Reports.<sup>97</sup> This might compromise the quality of the shadow reports and might have an impact on whether shadow reports are submitted at all. This may be counteracted by the fact that participating civil society organisations then proceed to write their own independent shadow reports in an objective manner.

## 9 Awareness and use by lawyers and judicial officers (law societies and other practising lawyers)

Use of the Maputo Protocol by lawyers has been limited. However, the closing submissions by the Women Lawyers Association in the *ex-parte MM* case<sup>98</sup> cited decisions of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). They argued that the Court ought to consider the circumstances of the violation when determining the amount of damages to be awarded as per *Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Republic of Cameroon*.<sup>99</sup> They further depended on a decision of the Commission in *Equality Now and Ethiopi-*

93 *Mary Manyenje v Manuel Mpingo and Melenia Pondani*, High Court of Malawi, Principal Registry, Miscellaneous Civil Appeal No 86 of 2018 (unreported).

94 As above.

95 African Commission on Human and Peoples' Rights 'Network' <https://www.achpr.org/ngos> (accessed 15 November 2020).

96 Chisala-Tempelhoff & Bakare (n 5) 156.

97 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 104.

98 *The Inspector General of Police* case (n 90).

an *Women Lawyers Association (EWLA) v The Federal Republic of Ethiopia*.<sup>100</sup>

## 10 Higher education and academic writing

As the only certified law school, the University of Malawi's Faculty of Law has a comprehensive curriculum on human rights. The Maputo Protocol is taught explicitly in Gender and Law and International Human Rights. The faculty introduced the Law of Human Rights as a separate and compulsory course in the 2001-2002 academic year. Women's rights and the Maputo Protocol are taught under special categories of human rights, alongside disability rights, child rights, and sexual minority rights.<sup>101</sup>

The Maputo Protocol is also taught in Gender and Law with the aspiration that 'students will discuss and analyse the relationship between gender and the law, as an agent of social ordering and social change for men and women'.<sup>102</sup> Gender and Law is a compulsory course. To wit, the University of Malawi also boasts a Gender Justice Clinic that provides pro-bono legal services to women from surrounding areas.

The African human rights framework is often referred to in academic writing. A general mention was made by Dr Alan Msosa in his PhD thesis that discussed rights regarding sexual orientation and gender identity in Malawi.

He highlighted the fact that Malawi ratified the African Charter on Human and Peoples' Rights (amongst others) and therefore:<sup>103</sup>

Since Malawi's legal framework incorporates international human rights norms, the content and decisions from the international human rights system must be applicable. International human rights bodies are increasingly recognising the urgent need to extend protections on the basis of sexual orientation and gender identity.

The Maputo Protocol was explicitly discussed by Dr Bernadette Malunga's Master's thesis that mentions the violation of article 3 of the Women's Protocol. Dr Malunga argued that the requirement for corroboration assumes that women make false accusations in rape and defilement cases. This assumption was not based on any empirical findings, and therefore, it violates article 3 of the Maputo Protocol that requires that the dignity of every woman is protected and that she be protected from sexual and verbal violence.<sup>104</sup>

## 11 Impact on independent state institutions and civil society

The Malawi Human Rights Commission (MHRC) is constitutionally mandated to protect and investigate violations of the rights enshrined in the Constitution.<sup>105</sup> The MHRC boasts a Directorate of Gender and Women's

99 *Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Republic of Cameroon* No 006/Com/002/2015 No 006/Com/002/2015

100 African Commission on Human and Peoples' Rights, Communication 341/2007.

101 From the 2020 Syllabus: LLB 327 – The Law of Human Rights II.

102 From the 2020 Syllabus: LLB 122 – Gender and the Law.

103 Unpublished: A Msosa 'Human rights and same-sex intimacies in Malawi' unpublished PhD thesis, University of Essex, 2017 80.

104 Unpublished: BW Malunga 'Remember Potipher's wife': The 'rule' on corroboration in rape and defilement offences. A systematic violation of the rights of women and girls in Malawi' unpublished Masters thesis, University of Zimbabwe, 2010 62.

105 Human Rights Commission Act 27 of 1998 sec 12.



Rights whose sole focus is women and gender.<sup>106</sup> It is also the leading implementing authority of the Gender Equality Act through the Gender Equality Committee, comprising representation from Government, Civil Society Organisations and Development partners.<sup>107</sup> The committee meets regularly to deliberate gender issues and conduct monitoring visits to assess the awareness levels and adherence to the Gender Equality Act.<sup>108</sup> In addition, MHRC has also authored its own shadow/alternative reports and been part of Malawi's delegation to state party reporting processes. The MHRC has made submissions to regional human rights bodies such as the African Commission.

The Office of the Ombudsman is constitutionally mandated to take action or steps to remedy instances of abuse of power or unfair treatment of any organ of government or manifest injustice or conduct by such official which would properly be regarded as oppressive or unjust in an open and democratic society.<sup>109</sup> Accordingly, the Ombudsman institutionalised Hospital Ombudspersons in public hospitals to deal with complaints from service users, patients, staff and stakeholders.<sup>110</sup> In her opening remarks, the Ombudsman Martha Chizuma stated that 'these focal persons will be responsible for ensuring that principles important to public health accountability are upheld which include

transparency, fairness, integrity and trust'.<sup>111</sup>

Both the MHRC and the Office of the Ombudsman were members of the Taskforce instituted by the Ministry of Justice and Constitutional Affairs to draft Malawi's latest state party report submitted in 2019. Other human rights institutions that were involved in the process of drafting the state party report were: Article III, Paralegal Advisory Service (PASI), Centre for Human Rights Education Advice and Assistance (CHREAA), Centre for the Development of People (CEDEP), Youth and Society, and Saccode Trust.<sup>112</sup>

## 12 State reporting

The Ministry of Justice and Constitutional Affairs is tasked with state reporting under the Maputo Protocol. To prepare the state report, the Ministry of Justice collaborates with the Ministry of Gender empanels a task force. First, the Maputo Protocol and recommendations from the previous review are disseminated to the key stakeholders (both state and non-state stakeholders). The task force then meets to compile data on the implementation of the report. After this, representatives from the Ministry of Justice and Constitutional Affairs, and the Ministry of Gender, Children, Disability and Social Welfare, travel to 4 districts in each region of Malawi to collect data on the implementation of the Protocol. Based on this data, the Ministry of Justice generates a zero draft

106 'Malawi Human Rights Commission, Background' <http://www.mhrcmw.org/mhrc/who-we-are/background> (accessed 13 November 2020).

107 Malawi Human Rights Commission, 'Gender Equality' <http://www.mhrcmw.org/mhrc/our-work/gender-equality> (accessed 13 November 2020).

108 Gender Equality Act (n 35) sec 9.

109 Ombudsman Act 17 of 1996 sec 5.

110 Office of the Ombudsman, 'Hospital Ombudsman' <https://www.ombudsmanmalawi.org/main.php?pages=hospital%20ombudsman> (accessed 13 November 2020).

111 MBC 'Ministry of Health launches hospital Ombudsman' <https://www.mbc.mw/index.php/radio-2/item/6537-ministry-of-health-launches-hospital-ombudsman> (accessed 13 November 2020).

112 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 104.

of the State Report. The draft is further developed through regional consultative working sessions. A national validation is called to validate the report. And finally, the report is submitted through the Permanent Mission to the African Union.

Malawi has submitted two state party reports to the African Commission. The Initial and Combined Periodic Report was submitted on 19 July 2013 for the period 2005 to 2013.<sup>113</sup> It combined the initial and all outstanding reports (second to eleventh) that spanned the eight-year reporting period, from the date of accession, for the Maputo Protocol. The second report was submitted in 2019 for the period May to March 2019.<sup>114</sup> Thus at the time of writing, Malawi is up to date in its reporting under the Protocol.

The Concluding Observations are disseminated to key stakeholders by the Ministry of Justice and Constitutional Affairs. The Ministry of Justice also assigns tasks to responsible Ministries, Departments, and Institutions.

At the time of writing this chapter, the most recent state report is yet to receive concluding observations from the African Commission. However, the concluding observations from the African Commission on the earlier report (Initial and Combined Periodic Report of 2013) highlighted issues to be addressed by the government in the realisation of the rights enshrined under the

Maputo Protocol. Most pertinent of all was the recommendation that processes for the domestication of the Maputo Protocol be expedited and that enactment of legislation and policies be concluded.<sup>115</sup>

The African Commission made numerous recommendations on various rights of women and children. A few of the recommendations will be highlighted.

- Affirmative action: The number of women in political positions such as Members of Parliament significantly fell during the 2014 general elections. This was despite a 50-50 campaign which sought to increase the number of women representatives at local government and parliament levels. The 2019 Gender Profile indicates that there are fewer women than men the decision-making positions (per grade) in the civil service, and oversight institutions.<sup>116</sup> The Gender Equality Act provides a quota for public sector institutions, no more than 60 per cent of one gender and no less than 40 per cent of one gender.<sup>117</sup> Despite this law, in October 2020 there were nationwide demonstrations denouncing the lack of gender representation of public service board appointments.<sup>118</sup>
- Reduction of maternal and infant mortality and access to maternity services: The status of child mortality and maternal mortality improved during the reporting period of the

113 Republic of Malawi, *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995 – 2013 and the Protocol to the African Charter on Human and Peoples' Rights 2005 – 2013*.

114 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol*, May 2015 to March 2019.

115 African Union *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14.

116 Republic of Malawi *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol*, May 2015 to March 2019 (2019) 89.

117 Gender Equality (n 35) sec 11.

118 The Nation, 'Women to protest against gender imbalance' <https://www.mwnation.com/women-to-protest-against-gender-imbalance/> (accessed 14 November 2020).

Initial and Combined Report of 2013. According to the 2015-2016 Malawi Demographic and Health (MDHS), childhood mortality rates have declined since 1992. Infant mortality has decreased from 135 deaths per 1,000 live births in 1992 to 42 in 2015-2016. During the same period, under-5 mortality has markedly declined fourfold from 234 to 63 deaths per 1,000 live births. 95 per cent of women aged between 15 to 49 receive antenatal care (ANC) from a skilled provider (doctor, clinical officer, medical assistant, nurse, and midwife).

- Abortion: The Law Commission produced a Termination of Pregnancy Bill that aimed to expand the legally justifiable grounds for abortion. At the moment, induced abortion is criminalised by the Penal Code with one exception – induced abortion is legal where it is used to save the mother's life.<sup>119</sup> The Termination of Pregnancy Bill suggests three additional grounds: prevention of injury to the physical or mental health of the woman, severe malformation of the foetus that will affect its viability/compatibility with life, and if the pregnancy is a result of rape, incest or defilement.<sup>120</sup> The Bill was due for debate in parliament as at 2020.<sup>121</sup> An electronic survey conducted by the authors found that 67 per cent of the respondents thought the Maputo Protocol could have an impact on the debate of the Termination of Pregnancy Bill while 33 per cent were unsure that it would. Placing this in context could encourage

greater dissemination of the details and awareness raising on the Maputo Protocol, especially to members of the National Assembly, to garner the knowledge and support needed for the enactment of the Termination of Pregnancy Bill.

- Marital rape: Marital Rape is a criminal offence in Malawi only in the context of court sanctioned judicial separation.<sup>122</sup> By this prescription, marital rape cannot occur during the subsistence of the marriage. The Penal Code does not criminalise marital rape.
- Child marriage: The Constitution was amended to raise the age of the child from 16 to 18 and this abolished child marriages. The amendment was done in line with the African Charter on the Rights and Welfare of the Child. Currently, the Government is undertaking a process to harmonise all laws on the definition of the child.
- Prohibition of child labour and trafficking: At the time the concluding observations were made, the Trafficking in Persons Act was still a Bill. It was eventually passed into law and has been operational since 2015. Section 79 of the Child Care, Protection and Justice Act also criminalises child trafficking. The National Plan of Action against Trafficking in Persons (2017-2022) targets a 50 per cent reduction of trafficking in persons cases by 2022. Law enforcement officers have been trained on anti-trafficking training, victim identification and assistance to potential trafficking victims, sentencing guidelines for offenders and the legal instruments available to counter trafficking.<sup>123</sup>

119 Penal Code 22 of 1929 sec 243.

120 Society for Medical Doctors, 'Termination of Pregnancy Bill' [https://www.smdmalawi.com/media/com\\_acymailing/upload/termination\\_of\\_pregnancy\\_bill\\_1.pdf](https://www.smdmalawi.com/media/com_acymailing/upload/termination_of_pregnancy_bill_1.pdf) (accessed 14 November 2020).

121 All Africa, 'Malawi: MPs Pledge to Table Termination of Pregnancy Bill' <https://allafrica.com/stories/202009280740.html> (accessed 14 November 2020).

122 Marriage, Divorce and Family Relations Act (n 28) sec 62.

123 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 72-73.

Freedom of Expression and Access to Information: The Access to Information Bill was passed in December 2016 and assented to in February 2017. The Act became operational on 30 September 2020 by way of a notice of commencement of operation that was gazetted on 31 August 2020.<sup>124</sup> The Malawi Human Rights Commission oriented information holders, media, civil society, traditional leaders, directors and heads of departments in the civil service. MHRC also trained information officers and oriented District Commissioners on the Act.

- HIV/AIDS: The HIV and AIDS (Prevention and Management) Act was passed in November 2017. The Act ensures that authorities are able to prevent and manage the HIV/AIDS pandemic. In line with international human rights standards, the Act prohibits compulsory testing for pregnant women, domestic workers and men in uniform. It also establishes the National Aids Commission as a statutory body that facilitates the management of HIV/AIDS response in the country.<sup>125</sup>

Malawi needs to establish a National Mechanism for Reporting and Follow Up (NMRF). In the meantime, the Ministry of Justice and Constitutional Affairs coordinates the implementation and follow-up of concluding observations through a task force that consists of Ministry of Justice and Constitutional Affairs as the Chair, Ministry of Gender, Children, Disability and Social Welfare, Ministry of Homeland Security, Ministry of Foreign Affairs and

International Cooperation, Ministry of Health and Population, Ministry of Education, Science and Technology, Ministry of Labour and Vocational Training, Malawi Police Service, Malawi Prisons Service, Malawi Human Rights Commission, Law Commission, National Registration Bureau, National Statistical Office, the Office of the Ombudsman, the Department of Immigration, the Legal Aid Bureau, the Malawi Judiciary, University of Malawi, Chancellor College Law School, Article III, Paralegal Advisory Service (PASI), Centre for Human Rights Education Advice and Assistance (CHREAA), Centre for the Development of People (CEDEP), Youth and Society, and Saccode Trust.<sup>126</sup>

### 13 Communications

While Malawi has not yet had any communications under the Maputo Protocol, there have been some indications by individuals and NGOs that complaints may be brought to the African Commission for consideration. This might be because of a lack of awareness and/or the inaccessibility of the court process generally. Accessing justice can be costly, and the requirement to exhaust of local remedies might dissuade parties from lodging complaints with the African Commission.

Historically, the communication made against Malawi found that Malawi had violated articles 4, 5, 6 and 7 of the African Charter. This communication resulted in the repeal of legislation that created the Traditional Courts, awarded compensation to Vera Chirwa,

124 Malawi LII, 'Notice of Commencement – Access to Information Act' <https://malawi.lii.org/mw/gazette/29> (accessed 14 November 2020).

125 Republic of Malawi *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 56.

126 Republic of Malawi *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 104.

who had been sentenced wrongly by these courts and referred the matter to the Assembly of Heads of States and Government.<sup>127</sup>

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

The last African Commission human rights promotion visit took place between 7 and 11 April 2008.<sup>128</sup> The delegation consisted of a member of the African Commission responsible for the promotion of human rights in Malawi, the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa and the Legal Officer for Protection at the Secretariat of the African Commission. The purpose of the visit was to 'among other things, exchange views with human rights stakeholders on ways and means of enhancing the enjoyment of human rights in the country'.<sup>129</sup>

Despite no further visits being made, the African Commission has issued a press release on Cyclone Idai and its attendant flooding that specifically addressed the plight of women and girls during natural disasters. The Press Release on Cyclone Idai stated:<sup>130</sup>

The Commission is particularly concerned about the impact of the flood to women

and girls who usually bear the brunt of such disasters, to the extent that access to resources, including shelter, food and other opportunities, is systematically disadvantaged to this group of people, rendering them more vulnerable to the impact of the disaster. This is also compounded by the specific vulnerability of women and girls with respect to mortality from such floods and their aftermath. In light of this, the Commission calls on the Governments of the concerned States, to attend to the special needs of women and girls during these difficult times and ensure that they have access to all relief opportunities and strategies. While internally displaced persons issues are primary State responsibilities, in cases of natural disasters, the support of all stakeholders are crucial.

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

Malawi's Periodic Report identifies four factors that may impede the impact of the Maputo Protocol, namely: weak implementation of laws and policies, resource constraints, slow pace of institutional reforms, and lack of public awareness of rights.<sup>131</sup> These observations are like those received from an anonymous self-administered survey conducted by the authors.

The electronic survey was completed by 22 people, 17 were female, and five were male. Ten of them were aged between 26 and 35, and 20 had tertiary education. In addition, 6 of the respondents were in the legal profession, four in the community and social service professions, and the rest were in other cross-cutting professions. The survey aimed to gauge awareness and impressions of the Maputo Protocol. The elec-

127 *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* Communication 64/92-68/92-78/92\_8AR.

128 African Commission on Human and Peoples' Rights 'Press Release on the Promotional Mission to Malawi' <https://www.achpr.org/pressrelease/detail?id=364> (accessed 13 November 2020).

129 As above.

130 African Commission on Human and Peoples' Rights 'Press Release on Cyclone Idai and the subsequent flooding in Mozambique, Malawi and Zimbabwe' <https://www.achpr.org/pressrelease/detail?id=399> (accessed 13 November 2020).

131 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 103.

tronic survey was widely disseminated online through a web link posted on WhatsApp groups and targeted individual emails sent to networks. 90 per cent of respondents said that the Maputo Protocol had minimal impact in Malawi, with the remaining 10 per cent saying it had no impact at all. However, 95 per cent believe that the impact could improve through public awareness campaigns, media was a close second with 86 per cent, and 71 per cent of the respondents believed public debates would also increase awareness of the Maputo Protocol.

## **16 Conclusion**

Malawi has made great strides in implementing the Maputo Protocol, such as amending legislation to raise the legal marriage age. However, there are numerous areas for improvement, such as civic awareness of the Maputo Protocol, broadening grounds for legal abortion, and addressing the comments raised by the African Commission. In addition, Malawi ought to ensure that the promises made in the Maputo Protocol and the legislation enacted are actualised in practice.



# THE IMPACT OF THE E MAPUTO PROTOCOL IN MAURITIUS

*Ashwanee Budoo-Scholtz\**



## 1 Introduction

### 1.1 Background

Mauritius has a population of about 1.3 million with about 639,000 women, which implies that more than half of the population are women.<sup>1</sup> To ensure better protection for the women on its territory, the country ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2017. This report seeks to assess the impact of the Maputo Protocol in Mauritius.

To do so, desktop research was undertaken on human rights in Mauritius, including the legal provisions, and literature on women's rights in Mauritius. This desktop research was supplemented by a questionnaire filled in by the Ministry of Gender Equality and Family Welfare (Response by MGEFW) to obtain information that is

not in the public domain (on file with author). The researcher also had informal conversations, either via email or through telephone calls, with law practitioners, the National Human Rights Commission, academics, students studying law at the undergraduate level and representatives of civil society organisations, including women's rights organisations.

### 1.2 Human rights in Mauritius

Mauritius has ratified several international human rights instruments as demonstrated in the Table below:

**Table: Human rights treaties ratified by Mauritius**

Treaty/Convention	Date of ratification/ accession
International Covenant on Civil and Political Rights (ICCPR)	12 December 1973
International Covenant on Economic, Social and Cultural Rights (ICESCR)	12 December 1973

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1 Statistics Mauritius 'Gender Statistics – 2018' available at [https://statsmauritius.govmu.org/Documents/Statistics/ESI/2019/EI1466/Gender\\_Stats\\_Yr18.pdf](https://statsmauritius.govmu.org/Documents/Statistics/ESI/2019/EI1466/Gender_Stats_Yr18.pdf) (accessed 22 November 2020).



International Convention on the Elimination of all Forms of Racial Discrimination (CERD)	30 May 1972
International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)	9 July 1984
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	9 December 1992
Convention on the Rights of the Child (CRC)	26 July 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC)	12 February 2009
Convention on the Rights of Persons with Disabilities (CRPD)	8 January 2010
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime	24 September 2003
The Hague Convention on the Civil Aspects of International Child Abduction	23 March 1993
African Charter on Human and Peoples' Rights	19 June 1992
African Charter on the Rights and Welfare of the Child	14 February 1992

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	3 March 2003
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	23 June 2017

Mauritius is a dualist state, which means that international instruments have to be domesticated for them to have effect at the domestic level.<sup>2</sup> Some of these international instruments have been translated into domestic laws through acts of parliaments.<sup>3</sup> Nevertheless, the majority of them still do not have domestic application.<sup>4</sup>

When Mauritius was colonised by the British, they signed the Treaty of Capitulation which, amongst others, stated that they will not change the French laws at the time. However, as time went by, the British enacted different laws which made Mauritius a dual legal system, with both French Napoleonic laws and British common laws.<sup>5</sup> As such, human rights in Mauritius are protected through different laws. The section that follows studies some of the

2 *Matadeen v Pointu* Privy Council Appeal 14 of 1997 para 24; *Jordan v Jordan* 2000 SCJ 226; *Pulluck v Ramphul* 2005 SCJ 196; and *Ex Parte Hurnam Devendranath, a Barrister-at-Law* 2007 SCJ 289.

3 For instance, Protection of Human Rights Act 1998; Workers Rights Act 2020; Equal Opportunities Act 2008; and Protection from Domestic Violence Act 1997, as amended.

4 See A Budoo & R Mahadew 'The Golden Jubilee of the Mauritian Bill of Rights: A milestone to celebrate or time for reflections?' in M Addaney, MG Nyarko & E Boshoff (eds) *Governance, human rights, and political transformation in Africa* (2020) 91-115.

5 AH Angelo 'Mauritius: The basis of legal system' *The Comparative and International Law of Southern Africa* (1970) 3(2) 228.

relevant domestic laws that provide for human rights, with a focus on laws on women's rights. It is to be noted that as at the time of writing, the country is still negotiating a Gender Equality Bill.

### 1.2.1 *The Constitution*

The Constitution of 1968, which is the supreme law of the land,<sup>6</sup> protects fundamental rights and freedoms in its chapter II, which was inspired by the European Convention on Human Rights.<sup>7</sup> Hence, it is of no surprise that chapter II of the Constitution emphasises on civil and political rights with no mention of economic, social and cultural rights.<sup>8</sup> Section 3 provides for non-discrimination on the basis of, amongst others, sex in the implementation of the following rights: the right to life, liberty and security of the person; right to protection of the law; 'freedom of conscience, of expression, of assembly and association and freedom to establish schools'; and the right to protection of privacy and property. These rights are subsequently developed in the different sections of chapter II of the Constitution.

Section 16 of the Constitution further provides a double protection from discrimination by stating that no law or its effect shall be discriminatory, and that no public official shall treat a person in a discriminatory manner. It describes 'discriminatory' as follows:<sup>9</sup>

... affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.

It is to be noted that when adopted, the Constitution did not include sex as a basis of non-discrimination. It was only in 1995 that the Constitution was amended by Act 23 of 1995 to replace 'colour or creed' by 'colour, creed or sex'.<sup>10</sup>

The rights in chapter II of the Constitution are enforceable by virtue of its section 17. The procedure under section 17 is elaborated in section 2 of the Supreme Court (Constitutional Relief Rules) 2000. According to these rules, reaffirmed in the case of *Noordally v the Attorney General and the Director of Public Prosecutions*,<sup>11</sup> only an aggrieved person can bring a case under section 17. Hence, there is no *actio popularis* in the country since the Supreme Court is cautious and admits such cases only when the applicant has sufficient standing as an aggrieved person.<sup>12</sup> It is important to highlight that section 17 is only applicable to chapter II, that is sections 3 to 16<sup>13</sup> and any other consti-

6 Section 2 of the Constitution of Mauritius.

7 *Matadeen* case (n 2).

8 R Mahadew 'Economic and social rights as constitutional guarantees, compared to privileges under the welfare state system: An assessment of the case of Mauritius' (2018) 19 *ESR Review* at 9: Economic, social and cultural rights in Mauritius are protected by virtue of Mauritius being a welfare state.

9 Section 16(3) of the Constitution of Mauritius.

10 Oxford Constitutions of the World 'Constitution of the Republic of Mauritius (Amendment) Act (23 of 1995) 23 August 1995.

11 *Noordally v the Attorney General and the Director of Public Prosecutions* 1986 MR 220/ SCJ 339.

12 Budoo & Mahadew (n 4).

13 *Matadeen* case (n 2): 'Section 1 itself is not justiciable by application for redress under section 17(1), which refers only to contraventions of sections 3 to 16. Strictly speaking, therefore, the contravention must have been of section 3, interpreted in the light of section 1. Their Lordships have no

tutional issues are subjected to section 83 of the Constitution.

Moreover, the non-inclusion of socio-economic rights in the Constitution implies that Mauritian women are not afforded a constitutional protection of their socio-economic rights. Mauritian women rely on the welfare state for the provision of socio-economic rights. In case of non-realisation therefore, they cannot obtain constitutional relief due to non-justiciability of socio-economic rights in the country.

### 1.2.2 *The Mauritian Civil Code*

Emphasising on the inalienability of human rights, the Mauritian Civil Code, inherited from the French colonialists provides that nobody can renounce their civil rights and fundamental freedoms.<sup>14</sup> It also provides for the civil rights of foreigners and corporations.<sup>15</sup> Moreover, it presents the respect of private life as a right in its article 22 while providing for legitimate limitations. In line with gender equality, the Mauritian Civil Code provides that both wife and husband can add each other's surnames to their own, which can be passed to their children.<sup>16</sup> Moreover, with regards to inheritance, both spouses are entitled to inherit from each other in case of death and the law makes no distinction between sons and daughters during such as processes.<sup>17</sup> The Mauritian Civil Code also provides for safeguards for

both parties in cases of divorces.<sup>18</sup> Marriage of children between 16 to 18 is still permitted under the Mauritian Civil Code with the consent of the parents, legal guardian or Judge in Chambers.<sup>19</sup> However, this provision will be changed with the Children's Bill which is expected to increase the age of marriage to 18.

### 1.2.3 *The Mauritian Criminal Code*

The Mauritian Criminal Code criminalises a range of violent crimes, including sexual violence, freedom from which is a recognised human right.<sup>20</sup> One stride towards women's rights in Mauritius was the amendment to the Criminal Code in 2012 to allow for abortion if:<sup>21</sup>

- (a) the continued pregnancy will endanger the pregnant person's life;
- (b) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant person;
- (c) there is a substantial risk that the continued pregnancy will result in a severe malformation, or severe physical or mental abnormality, of the foetus which will affect its viability and compatibility with life; or
- (d) the pregnancy has not exceeded its fourteenth week and results from a case of rape, sexual intercourse with a female under the age of 16 or sexual intercourse with a specified person which has been reported to the police.

This amendment is in line with the Maputo Protocol despite the fact that it was effected before Mauritius ratified the document. Even though abortion is

13 doubt that the democratic nature of the sovereign state of Mauritius is an important matter to be taken into account in the construction of any part of the Constitution and in particular its guarantees of fundamental rights and freedoms'.

14 Article 11 of the Mauritian Civil Code.

15 Articles 12 to 15 of the Mauritian Civil Code.

16 Articles 37 and 38 of the Mauritian Civil Code.

17 Articles 731 to 738 of the Mauritian Civil Code

18 Articles 229 to 268 of the Mauritian Civil Code.

19 Article 145 of the Mauritian Civil Code.

20 Article 1(j) of the Maputo Protocol that includes sexual violence in the definition of violence against women.

21 Section 235A of the Criminal Code; Act 11 of 2012.

allowed only in specific cases as cited above, this can be considered as a progressive step of the country. Nevertheless, sodomy is still criminalised in Mauritius through section 250 of the Criminal Code demonstrating that the country is still held back by archaic provisions in some areas of human rights.

#### 1.2.4 *The Protection from Domestic Violence Act*

The Protection from Domestic Violence Act was adopted in 1997 to 'provide protection to the victims of domestic violence'. It defines domestic violence<sup>22</sup> as 'the infliction or attempted infliction of injury, intimidation, forcible engagement in an act from which the spouse had a right to refrain'. It further emphasises that it is not only against one's spouse and/or kids, but anyone living under the same roof. The Act provides protection orders,<sup>23</sup> counselling sessions organised by the Ministry,<sup>24</sup> occupancy order,<sup>25</sup> tenancy order, and ancillary

orders.<sup>26</sup> The Protection from Domestic Violence Act was amended in 2016 to include violence by any member living under the same roof. However, it does not recognise same-sex relationships since it only recognises persons who are of opposite sexes.<sup>27</sup> Hence, if a partner in a same-sex relationship does not live under the same roof and is a victim of violence by the other partner, it will not be considered as domestic violence.

#### 1.2.5 *The Equal Opportunities Act*

The Equal Opportunities Act, which repeals and replaces the Protection from Sex Discrimination Act 2002, defines the different forms of discrimination that are within the scope of the act such as direct discrimination,<sup>28</sup> indirect discrimination,<sup>29</sup> and discrimination by victimisation and makes reference to discrimination on the ground of sex and sexual orientation.<sup>30</sup> It further highlights that the 'discriminator's motive is irrelevant' in determining whether there has been any discrimination.<sup>31</sup>

Part V of the Equal Opportunities Act states that a person sexually harasses another in:<sup>32</sup>

... circumstances in which a reasonable person would have foreseen that the other person would be humiliated, offended or intimidated, he –

(a) makes an unwelcome sexual advance, or an unwelcome request for a sexual favour, to another person; or (b) engages in any other unwelcome conduct of a sexual nature towards another person.

- 22 Section 2 of the Protection from Domestic Violence Act 1997: '... any of the following acts committed by a person against his spouse, a child of his spouse or another person living under the same roof – (a) wilfully causing or attempting to cause physical injury; (b) wilfully or knowingly placing or attempting to place the spouse or the other person in fear of physical injury to himself or to one of his children; (c) intimidation, harassment, ill-treatment, brutality or cruelty; (d) compelling the spouse or the other person by force or threat to engage in any conduct or act, sexual or otherwise, from which the spouse or the other person has the right to abstain; (e) confining or detaining the spouse or the other person, against his will; (f) harming a child of the spouse; (g) causing or attempting to cause damage to the spouse's or the other person's property; (h) threatening to commit any act mentioned in paragraphs (a) to (g)'.
- 23 Section 3 and 3A of the Protection from Domestic Violence Act.
- 24 Section 3B of the Protection from Domestic Violence Act.
- 25 Section 4 of the Protection from Domestic Violence Act.

- 26 Sections 8 and 8(B) of the Protection from Domestic Violence Act.
- 27 Section 3 of the Protection from Domestic Violence Act.
- 28 Section 5 of the Equal Opportunities Act.
- 29 Section 6 of the Equal Opportunities Act.
- 30 Section 7 of the Equal Opportunities Act.
- 31 Section 8 of the Equal Opportunities Act.
- 32 Section 25(1) of the Equal Opportunities Act.

Such a conduct ‘includes making or issuing an unwelcome oral or written statement of a sexual nature to a person or in the presence of a person’.<sup>33</sup> It also provides a list of what constitutes acts of sexual harassment.<sup>34</sup> If someone feels that they have been aggrieved under the Equal Opportunities Act, they may ‘lodge a written complaint’ within 12 months of the date of the act to the Commission that provides details of the ‘alleged act of discrimination’. However, the Commission can extend the delay of 12 months if the complainant shows a good cause.<sup>35</sup> The Commission has the mandate to resolve a matter through conciliation.<sup>36</sup> If such is not possible, the Commission must, with the consent of the complainant, refer the complaint to the Equal Opportunities Tribunal,<sup>37</sup> set up under Part VII of the Equal Opportunities Act. Any party that is not satisfied with the order of the Tribunal has the right to appeal to the Supreme Court within 21 days of the date of the order of the Tribunal.<sup>38</sup>

The case of *Dalwhoor v Belle Mare Beach Development Co Ltd*<sup>39</sup> (Employment Relations Tribunal 2019) is relevant for women’s rights. The Tribunal was approached with a case about whether the prohibition of a ‘tika (decorative mark/coloured dot worn in the middle of the forehead by Indian women, especially Hindu married women)’ by the employer constituted discrimination. The Tribunal held that:

... considering the manner in which the Respondent implemented its decision to ban the tika to all employees, the more so a decision emanating from a misconceived interpretation of the law, we hold that on the principles of fairness and best practices of good employment relations, the Respondent’s action was irrational, unmeasured and undesirable.

### 1.2.6 *The Workers’ Rights Act*

The Workers’ Rights Act 2019 replaces the Employment Rights Act 2008. Part II of the Workers’ Rights Act focuses on measures against discrimination in employment and occupation. Discrimination includes different treatments to different workers, amongst other things, on the basis of sex, sexual orientation, gender, marital or family status and pregnancy.<sup>40</sup>

### 1.2.7 *The Local Government Act*

The Local Government Act is relevant for the current report since it contains a quota provision in line with substantive equality. Section 11(6)(2) – introduced by an amendment in 2014 – requires that:<sup>41</sup>

... every group presenting more, than 2 candidates at an election of a Municipal City Council or Municipal Town Council shall ensure that not more than two thirds of the group’s candidate for election to that Council are of the same sex.

This provision is ground-breaking for Mauritius where female representation in politics is low. However, the quota provision is only at the local level and does not apply to the national level.

33 Section 25(2) of the Equal Opportunities Act.

34 Section 26 of the Equal Opportunities Act.

35 Section 28 of the Equal Opportunities Act.

36 Section 32 of the Equal Opportunities Act.

37 Section 33 of the Equal Opportunities Act.

38 Section 41 of the Equal Opportunities Act.

39 *Mrs Sooleka Dalwhoor v Belle Mare Beach Development Co Ltd (The Residence Mauritius)* 16 January 2019.

40 Section 5(5)(a) of the Workers’ Rights Act.

41 Section 11(6)(a) of the Local Government Act 2011.

### 1.3 Overview of the status of women's rights in the country

As seen above, there are many laws that ensure the protection of women's rights in Mauritius. However, there are still many challenges in the realisation of women's rights in Mauritius. Such challenges are what led Mauritius to be ranked 115 out of 153 countries around the world in the 2020 Global Gender Gap Index.<sup>42</sup> This index takes into account economic participation and opportunity, educational attainment, health and survival and political empowerment.<sup>43</sup> While Mauritius ranks first in health and survival, it is 116th in economic participation and opportunity, 74th in educational attainment (despite free primary, secondary and tertiary education), and 124th in political empowerment.<sup>44</sup> These figures demonstrate that the country is lagging behind when it comes to civil, political, economic, social and cultural rights. Some of the issues that Mauritian women face are discussed below.

#### 1.3.1 Non-recognition of religious marriages by civil law

One area that has not received much focus and which could be considered to be the basis of several women's rights violations in Mauritius, is the non-recognition by civil law of religious marriages which have not been registered under Civil Status Act. According to the Civil Status Act of 1982, marriage includes both 'civil and religious marriage'.<sup>45</sup> It recognises religious marriages with civil effects<sup>46</sup> and

requires past religious marriages to be registered for them to have civil effects.<sup>47</sup> The Civil Status Act also provides for a separate regime for marriages celebrated under Muslim rites, which are registered with the Muslim Family Council.<sup>48</sup> The Muslim Family Council is responsible for making rules for the celebration and dissolution of marriages under this regime. Thus, marriages registered by the Muslim Family Council do not benefit from the safeguards in the Mauritian Civil Code in case of divorce and death of the husband,<sup>49</sup> and in instances of polygamy.<sup>50</sup> It has been argued that for religious marriages that have not been registered, there is the possibility of men taking more than one wife, thus leading to polygamous situations which are criminalised by section 257 of the Mauritian Civil Code.<sup>51</sup> There were calls to re-introduce a Muslim personal law in Mauritius following the Civil Status Act (Amendment Act) of 1987 which repealed the previous Muslim Personal Law to regulate religious marriages under the freedom of religion provision of the Constitution of Mauritius. However, the case of *Bhewa v Government of Mauritius*<sup>52</sup> confirmed that there is no need for a Muslim personal law for the enjoyment of freedom of religion and that the civil law ensured monogamy and the protection of women from discrimination in line with Mauritius' international obligations. Therefore, Mauritian women

42 World Economic Forum 'Global Gender Gap Report 2020' (2019) 9.

43 World Economic Forum (n 42) 8.

44 World Economic Forum (n 42) 12-13.

45 Section 2(i) of the Civil Status Act.

46 Section 25 of the Civil Status Act.

47 Section 74 of the Civil Status Act.

48 Section 30 of the Civil Status Act.

49 See section 1.2.2 of the Civil Status Act.

50 Section 257 of the Mauritian Civil Code criminalises bigamy in civil marriages or marriages with religious effects.

51 Musawah 'Thematic report on muslim family law and muslim women's rights in Mauritius' shadow report submitted to the Committee on the Elimination of Discrimination Against Women (October 2018) 8.

52 *Bhewa v Government of Mauritius* 1990 MR 79.

who do not register their marriages with the Civil Status Office do not have protection of the civil law when it comes to equal rights in and after marriage, and monogamy. This extends to the girl child who is in a religious marriage. They are also not afforded the protection of non-discrimination as per section 16(4)(c) of the Constitution.<sup>53</sup>

### 1.3.2 *Child marriages*

Child marriage is also a human rights issue for Mauritian girls. Despite affecting both girls and boys, the incidence is higher between girls with 127 girls compared to six boys being married in 2018, and 94 girls compared to seven boys being married from January to August 2019.<sup>54</sup> It is to be noted that these are registered marriages, and the actual number is higher since there are many instances where such marriages are not recorded. The number is not as high as other African countries, but one child married is one too many due to the various human rights violations.<sup>55</sup>

In 2020, the government adopted the Children's Act which prohibits marriage of a child, be it a civil or reli-

gious one, in line with the Maputo Protocol. This follows efforts by the government to sensitise the population about child marriage. For instance, the Ombudsperson for children carried out sensitisation campaigns against child-marriage,<sup>56</sup> and the then Ministry of Justice (it has now been converted into a division under the Aegis of the Ministry of Foreign Affairs, Regional Integration, and International Trade – MFA), Human Rights and Institutional Reforms launched a video clip on 'No to child marriage' on the occasion of Human Rights Day on 10 December 2018.<sup>57</sup>

### 1.3.3 *Women's political participation*

Women's political participation in Mauritius is a challenge since the proportion of women in the political sphere compared to men is minimal. For instance, in the November 2019 general elections, only 14 women were voted to be part of the 70 members' National Assembly.<sup>58</sup> The Cabinet of Ministers comprises of 3 women out of 23, with two being Ministers (Minister of Social Integration, Social Security and National Solidarity, and Minister of Gender Equality and Family Welfare) and one being the Vice-Prime Minister, and Minister of Education, Tertiary Education, Science and Technology.<sup>59</sup>

53 Section 16(4)(c) of the Constitution: 'Subsection (1) shall not apply to any law so far as that law makes provision ... or the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description'.

54 'Mariages: de janvier à août 2019, 101 mineurs se sont dit "oui"' *L'express.mu* 11 January 2020 available at <https://www.lexpress.mu/article/368028/mariages-janvier-aout-2019-101-mineurs-sont-dit-oui> (accessed 20 November 2020).

55 A Budoo 'It's time Mauritius took decisive steps to outlaw child marriages' *The Conversation* 3 July 2018 available at <https://theconversation.com/its-time-mauritius-took-decisive-steps-to-outlaw-child-marriages-99226> (accessed 20 November 2020).

56 Republic of Mauritius 'Ninth combined to tenth combined periodic report of the Republic of Mauritius on the implementation of the African Charter on Human and Peoples' Rights (January 2016 to August 2019)' submitted to the African Commission on Human and Peoples' Rights (2019) para 68 (2019 State Report).

57 2019 State Report (n 56) Annex 1, 158.

58 Website of the National Assembly available at <https://mauritiusassembly.govmu.org/Pages/Members.aspx> (accessed 22 November 2020).

59 Website of the Prime Minister's Office available at [https://pmo.govmu.org/Pages/My\\_Cabinet.aspx](https://pmo.govmu.org/Pages/My_Cabinet.aspx) (accessed 22 November 2020).

These figures demonstrate that women do not participate in politics on an equal basis with men. One can argue that political parties cannot be held liable for such low participation of women in politics if women themselves are not willing to participate in the political sphere. Hence, there is a need for affirmative action to ensure more female political participation such as the quota system which will ensure that at the very outset, political parties recruit women as their candidates.

As for local elections, as demonstrated in section 1.2.7 above, the Local Government Act imposed a quota to ensure more balanced gender representation. This amendment did increase the number of female candidates to 127 out of 726 in 2015, compared to 58 in 2010.<sup>60</sup> However, 127 out of 726 is still a low figure.

### 1.3.4 Domestic violence

Domestic violence is the most common form of violence against Mauritian women and in many instances, such cases go unreported due to the family dynamics.<sup>61</sup> Statistics demonstrate that 24 per cent of women are victims of violence, with sometimes seven cases being reported per day.<sup>62</sup> Moreover, about 40 per cent of women in the rural and suburb areas have been 'physically, verbally, emotionally or sexually abused

by their partners'.<sup>63</sup> In 2018, there were 531 applications for protection orders, out of which 270 were issued, with 506 interim protection orders.<sup>64</sup>

Such domestic violence also occurs against children who are in child marriage/live in situations. In many instances, these are not reported unless the child is severely injured or loses their life. Two cases that gained considerable media coverage are that of a 13-year old in a religious marriage situation who died while she was two months pregnant, and that of another 13 year old pregnant girl who was assaulted by her adult partner.<sup>65</sup>

Another form of domestic violence is that of parents/spouse or partners of parents against children. There are many instances in Mauritius where children have been assaulted by parents/spouse or partners of parents to such an extent that the child loses their life. One case that shook Mauritius in November 2020 of a two-year old boy who was killed by his step-father while the mother did not do anything.<sup>66</sup> Such incidents also affect the girl child. In 2020, in March, the lifeless body of a 10-year old girl was found, following which the mother and the step-father acknowledged hitting her to an extent that she lost her life.<sup>67</sup> These cases received

60 2019 State Report (n 56) 81.

61 'Domestic violence: The untold suffering of women' *Sunday Times* (11 August 2020) available at <https://www.sundaytimesmauritius.com/1-e-domestic-violence-the-untold-suffering-of-women/> (accessed 22 November 2020).

62 'Violence domestique: Sept cas rapportés en une journée' *L'express.mu* (17 September 2019) available at <https://www.lexpress.mu/article/361127/violence-domestique-sept-cas-rapportes-en-une-journee> (accessed 22 November 2020)

63 *Sunday Times* 2020 (n 61).

64 2019 State Report (n 56) 112.

65 Mrinal Roy 'Never again' *Mauritius Times* (9 July 2018) available at <http://www.mauritiustimes.com/mt/never-again/> (accessed 22 November 2020).

66 'Une mort atroce à deux ans : Pourquoi la mère d'Ayaan n'a rien fait?' *L'express.mu* (16 November 2020) available at <https://www.lexpress.mu/article/385149/une-mort-atroce-deux-ans-pourquoi-mere-dayaan-na-rien-fait> (accessed 22 November 2020).

67 'Meutre d'une gamine de 10 ans: un bébé des parents déjà mort en janvier' *L'express.mu* (30 March 2020) available at <https://www.lexpress.mu/node/373708> (accessed 22 November 2020).



extreme media coverage since the children lost their lives. Many children, including the girl child, are subjected to domestic violence on a daily basis without knowing how to get out of it unless someone else notices the child's suffering. One such case is that of an anonymous report of a six year old who was being abused by the step-mother since the person saw her with severe bruises.<sup>68</sup> If such reports are not made on time, the child is at risk of perpetual violence that can lead to loss of life.

Older women, as a vulnerable group, are also not protected from this scourge. In many instances, they are mis-treated by their children, with some even being raped by their sons.<sup>69</sup> In addition, mothers are assaulted for their old age pension – with one such case happening in 2020 against an 87 year old.<sup>70</sup> Such assaults are often related to drug abuse.<sup>71</sup>

There are many reasons for domestic violence in Mauritius which include 'early age of marriage, low income, low standard of living index, alcohol consumption of the batterer and large families in small dwellings'.<sup>72</sup> Domestic

violence is still considered as a private issue in Mauritius where parties try to settle the issue without seeking protection of the law – which explains why marital rape is not criminalised in the country. It is even worse for children, who despite the Child Protection Unit of the MGEFW, are too afraid of their parents/spouse or partners of parents to make complaints. Not only are these issues often kept within the realm of the family and household premises, but neighbours also refrain from reporting cases citing it is their (the victims') personal matter. COVID-19 has exacerbated the vulnerabilities of victims with them having had to spend a protracted period in the house with their perpetrators.

### 1.3.5 *Teenage pregnancies*

Teenage pregnancies impact on several human rights of teenagers. They are either the result of sexual violence<sup>73</sup> or romantic relationships without any proper sex education.<sup>74</sup> In 2017, there were 208 cases of registered teenage pregnancies and in 2016, there were 96 cases of sexual violence against teenage girls recorded, with 45 cases of teenage pregnancy.<sup>75</sup> Teenage pregnancy impacts on the right to education, health and life of the mother. In Mauritius, teenagers are allowed to attend schools when they are pregnant but, in many instances, they stop to do so due to stigmatisation.<sup>76</sup> Furthermore, most of the teenagers who fall pregnant come from

68 'Mo pann kapav get sa bann mark-la dan so figir, monn bizin denonse' *Defimedia.info* (21 November 2020) available at [https://defimedia.info/info-soiree-mo-pann-kapav-get-sa-bann-mark-la-dan-so-figir-monn-bizin-denonse?fbclid=IwAR0G8uD8dOBGi-5ZmV7j\\_nqVEcHnTE8YaVKS2X\\_SSjTFzprR1Qbob-TtjyA](https://defimedia.info/info-soiree-mo-pann-kapav-get-sa-bann-mark-la-dan-so-figir-monn-bizin-denonse?fbclid=IwAR0G8uD8dOBGi-5ZmV7j_nqVEcHnTE8YaVKS2X_SSjTFzprR1Qbob-TtjyA) (accessed 22 November 2020).

69 'Violée par son fils: "Ki to pe faire? To pas respekté moi, mama mwa"' *L'express.mu* available at <https://www.lexpress.mu/article/383913/violee-son-fils-ki-pe-fer-pa-respekté-mama-mwa> (accessed 29 March 2021).

70 'Neglect and abuse of older people around the world intensified by COVID-19' *HelpAge* (15 June 2020).

71 'Drogue et violence: Ces jeunes qui terrorisent leurs parents' *Defimedia.info* (29 April 2019) available at <https://defimedia.info/drogue-et-violence-ces-jeunes-qui-terrorisent-leurs-parents> (accessed 29 March 2021).

72 *Sunday Times* 2020 (n 61).

73 'Teenage pregnancy: A growing concern!' *Sunday Times* (2 April 2018) available at <https://www.sundaytimesmauritius.com/teenage-pregnancy-a-growing-concern/> (accessed 22 November 2020).

74 'Teen mums at school' *Defimedia.info* (9 April 2018) available at <https://defimedia.info/teen-mums-school> (accessed 22 November 2020).

75 *Sunday Times* 2018 (n 61).

76 *Defimedia.info* (n 71).

fragmented families with poor economic conditions and hence, the girl is forced to leave school to cater for herself and her child.<sup>77</sup>

It has been argued that teenage pregnancies, except in cases of sexual violence, is a result of lack of information and awareness.<sup>78</sup> Mauritius is still a conservative society where parents, in the first instance, are reluctant to have discussions on sexual and reproductive health. In the second instance, the government has not yet adopted comprehensive sex education to educate teenagers on sexual and reproductive health. The assumption is that such modules will corrupt the mind of the teenagers.

### 1.3.6 *Lesbian, bisexual, transgender and queer (LBTQ) women*

One can be 'tempted' to categorise Mauritius as a sexual minorities friendly country where persons forming part of sexual minorities 'not persecuted and their rights are respected'.<sup>79</sup> However, even if there is no extreme use of physical violence, patriarchal and conservative Mauritian society has negative attitudes towards non-heterosexual persons, including LBTQ women. One such instance is the homophobic statement on social media against a woman police constable who was killed in a drug operation that reads as follows:<sup>80</sup>

By her look, I think she really thought she was a man and should do such manly

thing. But unfortunately, reality got back at her. A woman (despite being a wanna-be man) VS two-thugs-the equation is not hard. RIP Officer. You were killed due to your own foolishness. Missions like that are for strong, well-trained and muscular men.

This statement is not only targeted at LBTQ women but also to heterosexual women who are expected to not take part in such operations since they are not 'strong, well-trained and muscular men'.

Such negative attitudes violate the human rights of LBTQ women. According to an organisation working in the area of queer persons,<sup>81</sup> till now there has been no comprehensive study to document the incidences of physical violence against sexual minorities, including LBTQ women in Mauritius. Despite the lack of statistics, reports suggest that sexual minorities, including LBTQ women, are victims of 'black-mail, harassment, discrimination and violence from relatives' and colleagues.<sup>82</sup> In some instances, they are kidnapped by their family in order to not meet their partners,<sup>83</sup> refused from donating blood<sup>84</sup> and suffer discrimination at the workplace.<sup>85</sup> Recently, a transgender woman discussed challenges she faces as a queer woman and highlighted most of the above issues faced by the LBTQ women in Mauritius, with her wanting to commit suicide.<sup>86</sup>

77 As above.

78 As above.

79 R Mahadew & DS Ramnauth 'A psycho-legal reflection on issues surrounding the LGBTI community in Mauritius' in S Namwase & A Jjuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 159.

80 On file with author; the statement was deleted from Facebook.

81 Young Queer Alliance, on file with author.

82 Collectif Arc-en-Ciel Individual Submission to Mauritius Third Period Review (2018).

83 Mahadew & Ramnauth (n 79) 167.

84 Mahadew & Ramnauth (n 79) 166.

85 As above.

86 'Kyrah transgenre: "À force d'être stigmatisée tu ne penses qu'au suicide"' *ION News* (5 February 2021) available at <https://ionnews.mu/kyrah-transgenre-a-force-detre-stigmatisee-tu-ne-penses-quau-suicide/> (accessed 29 March 2021).

Only one law has a direct bearing on LBTQ women, which is article 250 of the Mauritius Penal Code that criminalises sodomy. This article prevents transgender and queer women from engaging in sexual activities with a man. The Constitution provides for non-discrimination on the basis of sex, thereby omitting persons forming part of sexual minorities even if the Equal Opportunities Act includes non-discrimination on the basis of sexual orientation (however, it applies only in work settings).<sup>87</sup> Moreover, the law does not provide for name change for transgender persons and the law is unclear for those who have undergone a name change abroad.<sup>88</sup> The Domestic Violence Act of Mauritius, although making reference to 'spouse', defines the same as 'either of a man or women',<sup>89</sup> which excludes same-sex relationship, thereby excluding LBTQ women from its scope. Hence, LBTQ women do not have protection of the law unless it is in the work settings, with their conduct sometimes being criminalised under article 250 of the Mauritian Penal Code.

The Maputo Protocol defines a woman as 'persons of female gender, including girls'.<sup>90</sup> The use of the word 'gender' includes all women who identify as a woman, irrespective of their sex at birth. Therefore, even if the *travaux préparatoires* do not show the debates around the purpose of the use of the term 'gender' instead of 'sex', the Maputo Protocol's provisions apply to lesbian, bisexual, transgender and queer (LBTQ)

women<sup>91</sup> by virtue of them identifying as women.

Additionally, the Maputo Protocol does not only provide for physical violence but also for acts that cause 'psychological and economic harm'.<sup>92</sup> So, the psychological effects of the negative attitudes are also considered as violence against women, and one should not only focus on physical violence.

## 2 Ratification of the Maputo Protocol

Mauritius signed the Maputo Protocol on 29 January 2005 and acceded to the document on 16 June 2017, with the instrument of accession being deposited with the African Union on 23 June 2017.<sup>93</sup> The long period between signature and ratification might imply that the country was in no hurry to show its firm commitment to the document.

The following reservations, with explanations were entered into upon ratification:<sup>94</sup>

- The Republic of Mauritius declares that it shall not take any legislative measures under article 6(b) and 6(c) of the Protocol where these measures would be incompatible with provisions of the laws in force in Mauritius.

87 Section 1.2.5 above.

88 Collectif Arc-en-Ciel (n 82) 4.

89 Section 2 of the Domestic Violence Act.

90 Article 1(k) of the Maputo Protocol.

91 A Budoo 'The Maputo Protocol and inclusivity' in Centre for Sexualities, AIDS and Gender and Centre for Human Rights (eds) *TransMaputo: Conversations on the African human rights of persons of female gender* (2019).

92 Article 1(j) of the Maputo Protocol.

93 African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 20 November 2020).

94 2019 State Report (n 56) para 42.

- The Republic of Mauritius declares in relation to article 9 of the Protocol that it shall not take any legislative measures under article 9 of the Protocol that it shall use its best endeavours to ensure the equal participation of women in political life, in accordance with its Constitution.
- The Republic of Mauritius declares that it shall not take any measures under articles 4(2)(k), 10(2)(d) and 11(3) of the Protocol.
- The Republic of Mauritius declares that it shall use its best endeavours to achieve the aims in article 12(2) of the Protocol, in accordance with its Constitution, and the accession to the Protocol should not be regarded as an acceptance of positive discrimination by the Republic of Mauritius.
- The Republic of Mauritius declares that it shall not take any measures under article 14(2)(c) of the Protocol in relation to the authorisation of medical abortion in cases of sexual assault, rape and incest where the matter has not been reported to the police or where the pregnancy has exceeded its fourteenth week.

Hence, the reservations were mainly in the areas of child marriage,<sup>95</sup> monogamy,<sup>96</sup> legislative measures to ensure women's political participation, women refugees, including their protection from violence,<sup>97</sup> positive discrimination to attain substantive equality, and termina-

tion of pregnancies in the event the pregnancy has exceeded 14 weeks.<sup>98</sup> Till now, no reservation has been withdrawn despite Mauritius' draft Children's Bill increasing the age of marriage to 18 years with no exception.

Ratification of international instruments in Mauritius is the responsibility of the Cabinet of Ministers which is the supreme authority for taking policy decisions for the government. International instruments can only have significance in Mauritius if they are endorsed by Cabinet upon the request of relevant ministries. Accordingly, initial considerations are made by the concerned Ministry in consultation with the Attorney General's Office and other stakeholders. The Attorney General's Office then carries out a compatibility review whereby the implications of the specific treaty will be assessed in the light of domestic policies, laws, and Mauritius' international obligations. Once the request for ratification is endorsed by Cabinet the MFA deposits the instrument of ratification with the relevant international body.

According to the response by MGEFW, government agencies and civil society organisations were consulted in the process of ratification of the Maputo Protocol. The Maputo Protocol was ratified recognising its potential to enhance the protection of women and girls because of the breadth of the rights it contains. They indicated that the repetitive calls of the African Commission on Human and Peoples' Rights (African Commission) to state parties who have not ratified the Protocol to do so were also persuasive. The African

95 However, Mauritius does not have a reservation to art 21(2) of the African Children's Charter which is similar to art 6(b) of the Maputo Protocol.

96 Musawah (n 51): The Mauritian law is ambiguous when it comes to religious marriages and only recognises 'religious marriages with civil effects. However, many men in some communities contract more than one religious marriage; See sec 1.3.1 above.

97 JM Mujuzi 'Mauritian courts and the protection of the rights of asylum seekers in the absence of dedicated legislation' 2019 31(2-3) *International Journal of Refugee Law* 2-3 321: Mauritius has not ratified the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and African Union Convention for the Protection and

Assistance of Internally Displaced Persons in Africa. It has also not adopted any laws for the protection of refugees.

98 See sec 1.2.3 above.

Commission had also recommended Mauritius to ratify the Maputo Protocol in its previous 2017 concluding observations.<sup>99</sup>

### 3 Government focal point

The Human Rights Division of the MFA is usually the focal point for all international instruments.<sup>100</sup> As for the Maputo Protocol, since it concerns gender equality, the Planning and Research Unit of the MGEFW is also considered as a focal point. The MFA is further responsible for bilateral and multilateral discussions and negotiations with international governmental organisations on a range of issues including human rights and then communicates with the concerned ministries. The Human Rights Division of the MFA coordinates all government activities pertaining to human rights and offers a great advantage for institutionalising all responsibilities of the state in relation to the African Charter. The channel of communication is dealt with effectively.

The Response by the MGEFW indicated that although they are well informed about the Maputo Protocol, there is a need for further consolidation of information.

### 4 Domestication or incorporation

Since Mauritius is a dualist state, the Maputo Protocol needs to be domesticated for it to have effect at the local level. As indicated above, several laws, including the Constitution, provide for certain aspects of women's rights. However, there is no comprehensive law on women's rights till date. In 2018, the MGEFW started the process of drafting a Gender Equality Bill,<sup>101</sup> which is now at the level of the Attorney General's Office. There have even been consultations with relevant stakeholders for inputs.<sup>102</sup> It has been recognised that when enacted, this Bill will 'serve as a fundamental legislation for ensuring the rightful place of women'.<sup>103</sup>

However, at the time of writing, the Bill has not yet been tabled for discussion.<sup>104</sup> The Response by the MGEFW indicated that the objectives of the Gender Equality Bill are to, among other things:

- (i) Promote, protect and provide a legal framework for gender equality in public and private spheres;

99 African Commission on Human and Peoples' Rights 'Concluding observations and recommendations on 6th to 8th Combined Report of the Republic of Mauritius on the implementation of the African Charter on Human and Peoples' Rights' adopted during its 60th session (8 to 22 May 2017) para 58 (2017 Concluding Observations).

100 Website of the Human Rights Division available at <https://humanrights.govmu.org/Pages/About%20Us/Vision-&-Mission.aspx> (accessed 20 November 2020).

101 Republic of Mauritius 'Eighth periodic report submitted by Mauritius under article 18 of the Convention pursuant to the simplified reporting procedure, due in 2018' to the Committee on All forms of Discrimination Against Women (19 June 2018) 50.

102 As above.

103 Website of the Government of Mauritius 'Gender Equality Bill to serve as a fundamental legislation for women, says Vice-Prime Minister Jeewa-Daureeawoo' (28 February 2019) available at <http://www.govmu.org/English/News/Pages/Gender-Equality-Bill-to-serve-as-a-fundamental-legislation-for-women,-says-Vice-Prime-Minister-Jeewa-Daureeawoo.aspx> (accessed 20 November 2020).

104 Website of the Mauritius National Assembly available at <https://mauritiusassembly.govmu.org/Pages/Bills.aspx> (accessed 20 November 2020).

- (ii) Provide for equal opportunities for all persons with greater attention to intersectionality of gender and other social categorization i.e. disability, age, race, class among others and create responsibilities for individuals and entities in public and private sphere;
- (iii) To eliminate gender based discrimination in particular discrimination against women based on gender roles;
- (iv) To promote equality and gender balance between family roles –unpaid care work and employment for men and women to improve the status of women;
- (v) To promote gender mainstreaming and integration in national development;
- (vi) To provide for special measures to ensure gender equality; and
- (vii) To provide for gender balance in public state finance management through Gender Responsive Budgeting.

Moreover, the Gender Equality Bill will be applicable to:

- (i) Individuals as well as public and private entities in the Republic of Mauritius in all spheres and binds operation in all arms of government-judiciary, executive and legislature and in appointive and elective positions.
- (ii) Professional and labour organizations.
- (iii) Political Parties.

Hence, if adopted, the Gender Equality Bill will ensure a more comprehensive protection for women's rights. To ensure that the Maputo Protocol becomes integral to the Gender Equality Bill, it is recommended that there is a provision which makes specific reference to the CEDAW and the Maputo Protocol. This will ensure that the Gender Equality Bill also covers those rights in the Maputo Protocol that have

not been mentioned expressly in the Bill. Moreover, the Parliamentary Gender Caucus, set up in 2017,<sup>105</sup> together with civil society organisations, need to ensure that the Maputo Protocol's language is adopted in the Gender Equality Bill.

## 5 Legislative reform or adoption

It is to be noted that no compatibility study was done prior to the ratification of the Maputo Protocol. Hence, there is no comprehensive document that elaborates on the laws in Mauritius that are in contravention with the Maputo Protocol. However, there have been amendments made to the country's existing laws that have an impact on women's rights.

In addition to the amendments to the Criminal Code<sup>106</sup> and the two new Bills in the form of the Children's Bill<sup>107</sup> and the Gender Equality Bill,<sup>108</sup> the government is in the process of proposing amendments to the Constitution that can have a bearing on women's rights. One of the amendments relate to gender quota to ensure more female representation in politics. This was following several calls from the international community to ensure more female representation in politics. During parliamentary debates of this Amendment Bill, reference was made to article 9 of the Maputo Protocol as the legal basis for the adoption of positive measures to promote political participation.<sup>109</sup> These

<sup>105</sup> 2019 State Report (n 56) 289.

<sup>106</sup> See sec 1.2.3 above.

<sup>107</sup> See sec 1.2 above.

<sup>108</sup> Section 4 above.

<sup>109</sup> Republic of Mauritius 'Sixth National Assembly: Parliamentary Debates (Hansard)' First session 8 December 2018 at 32 available at <https://mauritiusassembly.govmu.org/Documents/Hansard/2018/hansard3618.pdf> (accessed 20 November 2020).

Amendments have not yet been adopted despite being presented in 2018.

Moreover, still in 2018, the government introduced a Mauritius Family Planning and Welfare Association Bill to 'provide for a more appropriate and modern legislative framework that makes provision for sexual and reproductive health and rights in accordance with international standards'.<sup>110</sup> This new Bill will establish a new Mauritius Family Planning and Welfare Association with the mandates to, among others:<sup>111</sup>

- (a) promote awareness on planned parenthood with a view to maintaining the fertility rate at a reasonable level;
- (b) promote family welfare, healthy ageing, good health and social integration through effective family planning services by addressing the need for sexual and reproductive health and rights in the community through information, education and advocacy; and
- (c) work for the advancement of the rights of women, men and young persons with a view to enabling them to make free and informed choices regarding their sexual and reproductive health and rights.

However, this Bill has not yet been adopted into law.

In 2018, the country adopted the National Women's Council Act that instituted a new National Women's Council to:<sup>112</sup>

- (a) promote women's empowerment and gender equality;
- (b) ensure and promote the active participation of women in the social, economic and political fields in

order to further their overall empowerment; and

- (c) provide a platform for women to voice their needs, concerns and aspirations.

The National Women's Council empowers women through training and sensitisation campaigns.

The Response by MGEFW indicates that there has been no additional resource allocation as a result of ratification of the Maputo Protocol. Therefore, there is no budget to popularise the provisions of the Maputo Protocol. Nevertheless, the government has engaged in sporadic gender budgeting initiatives. For instance, in 2018, the government allocated about \$5000 to each ministry 'to promote sensitisation and awareness programmes, and implement activities on gender mainstreaming'.<sup>113</sup> The government also offered a one-off grant to build crèches in companies so that more women can join the workforce. The government also increased the monthly basic retirement pension so that older persons are more financially stable. The budget adopted for 2020-2021 in the context of COVID-19 recognised violence against women as a 'stain on society' and proposed to set up a Gender Policy Observatory.<sup>114</sup> Moreover, the Development Bank of Mauritius will provide women entrepreneurs with loans of \$5.02 million at a concession rate of 0.5 per cent per year.<sup>115</sup> One can note from the 2020 budget that the government has main-

<sup>110</sup> 2019 State Report (n 56) para 186.

<sup>111</sup> As above.

<sup>112</sup> 2019 State Report (n 56) para 283.

<sup>113</sup> Website of the Government of Mauritius available at <http://www.govmu.org/English/News/Pages/Budget-2018-2019-Enhancement-of-Gender-Equality-and-Support-to-the-Elderly.aspx> (accessed 20 November 2020).

<sup>114</sup> Minister of Finance, Economic Planning and Development 'Budget Speech 2020-2021: Our new normal: The economy of life' (2020) paras 318 and 319.

<sup>115</sup> Ministry of Finance (n 114) 322.

streamed gender during the resource allocation process.

## 6 Policy reform or formulation

In 2008, the government adopted the National Gender Policy Framework (NGPF) with the purpose of 'gender equality and women's empowerment'.<sup>116</sup> Its aim was to strengthen 'accountability and coherence across government and non-state actors to achieve gender equality and women's empowerment in line with human rights treaty obligations and intergovernmental policy commitments'. However, this policy is outdated and the government is in the process of formulating a new Gender Policy Framework. The new Framework will be for the next ten years and will be 'an effective tool for Ministries and other institutions to review policies and promote gender equality'.<sup>117</sup> The Gender Policy is not yet in the public domain at the time of writing. However, the response by the MGEFW indicates that even if the new Gender Policy refers to the Maputo Protocol as one of its guiding principles, the CEDAW is given a position of primacy as the main instrument that inspired the policy.

According to the response by the MGEFW, general comments of the African Commission are persuasive and provide guidance while implementing policies, programmes projects and activities at national level.

116 NGPF 4.

117 Website of the Government of Mauritius available at <http://www.govmu.org/English/News/Pages/A-new-National-Gender-Policy-to-review-policies-and-promote-gender-equality.aspx> (accessed 20 November 2020).

## 7 Impact on the judiciary

Till date, no decision of the Mauritian courts mentions the Maputo Protocol or the general comments on its provisions.

## 8 Awareness and use by civil society

Civil society organisations in Mauritius are aware of the Maputo Protocol. For instance, they have used the Maputo Protocol as a tool to advocate for the elimination of child marriage and have made calls to the government to withdraw its reservations under article 6(b) of the Maputo Protocol.<sup>118</sup>

The most prominent civil society organisation working on women's rights in Mauritius is Gender Links. It has three main areas of focus which are Safe Haven Halfway Home which hosts women who are survivors of violence, Ending Child Marriage and the Media project to ensure more women's voices in media.<sup>119</sup> Together with Young Queer Alliance, Media Watch Organisation and SOS Femmes, it has produced shadow reports to the CEDAW Committee.<sup>120</sup> However, its focus is the Southern African Development Community Protocol on Gender and Development as reflected in its Strategy for 2016 to 2020. The strategy was

118 Centre for Human Rights 'Ratification of the Maputo Protocol by Mauritius: Reflections, Expectations and Next Steps' (28 September 2017) available at [https://www.up.ac.za/faculty-of-law/news/post\\_2569008--ratification-of-the-maputo-protocol-by-mauritius-reflections-expectations-and-next-steps](https://www.up.ac.za/faculty-of-law/news/post_2569008--ratification-of-the-maputo-protocol-by-mauritius-reflections-expectations-and-next-steps) (accessed 20 November 2020).

119 Website of Gender Links available at <https://genderlinks.org.za/countries/mauritius/> (accessed November 2020).

120 Gender Links and Others 'Report to CEDAW from Mauritius' available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MUS/INT\\_CEDAW\\_CSS\\_MUS\\_32569\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MUS/INT_CEDAW_CSS_MUS_32569_E.pdf) (accessed 22 November 2020).



adopted before Mauritius ratified the Maputo Protocol and it is hoped that the new strategy will also lean on the Maputo Protocol.

In addition to Gender Links, civil society organisations such as MACOSS (with a Women's Cell) and the Global Rainbow Foundation have engaged with the Maputo Protocol. For instance, on the one hand, together with Gender Links, MACOSS was part of the state report drafting procedure, attended training workshops and provided inputs on the implementation of the Maputo Protocol. On the other hand, the Global Rainbow Foundation, in collaboration with Ditshwanelo, a civil society based in Botswana with observer status before the African Commission, presented a shadow report to the 9th to 10th Periodic Report of Mauritius.<sup>121</sup> The shadow report included provisions of the Maputo Protocol relating to women's political rights, violence against women and religious marriages.

Till now, no organisation working on women's rights has observer status with the African Commission despite civil society organisations resolving to apply for such observer status.<sup>122</sup>

## **9 Awareness and use by lawyers and judicial officers**

Most lawyers and judicial officers admitted to the Mauritian Bar studied either in Mauritius or in the United Kingdom. As demonstrated in section 10 below, minimal focus is placed on the African human rights system, let alone the Maputo Protocol, at the undergraduate level in universities in

Mauritius. For those studying in the United Kingdom, they are more comfortable with the European human rights system than the African human rights system. Hence, when lawyers and judicial officers join the profession, they do so with very limited knowledge of the Maputo Protocol.

The Institute for Judicial and Legal Studies (IJLS), established by the Institute for Judicial and Legal Studies Act 2011, is responsible for, amongst others, the continued education of judicial and legal officers.<sup>123</sup> It offers Continuing Professional Development Programmes under section 9 of the Law Practitioners Act 2011 and the Judicial and Legal Studies (Continuing Professional Development Programmes) Regulations 2012. The IJLS would have been a good platform to introduce the Maputo Protocol to lawyers and judicial officers. However, the Institute has not yet offered a course on the African human rights system or the Maputo Protocol.<sup>124</sup>

Till date, no lawyer has mentioned the Maputo Protocol in their pleadings. This might be due to the dualist system or the lack of training on the Maputo Protocol at university level and in the Continuing Professional Development Programmes.

121 Ditshwanelo and Global Rainbow Foundation's shadow report submitted to the African Commission (2020).

122 Centre for Human Rights 2017 (n 118).

123 Section 4 of the Institute for Judicial and Legal Studies Act.

124 Website of the IJLS available at <http://www.ijls.mu/index.php/lecture-notes?start=0> (accessed 20 November 2020).

## 10 Higher education and academic writing

The main university in Mauritius with focus on Mauritian law<sup>125</sup> is the University of Mauritius which has a Faculty of Law with Management that offers undergraduate courses in law. For students in the LLB programme, human rights is a core module taught over a semester.<sup>126</sup> The syllabus for the module<sup>127</sup> provides for, amongst others, an introduction to the African human rights system with the outline also mentioning women's rights. The Module Map shows that the students spend two sessions, a total of eight hours, on the regional human rights system. One can already conclude from the time allocated to regional human rights system that the students do not have much time to learn about the Maputo Protocol. As a former LLB student at the University of Mauritius, the researcher can confirm that at the time (2008) human rights was taught, there was little focus on the African human rights system. However, to assess whether things have changed, a student who studied the human rights Module in the past year was interviewed. According to them, they do spend more hours on human rights. However, the Maputo Protocol is just mentioned in passing without any details on the document while the CEDAW is given more focus for women's rights protection. Hence, it can be concluded that students studying human rights at undergraduate level at the University of Mauritius are not

familiar with the provisions of the Maputo Protocol.

Another university, the Open University of Mauritius, also has a similar degree with students having a module in human rights. The students have a student manual for that programme.<sup>128</sup> There are units on both women and Africa and human rights. The human rights manual dedicates a whole section to the Maputo Protocol which elaborates on its provisions, general comments and cases at the regional level on the document. However, unfortunately, none of the students of that course were available to interview so as to assess whether lecturers spend much time on the topic.

In addition to the module in human rights, students at the University of Mauritius participate in the annual African Human Rights Moot Court Competition organised by the Centre for Human Rights, University of Pretoria.<sup>129</sup> These cases focus on the African human rights system, with students having to submit written submissions and argue a hypothetical case as if they before the African Court on Human and Peoples' Rights. Very often, these cases have a women's rights component thereby exposing the participating students to the Maputo Protocol.

As for academics, many authors (either in law or other disciplines) write on women's rights in Mauritius.<sup>130</sup> Nevertheless, the only one making

125 There are branches of British universities in Mauritius that offer English LLB syllabus.

126 University of Mauritius website available at <https://www.uom.ac.mu/Images/Files/programmes/FLM/YR2014/Undergraduate/LM310EA.pdf> (accessed 20 November 2020).

127 On file with author.

128 On file with author.

129 For more information, see the Centre for Human Rights Website available at <https://www.chr.up.ac.za/moot> (accessed 20 November 2020).

130 R. Ramtohul 'Fractured sisterhood: The historical evolution of the women's Movement in Mauritius' *Afrika Zamani* (2010-2011) 18-19, 71-101; R. Ramtohul 'Intersectionality and women's political

consistent reference to the Maputo Protocol is Mahadew, who is a senior lecturer at the Faculty of Law with Management at the University of Mauritius. This might be attributed to the fact that he studied a Master's in Human Rights in Democratisation in Africa, one of the focus of which is the African human rights system, including the Maputo Protocol. Mahadew was also the technical assistant to assist the state in drafting its report under the Maputo Protocol (not yet submitted – see section 12 below).<sup>131</sup>

## 11 Impact on independent state institutions

Mauritius has three main human rights institutions whose mandate extend to women's rights namely the National Human Rights Commission, the Equal

Opportunities Commission<sup>132</sup> and the Ombudsperson for Children.

Section 3 of the Protection of Human Rights Act 1998 establishes the National Human Rights Commission. As a body corporate, it is not under the control of any person or authority. The main functions of the Commission are detailed in Section 3A of the Act as follows and concerns mainly the promotion and protection of human rights. The Act creates a Human Rights Division with the power to enquire into any written complaint from any person alleging to be a victim of human right abuse or denial.<sup>133</sup> The language of the Protection of Human Rights Act is gender-neutral and hence there is no specific unit dealing with women's rights. Nevertheless, the National Human Rights Commission engages on women's rights during their talks and workshops which are often held in secondary schools, youth centres, recreational centres, Citizen Advice Bureau and other public institutions across the island. However, such sensitisation campaigns rarely mention the CEDAW, let alone the Maputo Protocol even if their target groups include women, amongst others.

The Ombudsperson for Children Act establishes the Office of the Ombudsperson for Children. The objectives of the office consist of the ensuring 'that the rights, needs and interests of children are given full consideration by public bodies, private authorities, individuals and associations of individuals', the promotion of 'the rights and best interests of the child', and 'compliance

citizenship' (2015) 33(1) *Journal of Contemporary African Studies* 27-47; V Tandrayen-Ragoobur 'Gendering governance: The case of Mauritius' (2014) 33(6) *Equality, Diversity and Inclusion* 535-563; R Ramtohul 'Gender and insecurity in Mauritius' in MR Izarali, O Masakure & E Shizha (eds) *Security, education and development in contemporary Africa* (2017); R Ramtohul 'Women's political representation in small island developing states: a comparative analysis of Mauritius and Seychelles' (2020) 3(1) *Small States and Territories* 83-98; and MY Yoon & S Bunwaree 'Women's legislative representation in Mauritius: 'A grave democratic deficit' (2006) 24(2) *Journal of Contemporary African Studies* 229-247; MG Techane & R Mahadew 'The impact of the African Charter and the Maputo Protocol in Mauritius' in VO Ayeni (ed) *The impact of the Africa Charter and the Maputo Protocol in selected African countries* (2016) 165-182; and R Mahadew 'Mauritius decriminalizes abortion in certain cases – Lessons from the travaux préparatoires' (2015) 36(2) *Statute Law Review* 160-174.

131 Centre for Human Rights 'Mauritius drafts its state party report on the Maputo Protocol' (29 July 2019) available at <https://www.chr.up.ac.za/news-archive/1777-mauritius-drafts-its-state-party-report-on-the-maputo-protocol> (accessed 20 November 2020).

132 Section 1.2.5 above.

133 Section 4 of the Protection of Human Rights Act 1998.

with the' CRC.<sup>134</sup> Again, the language of the Ombudsperson for Children Act is neutral and does not specifically mention the girl child. Although the Office of the Ombudsperson has been involved in sensitisation campaigns that concerns the girl child, for instance against child marriage,<sup>135</sup> there is no reference to the Maputo Protocol with its focus being CEDAW.

Usually, members of the National Human Rights Commission are invited to contribute to state reports although they have no active mandate in the implementation/follow-up of concluding observations.

## 12 State reporting

The Human Rights Division of the MFA has the primary responsibility to ensure that appropriate actions are taken and implemented for the state to meet its international reporting obligations regarding human rights.<sup>136</sup> For treaties such as the CEDAW and the Maputo Protocol, the MGEFW and the Human Rights Division of the MFA have shared responsibility for the preparation of state reports. The Human Rights Division has also set up a National Mechanism for Reporting and Follow-up (NMRF) which is 'chaired by the Hon. Minister responsible for human rights and comprises representatives of Ministries and Departments, National Human Rights Institutions ... and Non-Governmental Organisations/the Civil

Society'.<sup>137</sup> It is an 'inter-ministerial structure set up ... for effective reporting and implementation of treaty obligations, engagement with the international and regional human rights systems and follow up on the recommendations or decisions' from, amongst others, the African Commission.<sup>138</sup> They also discuss the outcomes of state party reviews – for instance, the 20 August 2020 meeting of the NMRF discussed, amongst others, the outcome of Mauritius' participation in the 66th session of the African Commission where the 2019 State Report was reviewed.<sup>139</sup>

According to the response by the MGEFW, the process of preparing reports involves gathering inputs from relevant government ministries, state departments and civil society organisations, and by conducting thorough consultations with the Attorney General's Office. Once the report is prepared, it is sent to the Cabinet for approval. Once approved by the Cabinet, the report is submitted to the MFA for transmission to the African Commission.

Till date, Mauritius has submitted three state reports to the African Commission.<sup>140</sup> The first two reports were submitted before Mauritius ratified the Maputo Protocol. However, they made mention of women's rights by virtue of the country's obligations under

134 Section 5 of the Ombudsperson for Children Act.

135 2019 State Report (n 56) para 68.

136 Website of the Human Rights Division of the MFA available at <https://humanrights.gov.mu.org/Pages/About%20Us/Vision-&-Mission.aspx> (accessed 22 November 2020).

137 Website of the Human Rights Division of the MFA available at <https://humanrights.gov.mu.org/Pages/Human%20Rights/TreatyConvention.aspx> (accessed 22 November 2020).

138 As above.

139 Website of the Human Rights Division of the MFA available at <https://humanrights.gov.mu.org/Documents/NEWS%26EVENTS/NMRF%20-%20WEBSITE.pdf> (accessed 22 November 2020).

140 Website of the African Commission available at <https://www.achpr.org/statereportsandconcludingobservations> (accessed 22 November 2020).

the African Charter.<sup>141</sup> The 2019 State Report of the Republic of Mauritius to the African Commission,<sup>142</sup> despite being submitted after Mauritius ratified the Maputo Protocol, was not prepared under the 2009 Guidelines on State Reporting under the Maputo Protocol which provides for a Section A on the African Charter and a section B on the Maputo Protocol. Instead, it mentions women's rights and the Maputo Protocol in the document without going into details in the different provisions of the Maputo Protocol.

According to the Response by the MGEFW, this was due to a misunderstanding that a separate report under the Maputo Protocol could be submitted instead of it being submitted as Part B of the state report to the African Commission – this came after they received training on state reporting to the African Commission, with a focus on 2009 Guidelines on State Reporting under the Maputo Protocol by the Centre for Human Rights, University of Pretoria.<sup>143</sup> They also received a technical assistant in the preparation of the report under the Maputo Protocol.

The response by the MGEFW also indicated that once they were apprised of the misunderstanding, Cabinet set up an inter-ministerial committee to examine the Maputo Protocol Report. However, with the onset of the COVID-

19 pandemic, the Committee could not examine the report before the deadline for submission and the 2019 report was submitted as it was. The Response by MGEFW further stated that they intended to submit a report in compliance with the 2009 Guidelines on State Reporting under the Maputo Protocol with the 11th periodic under the African Charter in 2021.

Although the concluding observations for the 2019 Report are not yet available, the 2017 concluding observations made several references to women's rights as follows:

- Ratification of the Maputo Protocol;<sup>144</sup>
- Article 16(4) of the Constitution which provides an exemption to the prohibition on discrimination on personal status law, which is discriminatory towards women;<sup>145</sup>
- Women's political participation;<sup>146</sup> and
- Violence against women<sup>147</sup>

According to the shadow report of Ditshwanelo and the Global Rainbow Foundation, out of the 32 recommendations of the 2017 concluding observations, '19 (59 per cent) were not implemented, 6 (19 per cent) recommendations were partly implemented, 4 (13 per cent) recommendations were implemented' there was no information on 3 (9 per cent) recommendations in the state report.<sup>148</sup>

Specific to women's rights, Mauritius ratified the Maputo Protocol shortly

141 Republic of Mauritius 'Country report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the African Charter on Human and Peoples' Rights' submitted to the African Commission (November 2014); and Republic of Mauritius 'Sixth to eighth combined periodic report of the Republic of Mauritius on the implementation of the African Charter on Human and Peoples' Rights' submitted to the African Commission (March 2016).

142 2019 State report (n 56).

143 Centre for Human Rights 2019 (n 131).

144 2017 Concluding Observations (n 99) para 58.

145 2017 Concluding Observations (n 99) Recommendation vii.

146 2017 Concluding Observations (n 99) Recommendation viii.

147 2017 Concluding Observations (n 99) Recommendation xxiii.

148 Ditshwanelo and the Global Rainbow Foundation (n 121) 8.

after the 2017 concluding observations were issued. As for women's political participation, although the 2019 State Report does not mention it, the government is in the process of debating amendments to the Constitution that will provide for a quota system to ensure more gender balance.<sup>149</sup> Concerning violence against women, the MGEFW has, amongst others, trained police officers to ensure effective response to cases of domestic violence<sup>150</sup> and has 'reinforced its sensitisation programmes targeting men, women, youth and religious leaders'.<sup>151</sup>

### 13 Communications

One pertinent case concerning discrimination against women in Mauritius heard at the international level is that of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius* at the Human Rights Committee.<sup>152</sup> This case concerned the Immigration (Amendment) Act of 1977 and the Deportation (Amendment Act) of 1977 which required husbands of Mauritian nationals to apply for a resident permit while such was not the case for wives of male Mauritian nationals. The Human Rights Committee recommended Mauritius to amend these two laws to avoid discrimination on the basis of sex.

As for the African Union level, till now, an analysis of the databases of the institutions shows that only the African Commission has had the opportunity to receive two cases against Mauritius<sup>153</sup>

and both were ruled inadmissible as follows:

- *Goornah v Republic of Mauritius*.<sup>154</sup> This case concerned violations of the African Charter and alleged that Mauritius violated the victim's right to fair trial. The complaint was submitted after three years one month and 15 days from the time the local remedy was exhausted and was dismissed since the complainant could not justify why three years one month and 15 days between the exhaustion of local remedies and the submission of the complaint could be considered as reasonable time.
- *Digbeejaye Koonjul v the Republic of Mauritius*.<sup>155</sup> This case also had the right to a fair trial as subject matter and was also ruled inadmissible since the applicants could not provide arguments as to why the complaint was not submitted within reasonable time.

Hence, no case has been submitted to the African Commission under the Maputo Protocol.

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

The last promotional visit of the African Commission to Mauritius was from 13 to 17 August 2019.<sup>156</sup> The mission's delegation consisted of:

Honourable Commissioner Soyata Maiga who is the Chairperson of the Commission, Chairperson of the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and

149 Section 5 above.

150 2019 State Report (n 56 above) para 268.

151 2019 State Report (n 56 above) para 269.

152 *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius* Human Rights Committee CCPR/C/12/D/35/1978 9 April 1981.

153 Website of the African Commission available at <http://www.achpr.org/communications/>.

154 *Romy Goornah (Represented by Dev Hurnam) v Republic of Mauritius* Communication 596/16 2018.

155 *Digbeejaye Koonjul v the Republic of Mauritius* Communication 569/15 (2020).

156 Website of the African Commission available at <https://www.achpr.org/pressrelease/detail?id=432> (accessed 22 November 2020).

Those at Risk, Vulnerable to and Affected by HIV, and Chairperson of the Working Group on Indigenous Populations/Communities in Africa; Honourable Commissioner Hatem Essaïem who is the Commissioner Rapporteur on the Human Rights Situation in the Republic of Mauritius and Chairperson of the Committee for the Prevention of Torture in Africa; and Honourable Commissioner Remy Ngoy Lumbu who is the Special Rapporteur on the Situation of Human Rights Defenders in Africa.

As can be noted, the Special Rapporteur on the Rights of Women in Africa was not part of the delegation.

The delegation was expected to meet with a range of stakeholders including 'officials from relevant Government ministries, national human rights institutions, civil society organisations, a cross-section of human rights actors in the country, and other stakeholders'.<sup>157</sup> The report on the Mauritius promotional visit has not yet been finalised by the delegation at the time of writing and hence the meetings and recommendations are not in the public domain. Nevertheless, the response by the MGEFW indicates that the government were recommended the following by delegation during their visit:

- To continue the efforts undertaken and all initiatives aimed at better enjoyment and effective protection of human rights in the country;
- To accelerate the adoption and promulgation of draft laws aimed at strengthening the effective realisation of human rights for the benefit of populations in general and vulnerable groups in particular;
- To consolidate the achievements as well as the actions underway within the framework of the implementation of social, economic and cultural rights;

- To strengthen coordination, monitoring and evaluation to improve the effectiveness of existing policies, programs and strategies in the area of protection and human rights.

As can be noted, the recommendations are very general and do not concern specific aspects of women's rights. However, as indicated, these are recommendations of the delegation during their visit and their reports might be more specific on the findings and recommendations.

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

The Maputo Protocol is a comprehensive document which, if implemented at the local level, will ensure an enhancement in the protection of women's rights. However, as indicated, the country has not yet domesticated the document. Although the country is in the process of negotiating a Gender Equality Bill, such Bill is premised on the CEDAW. Although the CEDAW relates to women's rights, it can be argued that it is not specific enough. The provisions of the Maputo Protocol relating to, amongst others, child marriage, violence against women, LBTQ women and monogamy, might be a better inspiration for the Gender Equality Bill. Moreover, the Maputo Protocol has innovative provisions relating to budgetary allocations,<sup>158</sup> which can ensure a better allocation of resources for women's issues. Hence, the Gender Equality Bill, if adopted without

<sup>157</sup> As above.

<sup>158</sup> Article 4(2)(i) of the Maputo Protocol: 'States Parties shall take appropriate and effective measures to ... provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women'; and article 26(2) of the

incorporating the provisions of the Maputo Protocol, might impede the impact of the Maputo Protocol at the domestic level.

Related to the above, one challenge that the implementation of the Maputo Protocol might face is the fact that Mauritius gives more importance to the UN human rights system, as compared to the African human rights system. Techane and Mahadew<sup>159</sup> in a similar study in 2016, highlighted that the 'detached physical location of Mauritius from Africa mainland', with the majority of the population being of Asian descent, might be the reason for the country giving precedence to the UN human rights system at the expense of the African human rights system. Despite this, Mauritius had a member on the African Commission, Commissioner Yeung Sik Yuen, whose mandate came to an end in 2020. He was involved in meetings concerning the Maputo Protocol in Mauritius.<sup>160</sup> Hence, despite the geographical location and population demographics, Mauritius does interact with the regional human rights system. The 2019 State Report and the willingness of the MGEFW to follow the 2009 State reporting Guidelines indicate that the country is aware of its obligations under African human rights instruments.

The NMRF's composition of all relevant stakeholders is an opportunity for ensuring the implementation of the Maputo Protocol at the domestic level. It is recommended that the NMRF's

members are trained on reporting under the Maputo Protocol so that they can present a report under the 2009 State Reporting Guidelines with both a Part A and a Part B. Civil society organisations in the NMRF need to be more forceful in ensuring that the concluding observations by the African Commission are implemented. They need to disseminate these concluding observations to the population, including the media, and ensure discussions for their implementation.

The media in Mauritius has been very pro-active in bringing into fore issues of women rights by, for instance, reporting on child marriage, teenage pregnancy and violence against women, including domestic violence. However, they focus on issues when it is too late – reporting on deaths due to violence, for instance. The media needs to use their platform as a tool to discuss preventative measures. They can also increase awareness on the Maputo Protocol, the African Commission and the implementation of concluding observations by hosting debates between members of the NMRF.

Despite the fact that the Maputo Protocol is a comprehensive document on women's rights, the African Union has adopted the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa in 2018 and the Protocol to the African Charter on the Rights of Older Persons in 2016. These two Protocols enhance the Maputo Protocol's provisions<sup>161</sup> on these vulnerable groups. The government of Mauritius has not yet ratified these two documents, which can provide for a better framework for the protection of vulnerable women in Mauritius.

Maputo Protocol: States Parties 'undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.'

159 Techane & Mahadew (n 130) 180-181.

160 Centre for Human Rights 2017 (n 118).

161 Articles 22 and 23 of the Maputo Protocol.



Civil society organisations in Mauritius have been instrumental in the ratification of the Maputo Protocol. However, they do not yet have observer status with the African Commission. They need to therefore apply for observer status to ensure more engagement with the African Commission. Mauritius, despite having ratified the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), has not yet made a declaration under its article 34(6) to allow non-governmental organisations with observer status before the African Commission to bring cases to the African Court. In addition to applying for observer status with the African Commission, civil society organisations in Mauritius need to lobby the government to make a declaration under article 34(6) so that they can bring cases of violations of the Maputo Protocol to the African Court. Civil society organisations must also lobby the government to ratify the two Protocols mentioned in the previous paragraph.

Generally, there is a lack of data collection relating to women's issues in Mauritius. For instance, as highlighted by UN Women, Mauritius needs to collect data concerning 'gender and poverty, women's access to assets including land, physical and sexual harassment, and gender and the environment'.<sup>162</sup> Furthermore, there is a need to adopt an intersectional lens when collecting data on women to include women with disabilities, women who form part of sexual minorities, women with limited education background, unemployed women, women of different racial groups, older women

and poor women, amongst others. Such data will allow an assessment of who is at risk of violations and the government and civil society organisations can then direct their efforts towards them.

162 Website of UN Women available at <https://data.unwomen.org/country/mauritius> (accessed 22 November 2020).

# THE IMPACT OF THE MAPUTO PROTOCOL IN NIGERIA

*Anthonia Lola Dickson\**



## 1 Introduction

Human rights in Nigeria is as old as the country itself. However, the entrenchment of fundamental human rights in the country in the modern sense could be traced to the 1960 independence Constitution.<sup>1</sup> This was the first Bill of Rights. Since then, the provisions relating to human rights have been included in all subsequent Constitutions in 1963, 1979 and now 1999 (as amended). Civil and political rights are enshrined in chapter four of the 1999 Constitution. Apart from the provisions of fundamental rights (civil and political rights) in these Constitutions, the 1979 and the 1999 Constitutions went further by providing for the Fundamental Objectives and Directive Principles of State Policy<sup>2</sup> which are termed the Economic, Social and Cultural Rights. The essence of the entrenchment of human rights provisions in Nigeria's Constitutions was to ensure the protection of the rights of the citizens as well as guarantee

the social and economic well-being of the people.<sup>3</sup>

Women's rights as a human rights issue is now gradually gaining traction in Nigeria. For a long time, women's rights issues have been treated much like a welfare issue and privileges which the government in its benevolence accords to women.<sup>4</sup> The Constitution at best in section 42 pays lip-service to women's rights by providing for non-discrimination on the basis of sex when in fact, this is far from reality.<sup>5</sup> However, as more international treaties were signed and ratified by the government, the executive arm of government started introducing policy documents that spelt out the rights of women. The judiciary followed suit by issuing judgments especially in

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1 Chapter 3 of the 1960 Constitution spelt out the fundamental rights.

2 This is contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999.

3 Federal Republic of Nigeria 'National Action Plan for the Promotion & Protection of Human Rights in Nigeria' 4 and 40.

4 OA Gbadamosi *Reproductive health and rights: African perspectives and legal issues in Nigeria* (2007) 351.

5 Section 42(1): 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject'.

intestate succession cases in favour of women thereby overruling the existing patriarchal property and succession rights laws,<sup>6</sup> and recently, the legislature passed the Violence Against Persons (Prohibition) Act in 2015.<sup>7</sup> This Act addresses several issues of violence against women. It could be argued that a gender-based interpretation of the various human rights provisions in chapters II<sup>8</sup> and IV<sup>9</sup> of the Constitution could have an effect on the advancement of women's rights to life, liberty, property, fair trial and privacy.

The Nigerian Constitution laid the foundation for the protection of women's rights in Nigeria. For example, section 42 of the Constitution prohibits discrimination on the basis of ethnic group, place of origin, sex, among others. Several other sections of the Constitution can be used to champion and protect the rights of women against any form of violation. Also, in addition to other policies, the country has a National Gender Policy that deals, among other things, with the empowerment of women against any form of discrimination on the basis of sex. The other relevant laws are the Criminal Code<sup>10</sup> and the Penal Code<sup>11</sup> as applicable in the southern and northern Nigeria respectively, which could be used to protect the rights of women in Nigeria.

## 2 The ratification and domestication of the Maputo Protocol

Nigeria signed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol or the Protocol) on 16 December 2003 and ratified it on 16 December 2004.<sup>12</sup> The instrument of ratification was deposited with the African Union on 18 February 2005.<sup>13</sup> The process of ratification of international treaties is entirely the responsibility of the executive arm of government.<sup>14</sup> The parliament is not involved in the process of ratification. There is no requirement to seek the advice of parliament let alone the consent of parliament before ratification. It should be noted however that in the case of the Maputo Protocol, the Ministry of Women Affairs, the Ministry of Justice and the Ministry of Foreign Affairs (MFA) were involved and took the lead in the process of its ratification. The Federal Ministry of Women Affairs is the focal point responsible for the implementation of the Maputo Protocol and the ministry staff are informed about the provisions of the Maputo Protocol.<sup>15</sup>

6 *Onyibor Anekwe & Anor v Maria Nweke* SC 129/2013, *Lois Chituru Ukeje v Gladys Ada Ukeje* SC.224/2004.

7 The VAPP Act is aimed at eliminating violence in private and public life, prohibit all forms of violence, including physical, sexual, psychological, domestic, harmful traditional practices; discrimination against persons and to provide maximum protection and effective remedies for victims and punishment of offenders.

8 Fundamental Objectives and directive Principles of State Policy.

9 Fundamental Rights.

10 Criminal Code Act, Laws of the Federation of Nigeria 1990.

11 The Penal Code applies to the northern states of Nigeria.

12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women In Africa, adopted in Maputo, Mozambique on 11 July 2003 – entered into force on 25 November 2005, available at 37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf (au.int).

13 African Union 'OAU/AU Treaties, Conventions, Protocols & Charters' available at <http://www.au.int/en/treaties> (accessed 13 March 2021).

14 CE Okeke & MI Anushiem, 'Implementation of treaties in Nigeria: Issues, challenges and the way forward' (2018) 9(2) *African Journals Online* at 226.

15 Nigeria: Initial Country Report on implementation of AU Solemn Declaration on Gender Equality in Africa (2004-2006).

There are no known reasons for the ratification of the Protocol. It may be right to conclude that, the ratification was driven by a desire to signal commitment to women's rights and comradeship with the comity of nations. Furthermore, section 12 of the Constitution of the Federal Republic of Nigeria 1999 embodies the principle of dualism. This implies that, before international treaties can be binding in the domestic setting, they must be domesticated by an act of the National Assembly of Nigeria.

### **3 Legislative reforms or adoption**

The Maputo Protocol has influenced legislative outcomes in Nigeria to a certain extent either directly or indirectly. An example is the effort of the government of Nigeria to deal with harmful cultural practices negatively affecting women and children in the country through legislative measures, some of which are listed below:

- Prohibition of child marriage and child betrothal under sections 21 and 22 of the Child's Right Act (CRA);
- Prohibition of Child Trafficking by Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2015;
- Anambra State Gender and Equal Opportunities Law 2007;
- Cross River State Law to Prohibit Girl-Child Marriages and Female Genital Circumcision or Genital Mutilation 2009;
- Ekiti State Gender-Based Violence (Prohibition) Law 2011;
- Imo State Gender and Equal Opportunities Law 7 of 2007;
- Lagos State Protection Against Domestic Violence Law 2007;
- Lagos State Protection of People Living with HIV and Affected by AIDS Law 2007;

- Rivers State Dehumanizing and Harmful Traditional Practices Law of 2003; and
- Edo State Law on female genital mutilation (FGM) 2000 bans the practice of FGM.

Some states of the Federation have also adopted bills prohibiting FGM. Some of them are the Osun State Female Circumcision and Genital Mutilation Prohibition Law 2004 and the Ekiti State Female Circumcision (Prohibition) Law 2002.

Worthy of mention is the Violence Against Persons (Prohibition) Act (VAPP) 2015, a federal legislation with the sole aim of eliminating violence in private and public life, prohibiting all forms of violence including physical, sexual, psychological, domestic violence, eradicating harmful traditional practices, preventing discrimination against persons, and to provide maximum protection and effective remedies for victims and punishment of offenders. Most states in Nigeria have passed laws with similar provisions with the VAPP Act, some of which are listed below:

- Edo State Law for Monitoring of Maternal Mortality and Other Matters Connected Thereto 2001;
- Anambra State Gender and Equal Opportunities Law 2007;
- Anambra State Malpractices against Widows and Widowers (Prohibition) Law No 2005;
- Anambra State Women's Reproductive Rights, Anambra State, 2005;
- Bauchi State Withdrawal of Girls from Schools for Marriage (Prohibition Law 17 of 1985);

- Bayelsa State Female Genital (Prohibition) Law, 2000;
- Child Rights Laws passed in 14 more states plus the Federal Capital Territory after the last country's report (a total of 23 states out of 36 have passed the Child's Rights Law);
- Cross River State Law to Prohibit Girl-Child Marriages and Female Genital Circumcision or Genital Mutilation in, 2009;
- Cross Rivers State Law to Prohibit Domestic Violence against Women and Maltreatment 10 of 2004;
- Edo State Female Circumcision and Genital Mutilation (Prohibition) Law 4 of 1999;
- Edo State Inhuman Treatment of Widows (Prohibition) Law 2004;
- Edo State Law for Monitoring of Maternal Mortality in Edo State and Other Matters Connected Thereto 2001;
- Ekiti State Gender-Based Violence (Prohibition) Law 2011;
- Enugu State HIV/AIDS Anti-Discrimination and Protection Law 2007;
- Enugu State Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law 3 of 2001;
- Imo State Gender and Equal Opportunities Law 7 of 2007;
- Imo State Widows (Protection) Law 2003;
- Lagos State Administration of Criminal Justice Law, 2011;
- Lagos State Law to Provide Rules on Criminal Conduct, Regulate Public Order and for Connected Purposes, 2011;
- Lagos State Protection Against Domestic Violence Law 2007;
- Lagos State Protection of People Living with HIV and Affected by AIDS Law 2007;

### 3.1 National Action Plan (NAP) for the Implementation of the United Nations Security Council Resolution 1325 and Related Resolutions in Nigeria

This became necessary for the inclusion of women in peacebuilding and peace-keeping processes as well as conflict resolution and management. The idea of involving women in these processes emanated out of a deep consideration of the heavy price women have paid in the violent conflicts that have ravaged some parts of the country for years.<sup>16</sup> Many women have been victims of sexual violence, sexually-transmitted diseases such as: human immunodeficiency virus and acquired immunodeficiency syndrome (HIV-AIDS), unplanned pregnancies, physical abuse, and have been victims in violent conflicts.<sup>17</sup> The security of women and girls during armed conflicts is very important. Apart from the involvement of women and girls mentioned above, NAP is committed to ensuring their security during post-conflict situations as well as serving as an operational tool to keep post conflict victims, especially women and children, informed about government support and response to their plight. In addition, NAP plays a very significant role in helping peacekeeping forces to observe high ethical standards and behavioural conducts towards women during conflicts.

16 Women's International League for Peace and Freedom, 'Women, Peace and Security in Nigeria' Joint Shadow Report, CEDAW Committee 67th Session (Submitted for the Committee's review of Nigeria's combined 7th and 8th Periodic Reports on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women) June 2017.

17 Women, Peace and Security (Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000)), documented by the United Nations, (2002), available at [WomenP&S.pdf](http://WomenP&S.pdf) ([refworld.org](http://refworld.org)).

### 3.2 The National Gender Policy (NGP) 2007

The Nigerian National Gender Policy was adopted officially in 2006 by the Federal Executive Council. This course of action was taken with the intent and purpose of solving the problem of women disempowerment, feminine poverty, gender inequality, and under-development in the country.<sup>18</sup> The goal of the NGP, is to eradicate poverty, achieve equality of the gender, and encourage inclusiveness in the process of governance and development.<sup>19</sup>

The NGP contains strategic frameworks towards enhancing the access of rural women to information, capacity-building, skills development among others.<sup>20</sup> These strategies are premised on a dual agenda principle. That is, gender equity and equality that would produce an effective and efficient system at national and organisational levels. Considering the cross-cutting nature of gender issues, seven strategies have been mapped out for the realisation of the NGP agenda. The expected outcomes include but are not limited to mainstreaming gender concerns across sectors and at all levels, increased gender knowledge and a positive gender culture which includes the involvement of men, gender responsive policy and budget efficiency across sectors, as well as reliable sex disaggregated data and indicators.<sup>21</sup>

In addition to the above strategies, the Federal Ministry of Women Affairs

developed frameworks and indicators that would ensure that the implementation process is result-yielding. Some of these indicators are:<sup>22</sup>

- (i) Monitoring inputs, the resources used to provide a service;
- (ii) Monitoring outputs, the level of source provided;
- (iii) Evaluating the impacts, the benefits women gain from the service in terms of better livelihoods and welfare;
- (iv) Ensuring public participation in budget monitoring, public consultations, communication and benchmarking.

The government of Nigeria has also made significant progress in creating useful policies towards the implementation of the provisions of the Maputo Protocol regarding the elimination of cultural practices that affect women and children. This is in fulfilment of the mandate of the government of Nigeria to eliminate harmful cultural practices as spelt out in article 5 of the Maputo Protocol. These include the National Strategy to End Child Marriage in Nigeria 2016-2021.

From the above steps taken by the Nigerian government to honour the spirit of the Maputo Protocol, one can safely conclude that the nation's policies have to some extent reflected the provisions of the Maputo Protocol and the general comments of the African Commission concerning women. However, much still needs to be done by the Nigerian government in addressing the problems and rights specific to women. The government needs to ensure the full implementation of

18 EI Amadi 'Implementation of Nigeria's National Gender Policy, revisiting the affirmative action' (2017) 5(5) *International Journal of Political Science and Development* at 146 and 147.

19 Amadi (n 18) 148.

20 Amadi (n 18).

21 The Nigerian National Gender Policy 2007.

22 Nigeria's 6th Periodic Country Report: – 2015 – 2016 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria, 64.

women's rights to sexual and reproductive health by promoting access to sexual and reproductive health and rights and the effective legal and policy framework for the actualisation of the general comments. Worthy of mention is the issue of abortion which is illegal in Nigeria except in a situation where the abortion is performed to save the life of the woman. In Nigerian jurisprudence, even if the foetus will die immediately after birth, terminating such a pregnancy will still amount to a crime.<sup>23</sup> The Penal and Criminal Codes are silent on the state of health of the foetus as a ground for abortion. They only focus on saving the life of the woman, as a legal ground for abortion even if the state of impairment of the foetus can pose a risk to the woman's physical, mental and even, emotional health.<sup>24</sup> The World Health Organisation has defined health as 'a state of complete physical, mental and social well-being and not only the absence of disease and infirmity'.<sup>25</sup>

The Maputo Protocol is the first treaty to recognise women's right to a legal abortion.<sup>26</sup> By the provisions of paragraph 40 of General Comment 2<sup>27</sup> of the Maputo Protocol, being forced to carry a pregnancy of a deformed child,

will amount to cruel and inhuman treatment. This can result in the mental suffering of the woman.<sup>28</sup> It could also lead to her death in the event that she chooses to go the clandestine way of terminating the pregnancy upon being denied a legal abortion.<sup>29</sup> Under article 14(2)(c) of the Maputo Protocol, state parties are called upon to take all appropriate measures to:

... protect the reproductive rights of women by authorizing a medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus

If the provisions of the Penal and Criminal codes are read alongside General Comment 2 of the African Commission, it goes without saying that, in a situation where a woman risks her mental health by raising a child with mental disabilities, bringing such a pregnancy to term will pose a serious risk to her life. Ironically, the Criminal and Penal Codes protect risk to the life of the woman but in practice, this is not the case since her physical, mental and emotional health, are not taken into consideration since the law forbids her to undergo a legal and safe abortion.

#### 4 Court judgments

The Maputo Protocol has notably influenced judicial decisions against Nigeria especially regarding the protection of women from all forms of discrimination. On 12 October 2017, the Economic Community of West African States (ECOWAS) Court of Justice (ECOWAS Court) in the case of *Dorothy Njemanze and 3 others v The Federal Repub-*

23 Sec 309 of the Criminal Code Act, Cap C38 LFN 2004.

24 The World Health Organization (WHO) defined 'health' as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

25 Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

26 Article 14(2)(c) of the Maputo Protocol, 2005.

27 General Comment 2 of art 14(2)(c) of the Maputo Protocol, 2005.

28 As above, para 38.

29 As above

*lic of Nigeria*,<sup>30</sup> a landmark judgement on the Maputo Protocol, relied on the Maputo Protocol and other instruments while making its pronouncement. This is the first time the ECOWAS court pronounced itself on the Maputo Protocol. In this case, the plaintiffs, Dorothy Njemanze, Edu Okoro, Justina Etim and Amarachi Jessyforth were arrested by officials of the Abuja Environmental Protection Board (AEPB) and other government agencies like the police and the military at various times between January 2011 and March 2013. They were accused of engaging in prostitution since they were found outside around midnight. The plaintiffs suffered cruel, violent, inhumane and degrading treatment by these officials. The court found that the arrest was unlawful and violated several rights of the plaintiffs such as their right to liberty, dignity, freedom from cruel, inhumane and degrading treatment and GBV. In fact, the court established a case of multiple violations of rights under articles 2,<sup>31</sup> 3,<sup>32</sup> 4,<sup>33</sup> 5,<sup>34</sup> 8,<sup>35</sup> and 25<sup>36</sup> of the Maputo Protocol. The first, third and fourth plaintiffs were each awarded damages in the sum of six million naira (approximately 14,500 USD) and the claim of the second plaintiff was dismissed for being statute barred under the protocol that created the ECOWAS Court.

Another interesting decision is the case of *Mary Sunday v Nigeria* in 2018.<sup>37</sup> In this case, the ECOWAS Court referred to the provisions of the Maputo Protocol to adjudicate on the allegations of violence and access to justice. The case was filed by two human rights organisations<sup>38</sup> on behalf of Mary Sunday, who was the plaintiff in this case. The plaintiff apparently suffered physical injuries as well as psychological and emotional trauma due to the attack on her by her fiancé who allegedly poured hot oil on her during a dispute. The plaintiff could not obtain justice from the state justice system, but her matter was lodged with the ECOWAS Court. The plaintiff relied on articles 2, 8, 13, 14 and 25 of the Maputo Protocol as the grounds on which her claim was based. The court awarded a sum of 15 million naira (approximately 36 300 USD) in damages against the Nigerian government for the violation of the right of the plaintiff to effective remedy, which is a right protected by the Maputo Protocol.<sup>39</sup> The court found the Nigerian government guilty on three grounds: the violation of the plaintiff's right to be heard within a reasonable time, right to access justice and the right to be informed of the procedure or process in which she is a party, while making particular reference to article 25 of the Maputo Protocol.<sup>40</sup>

30 *Dorothy Njemanze and 3 others v The Federal Republic of Nigeria*, Court of Justice of the ECOWAS, ECW/CCJ/JUD/08/17.

31 Article 2 of the Maputo Protocol on the Elimination of Discrimination Against Women.

32 Article 3 of the Maputo Protocol on the Right to Dignity.

33 Article 4 of the Maputo Protocol on the Rights to Life, Integrity and Security of the Person.

34 Article 5 of the Maputo Protocol on the Elimination of Harmful Practices.

35 Article 8 of the Maputo Protocol on the Access to Justice and Equal Protection before the Law.

36 Article 25 of the Maputo Protocol on the Right to effective remedy.

37 *Mary Sunday v Federal Republic of Nigeria*, ECW/CCJ/APP/26/15 (2018).

38 Women Advocates and Documentation Centre and IHRDA.

39 Article 25 'States Parties shall undertake to: a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

40 Article 25 of the Maputo Protocol protects the right to effective remedy.



Aside from decided cases that directly alleged violation of the provisions of the Maputo Protocol, the judicial system in Nigeria is graced with a plethora of judicial decisions both at the lower and higher courts that have incorporated the essence of the provisions of the Maputo Protocol. Such provisions of the Protocol include the elimination of discrimination against women,<sup>41</sup> the right to dignity,<sup>42</sup> the elimination of harmful practices,<sup>43</sup> marriage,<sup>44</sup> separation, divorce and annulment of marriage,<sup>45</sup> access to justice and equal protection before the law,<sup>46</sup> and the right to inheritance.<sup>47</sup> Some of these decisions have dealt with obnoxious customary practices that have encouraged violation of women for ages. However, the actual provisions of the Maputo Protocol have not necessarily been evoked in the domestic courts, only principles and rights established by the instrument.

In *Shodipo v Shodipo*,<sup>48</sup> the Court refused to recognise the contribution of a woman to her marriage of 43 years. A lump sum of 200,000 naira, an equivalent of 1,800 USD, was awarded to her instead of a 50-50 equitable distribution of the property acquired in her marriage, upon divorce. The judicial bent has however been strengthened by judicial pronouncements that frown at customary practices that restrict a woman's freedom on grounds of her gender declaring such as unreasonable, repugnant to natural justice and good conscience.

In *Asika v Atuanya*,<sup>49</sup> the Court of Appeal struck out a case in which the custom tended to demean a woman on grounds of her gender. The court declared such a customary practice as unconstitutional.

On 11 April 2014, in the case of *Lois Chituru Ukeje v Gladys Ada Ukeje*,<sup>50</sup> the Supreme Court per Justice Olabode Rhodes Vivour declared that the circumstances surrounding the birth of a female child notwithstanding, she is entitled to a portion of inheritance from her father's estate. In the Igbo customary law, a female child is not entitled to partake in such inheritance. This customary practice violates the non-discrimination provision of the Constitution of the Federal Republic of Nigeria and was therefore declared null and void.<sup>51</sup>

Similarly, in the case of *Onyibor Anekwe & Anor v Maria Nweke*, a woman (widow) was denied access to her late husband's property and her daughter denied access to any inheritance from her late father's estate. The Supreme Court found this customary law of male primogeniture,<sup>52</sup> a culture among the Akwa people in Nigeria, to be repugnant to natural justice, equity and good conscience. This is the customary practice where the right of succession belongs to the eldest son. The court also found any customary practice that denies women especially widows, their inheritance, repugnant to natural justice, equity and good conscience. In the cases above, the supreme court described such

41 Article 2 of the Maputo Protocol.

42 Article 3 of the Maputo Protocol.

43 Article 5 of the Maputo Protocol.

44 Article 6 of the Maputo Protocol.

45 Article 7 of the Maputo Protocol.

46 Article 8 of the Maputo Protocol.

47 Article 21 of the Maputo Protocol.

48 *Shodipo v Shopido* WRN 98 (1990).

49 *Asika v Atuanya* 17 NWLR (Pt 1117) (2008) at 484.

50 *Lois Chituru Ukeje v Gladys Ada Ukeje* SC.224/2004.

51 Sec 42(1)(2) of the Constitution of the Federal Republic of Nigeria.

52 *Onyibor Anekwe & Anor v Maria Nweke* SC. 129/2013.

practices as barbaric, worrying and flesh skinning and further concluded that such should be punitively dealt with.

In *Dr Priye Iyalla-Amadi v Director-General of the Nigeria Immigration Service and Nigerian Immigration Service (NIS)*,<sup>53</sup> Dr Priye Iyalla-Amadi applied for a new passport after the loss of her passport. The immigration officer that attended to her gave her a list of documents to attach to her application. Among these documents was a letter of consent from her husband before an international passport can be issued. The Federal High Court that handled the matter declared such an act as unconstitutional, an age-old oddity and a violation of section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 on the right to freedom from discrimination.

Regulation 124 of the Police Act (Cap 19) prohibited a female from marrying a man of her choice except with the approval of the Commissioner of Police in the command where she is serving. The woman police officer is required to apply in writing and submit her intending fiancé's personal details for investigation for criminal records in order to get an approval.<sup>54</sup> Permission would only be granted on two grounds: if the woman police officer has served in the force for at least three years and secondly, if the fiancé is of good character. The lawsuit was filed by the Women Empowerment and Legal Aid Initiative (WELA),<sup>55</sup> a non-governmental organisation who challenged the constitution-

ality of that provision of the Police Act. The Federal High Court declared this as unconstitutional and illegal and held that, that regulation was null and void as it contravened section 42 of the 1999 Constitution and article 2 of the African Charter on Human and Peoples' Rights prohibiting discrimination on the basis of sex.<sup>56</sup>

## 5 Awareness and use by civil society

Civil societies, women focused non-governmental organisations and gender-concerned activists, formed a National Coalition on Affirmative Action (NCAA) in Nigeria to lobby for the domestication and implementation of the Maputo Protocol in Nigeria. Other efforts made by civil societies include, the passage of the Gender and Equal Opportunities Bill, 2010/2011 and the Violence Against Women Bill into law. They have constant engagements with the National Assembly lawmakers regarding passage of bills. The National Coalition on Affirmative Action is made up of 150 non-governmental organisations (NGOs) working towards the entrenchment of affirmative action policies in the laws of Nigeria.

Several NGOs have been actively involved in activities that promote public education activities, legal assistance services, capacity building and human rights counselling services for

53 Reported in *THISDAY LAWYER* June 23, 2009.

54 Regulation 124 of the Police Act Amendment Bill, 2019.

55 WELA as an NGO offers free legal services to the less privilege in the society, specialises in the empowerment of women and defence of women's rights. WELA is non-governmental organisation that specialises in the defence of Women's right, challenges any

laws that are not favourable to women and children or any law that tends to be biased against women.

56 Make Every Woman Count 'NIGERIA: Court Voids Law Barring Female Policemen From Marriage' available at <http://www.mewc.org/index.php/gender-issues/human-rights-of-women/3589-nigeria-court-voids-law-barring-female-policemen-from-marriage>.

women and girls who have been victims and survivors of GBV.<sup>57</sup>

Some of these NGOs are:

- Action Health Incorporated, Lagos – a non-profit organisation dedicated to promoting young people's health and development to ensure their successful transition to healthy and productive adulthood.
- AHIP, Kano – this is an NGO which focuses on areas such as health, social and economic issues related to young people and women. It is one of the pioneering organisations on youth development in the northern part of Nigeria, it has successfully partnered with international and national development agencies, government at national, state and local levels, and also traditional community-based organisations and other stakeholders to establish functional in and out of school youth programs, including sexuality education and comprehensive youth centres/services.
- BAOBAB for Women's Human Rights, Lagos – a non-profit, non-governmental women's human rights organisation, which focuses on women's legal rights issues under the three systems of law – customary, statutory and religious laws – in Nigeria
- GHARF Enugu – the mission of this NGO is to empower women and adolescents economically and with correct information on sexuality and reproductive health issues and rights through education, research documentation, service provision and income generation activities.
- Girls' Power Initiative (GPI), Calabar: a non-profit feminist youth development organisation and pioneer

of sexual and reproductive health and rights education within Nigeria.

- WACOL, Enugu – WACOL is a democratic society free from violence and abuse, where human rights of all, in particular women and young people, are recognised in law and practice.
- WHARC, Benin – The Women Health and Action Research Centre is a Nigerian non-profit and charitable organisation based in Benin City, Edo State to promote reproductive health through research and advocacy.
- WOCON, Lagos – this is the foremost centre which focuses on gender, health and human rights, and combines strong commitment to service and advocacy with human rights education in Nigeria and the sub-Saharan region of Africa.
- WRAPA, Abuja – Women's Rights Advancement and Protection Alternative.

There is however no specific record of their knowledge and engagement with the Maputo Protocol.

## 6 Awareness and use by practicing lawyers

The Maputo Protocol is not well known among practising lawyers. The feedbacks from the oral and written interviews conducted in the course of this project shows very limited knowledge of the Maputo Protocol. In fact, some lawyers were not aware of its existence. This limits the usefulness of the Maputo Protocol as a tool for redress and justice for women in the law courts.

## 7 Academic writing and law school education

The curriculum of the Nigerian Law School does not accommodate the provisions of the Maputo Protocol. However, the Maputo Protocol has been a part of the Human Rights Law as pres-

57 A Statement on Women's Human Rights in Nigeria at the 62 Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission) (25 April - 9 May 2018), available at <https://alliancesforafrica.org/a-statement-on-womens-human-rights-in-nigeria-at-the-62-ordinary-session-of-the-african-commission-on-human-and-peoples-rights-achpr/> (accessed 14 March 2021).

ently being taught in Nigerian universities. Nevertheless, the curriculum is not detailed enough since Human Rights Law in Nigerian universities is an elective course for students of Law and not a compulsory course. In addition, such elective courses focus generally on human rights protection and not specifically on the protection of women. Academics, particularly in the field of human rights law, more often refer to Maputo Protocol in their academic writing that deals with the protection of women. The views generally expressed relates to the vital role the Maputo Protocol could play in promoting gender parity, sexual and reproductive health and rights and freedom from discrimination against women in Africa if the Protocol is effectively implemented by states parties following the adoption and ratification. Consequently, the level of awareness of the Maputo Protocol among lawyers and the law society is generally low despite the fact that few of them are aware of the Maputo Protocol and its place in protecting the rights of women. Owing to the low level of awareness of the Protocol among lawyers, the Protocol is hardly cited in their arguments before the court of law.

## 8 National human rights institutions

The Nigerian Human Rights Commission serves in the capacity of an extra-judicial mechanism for the promotion and the enjoyment of human rights. It was established by an enabling legislation, the National Human Rights Commission (NHRC) Act 1995, amended by the NHRC Act 2010, in response to the resolution of the United National General Assembly which mandates all member states to see to the establishment of a national human rights

commission for the protection, promotion and enforcement of human rights. Among the NHRC's enlightenment programs are, public enlightenment activities, research and dialogues in order to raise awareness on issues that relate to the protection of human rights.<sup>58</sup> In the process, the NHRC has been able to raise awareness on the Maputo Protocol. The NHRC has 'women and gender' as one of its thematic areas. It also has an advocacy group on 'violence against women'. Worthy of note is the role NHRC played in the coordination of the National Action Plan on the Promotion and Protection of Human Rights in Nigeria with heavy reliance on the Maputo Protocol.

## 9 State reporting

Article 26 of the Maputo Protocol, mandates state parties to submit a report on

measures, legislative or otherwise, taken to ensure the protection of all the rights and freedoms recognised and guaranteed under the African Charter and the rights protected in the Protocol as well as the progress made towards the enjoyment of these rights on a two-yearly basis.

This periodic report must be submitted accordance with article 62 of the African Charter.<sup>59</sup> The reporting process is coordinated by the Ministry of Justice. Nigeria has submitted six periodic reports to the African Commission, under the African Charter and can therefore be said to have fulfilled its

58 Sec 5(a) of the National Human Rights Commission (Amendment) Act 2010.

59 In order to provide guidance to State Parties in Reporting under article 62 of the African Charter and article 26 of the Maputo Protocol, and to promote best practices in the State Reporting Process, the Commission has adopted a number of Guidelines on State Reporting.

reporting obligation under the African Charter. The reports were submitted in this sequence: 1990, 2003, 2008, 2011, 2014 and 2017 respectively. Nigeria has also submitted 2 reports on its effort at promoting the rights protected by the Maputo Protocol, first in the state report covering 2011 to 2014, and then in the state reporting covering 2015-2016 which was considered at the 62nd Ordinary Session of the African Commission in Mauritania.<sup>60</sup>

## 10 Communications involving Nigeria

There are so far no communications before the African Commission against the government of Nigeria on violations of the provisions of the Maputo Protocol. This is in spite of the high rate of reports on violations of the rights of women in Nigeria. This is suggestive of the non-awareness of the provisions of the Maputo Protocol by a large number of the population.

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

The African Commission's first promotional visit to Nigeria took place in 1997. The mission was undertaken by Prof EVO Dankwa, the then Vice-Chairman of the African Commission, Mr Atsu-Koffi Amega, a member of the African Commission and Dr Essombe Edimo Joseph, a legal officer at the

Secretariat of the African Commission.<sup>61</sup> One of the focuses of the visit was to present to the African Commission the human rights situation in Nigeria. In addition, in 2001, the Special Rapporteur on the Rights of Women in Africa conducted a promotional visit to Nigeria.<sup>62</sup> The delegation team members were:

- (a) Mrs Julienne Ondzie-Gnelenga, the then Special Rapporteur of Women's Rights in Africa and also member of the African Commission;
- (b) Mrs Annie Rashida-Mulumba, legal officer at the African Commission's Secretariat; and
- (c) Mrs Charlotte M Ndayisaba, the personal assistant to the Special Rapporteur.

Among other recommendations, she encouraged the federal government of Nigeria to:<sup>63</sup>

take all steps necessary to protect women from violence in all its forms, traditional beliefs and customs such as female genital mutilation, burying wives alive with their late husbands, despoilment of widows, among other traditions; help women to be aware of their fundamental rights especially regarding their reproductive rights thereby reducing the rate of maternal mortality and infant mortality; and take appropriate measures to ensure that the

60 African Commission on Human and Peoples Rights 'Federal Republic of Nigeria: 6th Periodic Report, 2015 - 2016' 62nd Ordinary Session, submitted on May 2018, African Commission on Human and Peoples' Rights States. (achpr.org) (accessed 15 March 2022).

61 African Commission on Human and Peoples' Rights 'Nigeria: Promotional Mission, 1997, 7 to 14 March' available at <https://www.achpr.org/states/missionreport?id=15> (accessed 15 March 2022).

62 African Commission on Human and Peoples' Rights 'Nigeria: Mission on Rights of Women, 2001', from 20 February to 2 March, available at <https://www.achpr.org/states/missionreport?id=11> (accessed 15 March 2022).

63 The 1995 Beijing Platform for Action flagged 12 key areas where urgent action was needed to ensure greater equality and opportunities for women and men, girls and boys. It also laid out concrete ways for countries to bring about change. UN Women works with governments and partners to ensure such change is real for women and girls around the world.

commitments made by the government of Nigeria during the Mid-Term Review of the implementation of the Beijing Platform are strictly adhered to.

It should be noted that two sessions of the African Commission have been held in Nigeria. The first one was held in 1991 before the ratification and adoption of the Maputo Protocol and the second in 2008, after the adoption of the Maputo Protocol.<sup>64</sup> These sessions did play a role in creating visibility about the Maputo Protocol in Nigeria.

## 12 Factors that may impede or enhance the impact of the African Charter

The government of Nigeria has made remarkable achievements towards granting maximum protection to women in distress situations in response to article 24 of the Maputo Protocol on the protection of women in distress.<sup>65</sup> Some of these women have suffered physical, psychological and sexual abuse and need to undergo rehabilitation and counselling to get them back on track.<sup>66</sup> In order to meet their needs, there are many individual and government owned shelters.

There are also provisions for hotlines and helpline services to

enhance immediate responses to incidence of violence against women.

Despite these efforts, certain factors impede the impact of the Maputo Protocol in Nigeria:

### (a) *Lack of awareness*

Majority of the people especially legal practitioners and judges have little or no knowledge of the Maputo Protocol, its provisions and its significance in protecting women rights in Nigeria. Undergraduate and law school students are not exposed to the provisions of the Protocol. At best, it is taught as a topic under human rights law and even then, as an elective course.

### (b) *Constitutional barriers*

Section 12 of the Nigerian Constitution creates a dualist approach to international law. According to this section, provisions of international treaties do not have effect in Nigeria unless they have been domesticated. While several legal arguments have been advanced to circumvent the effect of this provision, it is obvious that this provision is one of the reasons why judges and lawyers do not include provisions of the Maputo Protocol in their briefs/arguments. Lawyers usually rely on authoritative sources of law rather than laws that have merely persuasive effect.

### (c) *Political barriers*

There is a general lack of political will by the political class. Since the implementation of treaty provisions is not required to secure voters' support, leaders show little or no commitment to it.

64 The African commission on Human and Peoples' Rights (Final Communiqué), Abuja, Federal Republic of Nigeria, 24 November 2008, African Commission on Human and Peoples' Rights Sessions (achpr.org).

65 Article 24 of the Maputo Protocol.

66 Canada: Immigration and Refugee Board of Canada, Nigeria: Services and shelters available to abused women, including location funding, and length of existence; government interest and involvement in the issue of abuse of women, 16 June 2000, NGA34541.E, available at <https://www.refworld.org/docid/3ae6ad7040.html> (accessed 15 March 2022).

**(d) Structural barriers**

Nigeria is a federal state.<sup>67</sup> This creates barriers for implementation of treaty provisions as some states are reluctant to domesticate provisions of the Maputo Protocol even when the Federal Government has done so. For example, despite the enactment of the Violence Against Persons Act (VAPP) by the Federal Government, several states of the Federation are yet to respond with a similar legislative instrument thus making the VAPP to have only limited effect.

**(e) Non-domestication**

Non-domestication is another barrier to the implementation of the Maputo Protocol. It reduces the extent to which lawyers can rely on provisions of the Maputo Protocol in courts and affects the willingness of judges to cite or rely on the Protocol in their judgments. A whole-sale domestication will greatly enhance the chances of the Maputo Protocol in Nigeria. However, it is noteworthy that recent legislative victories such as the VAPP has enhanced the impact and influence of the Maputo Protocol in Nigeria.

The following factors may enhance the impact of the Maputo Protocol in Nigeria:

**(a) Role of civil society/advocacy groups**

NGOs have played a crucial role in promoting awareness and the use of the Maputo Protocol through lawsuits, conferences, seminars and workshops with different stakeholders including

legislators, policy makers, academics and judges. The intervention of these NGOs cannot be underrated as it is the most fundamental pillar of the influence of the Maputo Protocol in Nigeria. In fact, the day-to-day activities of NGOs are aimed at giving life to the rights enshrined in the Maputo Protocol. NGOs are a great link that have enhanced the impact of the Maputo Protocol in Nigeria.

**(b) African Human Rights Moot Court Competition**

The yearly African Human Rights Moot Court Competition has helped with creating awareness about the Maputo Protocol. Students attending institutions involved in such moot competition have a better advantage. However, many institutions are not involved in this academic exercise. A way forward may be to have a system where the African Moot Court competition franchise is implemented in each country with the finals comprising the finalist school per country, holding rotationally. This will provide a major awareness drive needed nationally for young lawyers and law students, judges and Magistrates. If funding is available, this two-layered moot court competition (first at country level; then at the continental level) should be implemented.

**(c) The role of the media**

The media plays a very limited but crucial role in creating awareness about the Maputo Protocol through their interviews with experts and audience – participatory programmes. While an average Nigerian is not likely to know about the Maputo Protocol from the media, he/she is likely to know more about women's rights issues from the

67 Section 12 of the Constitution of the Federal Republic of Nigeria 1999.

media. Therefore, the role of the media should not be underrated. Women rights issues should be mainstreamed into their contents. Social media has also created significant awareness about women's rights issues but specific social media movements on actual provisions of the Maputo Protocol are rare. One of the challenges with human rights influence or impact analysis is the thinking that treaties will have direct word for word impact at the domestic level. This is rarely the case. In most cases, treaty provisions provide support for ideas, and the media standing on the authority of the treaties, lend greater credence to the cause of the treaty mostly without referencing the treaty.

gender interest, some of which are not addressed in the much-celebrated Nigerian National Gender Policy.

### **13 Conclusion**

The Maputo Protocol has been impactful in Nigeria to some extent. Its level of influence can be explained under three headings: whether the level of influence of the Maputo Protocol has remained static, is regressing or whether it is progressing. While the level of influence is certainly not in a fast lane, there is no doubt that it is progressing. Again, human rights treaty provisions do not operate in isolation. At least some legislators at national and state level are now aware there is a treaty called the Maputo Protocol. The efforts of wives of governors across the 36 states of the Federation have also bolstered the influence of the Maputo Protocol. Several of them are campaigning vigorously against rape, defilement and sexual harassment. From time to time in their campaign, they refer to the Maputo Protocol. While the impact of the Maputo Protocol in Nigeria is revolutionary, it is trite that lots needs to be done. The government of Nigeria must look deeper into issues that promote





# THE IMPACT OF THE MAPUTO PROTOCOL IN SIERRA LEONE

*Rashid Dumbuya\**



## 1 Introduction

Sierra Leone is a country situated on the West Coast of Africa. It is a former British colony that gained independence in 1961. It is one of the least developed countries in the world, as ranked by the United Nations Development Programme (UNDP),<sup>1</sup> with an estimated population of seven million people. Women constitute a majority of its total population.<sup>2</sup>

But despite women being in the majority and having always contributed meaningfully to the country's economy and wellbeing, they have continued to experience systemic marginalisation and discrimination especially in the political, economic, social and cultural aspects of society.<sup>3</sup> Issues related to equal opportunities for men and women in the Sierra Leonean society have been largely undermined as a result of early

marriage, teenage pregnancy, broken homes, patriarchy, stereotypes, post conflict society, promiscuous lifestyles and harmful practices such as female genital mutilation (FGM). Sexual and gender-based violence (SGBV) meted against women and girls still remains appalling and commonplace in Sierra Leone.<sup>4</sup>

Against this backdrop, and in a bid to address this ugly state of affairs, successive governments of Sierra Leone in the last two decades have made commitments to expand opportunities for women and girls to promote the advancement of gender equality and women empowerment initiatives. To fulfil its commitment, the state of Sierra Leone has at both the international and regional levels accepted many international treaties and conventions that guarantee the rights of women. These instruments include: the Universal Declaration of Human Rights (UDHR),<sup>5</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>6</sup> the International Covenant on Econom-

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1 See 'UNDP Human Development Report Index 2019.' Available at [www.hdr.undp.org](http://www.hdr.undp.org) (accessed 3 August 2021).

2 '2015 Population and Housing Census: Summary of Final Results in Sierra Leone'.

3 'Gender Equality and Women's Empowerment' *The USAID* 21 July 2021.

4 As above.

5 The UN legal instrument that guarantees human rights in general that was passed into law on 10 December 1948.

6 The UN legal instrument that guarantees civil and political rights that was passed in 1966.

ic, Social and Cultural Rights (ICESCR),<sup>7</sup> the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW),<sup>8</sup> the African Charter on Human and Peoples' Rights (African Charter)<sup>9</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), to name but a few.

At the domestic level, steps have also been taken by successive governments to build and consolidate a culture of respect for women's rights through the enactment of policies and legislation. Sierra Leone has also established state institutions that give effect to the human rights obligations created by international instruments signed by Sierra Leone at both the international and regional levels.

Although much has been done for the realisation of women rights in the country, the status of women and their livelihoods have not significantly changed for the best. Research shows that the statistics of teenage pregnancy and gender-based violence (GBV) are still on the increase.<sup>10</sup> Case in point is the horrific incident of sexual violence against a 55 year old woman who was gang-raped on 11 January 2020 in Motou Village Kpanda-Kemo Chiefdom Bonthe district, by 15 men allegedly

members of the *poro* society.<sup>11</sup> Despite the fact that Sierra Leone has signed and ratified a good number of international treaties and conventions that guarantee women's socio-economic and cultural rights, it is vital to note that the 1991 Constitution of Sierra Leone does not recognise, protect or allow for the enforcement of these rights.

Under Chapter 2 of the 1991 Constitution of Sierra Leone, socio-economic and cultural objectives are provided for. However, by virtue of section 14 of the Constitution,<sup>12</sup> Chapter 2 on socio-economic and cultural objectives does not confer legal rights and cannot be enforced within the court system. They merely exist as Fundamental Principles and Objectives of state policy to be taken into consideration in the governance of the country and the making of laws by parliament. These objectives were never intended to confer legal individual rights to citizens. Women continue to be disproportionately affected by this lacuna.

In contrast, the 1991 Constitution of Sierra Leone does recognise, protect and guarantee civil and political rights of its citizens. These rights are enshrined under Chapter 3 and are also entrenched provisions within the Constitution. Women have in some cases continued to enjoy these rights. However, section 27(4) of the 1991 Constitution of Sierra Leone makes it lawful for women to be discriminated on certain grounds.<sup>13</sup> The provision excludes the application of the right to non-discriminatory laws to

7 The UN legal instrument that guarantees economic, social and cultural rights that was passed into law in 1966.

8 An international bill of rights for women and girls that was passed into law in 1979 at the United Nations.

9 The AU legal instrument that was passed into law in 1981.

10 'The Family Support Unit 2017 Report on Sexual and Gender-Based Violence puts the figure at 1,557 cases of SGBV and 156 teenage pregnancies.' Available at [www.fsu.slp.org](http://www.fsu.slp.org) (accessed 4 July 2021).

11 This is a male secret society in Sierra Leone, Liberia, Guinea, and the Ivory Coast, introduced by the Mande people. Available at <https://en.m.wikipedia.org/wiki/Poro> (accessed 4 July 2021).

12 See sec 14 of The Constitution of Sierra Leone, 1991.

13 The Constitution of Sierra Leone (n 12) sec 27(4)(d).

matters of personal law that include marriage, divorce, adoption, or devolution of property upon death. Women are often discriminated with respect to all of the excluded matters.

In a nutshell therefore, it is disheartening to note that irrespective of the plethora of international and regional conventions that have been signed and ratified by the state of Sierra Leone which guarantees political, socio-economic and cultural rights of women, the 1991 Constitution is yet to be in line with these legal instruments. Thus, it is safe to conclude that the 1991 Constitution is still not in tandem with contemporary best practices in a democratic state like Sierra Leone.

## 2 Ratification of the Maputo Protocol

After almost 12 years of countless lobbying efforts by the Ministry of Social Welfare Gender and Children's Affairs<sup>14</sup> (MSWGCA), the Ministry of Foreign Affairs and International Corporation<sup>15</sup> (MFAIC), the Attorney General & Minister of Justice<sup>16</sup> (AGMoJ), the Human Rights Commission of Sierra Leone (HRCSL)<sup>17</sup> and civil society organisations<sup>18</sup> (CSOs) for the ratification of the Maputo Protocol, the document was finally tabled in Parliament on 4 March 2014.<sup>19</sup>

14 A former government institution that was pushing for the advancement of women and children's rights in Sierra Leone.

15 The government institution that deals with all international relations matters of the state of Sierra Leone.

16 The government institution that advises the state of Sierra Leone in all legal matters.

17 The government institution that protects and promotes human rights in Sierra Leone.

18 These are independent organisations that complement the work of government in Sierra Leone.

19 'Sierra Leone Finally Ratifies Maputo Protocol' *The Politico Newspaper* 16 July 2015 at 1-2.

The executive, through the then Minister of Social Welfare, Gender and Children's Affairs, Moijueh Kai Kai, assured members of parliament that the idea of having Sierra Leone ratify the Maputo Protocol was to promote best practices in its democratisation process. He appealed to the Members of Parliament (MPs) to ratify the Protocol as it is geared towards advancing women rights in the country.<sup>20</sup>

Contributing to the debate, the role of MPs was outstanding. The then minority leader of parliament, Honourable Barnedette Lahai, for example pointed out the end had finally justified the means. This is so because according to her, '34 years ago, the African Charter on Human and Peoples' Rights failed to cater for women rights; thus the need for the Maputo Protocol'.<sup>21</sup> She ended her statement by encouraging the Minister to consult the people before signing such Protocol to determine whether there is any need for reservations.<sup>22</sup> The MP concluded that just like the other international and regional conventions that are pushing for women rights which Sierra Leone had signed and ratified, the same was true for the Maputo Protocol.

Having rigorously debated each and every provision of the Maputo Protocol and also seeking clarifications for some of the critical provisions in the Protocol especially the one that has to do with the practice of FGM, the MPs overwhelmingly voted in favour of the ratification of the Maputo Protocol in July 2015 with no reservation.

20 *The Politico Newspaper* (n 19) at 2.

21 'Sierra Leone Finally Ratifies Maputo Protocol on Women' *The Awareness Times* 6 July 2015 at 1-2.

22 *The Awareness Times* (n 21) at 2.

### 3 Government focal point

In Sierra Leone, it was the then Ministry of Social Welfare, Gender and Children's Affairs that was the key governmental institution responsible for pushing for the ultimate realisation of the Maputo Protocol. After it was diffused in 2019, the Ministry of Gender and Children's Affairs is now taking the lead.

It is worth noting that even though the Ministry of Gender and Children's Affairs remains the government focal point, it stands to reason that it works in complementarity with other Ministries, Departments and Agencies in the formulation and implementation of policies that are in line with the Maputo Protocol.<sup>23</sup>

The Office of the Attorney General and Ministry of Justice, the Ministry of Foreign Affairs and International Cooperation and the Human Rights Commission of Sierra Leone are the most relevant governmental institutions complementing the work of the Ministry of Gender and Children's Affairs towards the realisation of the protocol. The Ministry of Foreign Affairs for example maintains a human rights division that deals with all treaties and legal instruments signed and ratified by the state of Sierra Leone.

The Office of the Attorney General and Ministry of Justice is the institution that proffers legal advice to the government of Sierra Leone. The Office maintains an international division that is responsible for primarily advising the government to comply with obligations under international law and further scrutinises state reports that are usually

prepared by Ministries, Department and Agencies.

The Human Rights Commission of Sierra Leone maintains a directorate of gender that is pushing for the advancement of women's rights as well as a treaty body unit that advises the state on treaty body reporting and sometimes presents alternative reports to treaty bodies. The Office of the First Lady has been instrumental in pushing for the advancement of women's rights through its popular 'Hands off our Girls'<sup>24</sup> Campaign that was launched in 2018.

The African Commission on Human and Peoples' Rights<sup>25</sup> communicates directly with the state of Sierra Leone on the Maputo Protocol through the African Union Embassy in the country. Once the African Union Embassy receives the information, it will channel it to the Ministry of Foreign Affairs and International Cooperation for the attention of the government. The Ministry will then communicate to the Ministry of Gender and Children Affairs through the Permanent Secretary for the attention of the Directorate of Gender in the Ministry. All the institutions mentioned above are well informed about the Maputo Protocol.

### 4 Domestication or incorporation of the Maputo Protocol

Regrettably, ever since Sierra Leone signed and ratified the Maputo Protocol, it has failed to domesticate and or incorporate the provisions of the said Protocol at the domestic level. Unlike

23 As above.

24 A 2018 governmental Policy that is pushing for the advancement of women and girls' rights in Sierra Leone.

25 A quasi-legal institution in Africa that protects and promotes human rights in the African continent.

other states that have a monist system of incorporating international treaties and conventions into their legal systems, Sierra Leone has continued to practice a dualist system which requires domestication of international treaties and conventions before they become part of its laws.<sup>26</sup>

Under international law, it is an established fact that the signing and ratifying of an international treaty are not the only requirements for such a treaty to form part of the legal system of a dualist state. It goes beyond that as the state is further required to pass an enabling legislation in a bid to domesticate the provisions of the treaty so as to incorporate them into the body of laws of that state.<sup>27</sup>

The 1991 Constitution of Sierra Leone which is the primary source of law is silent in many respects about the rights contained in the Maputo Protocol.<sup>28</sup> The Constitution guarantees certain human rights to the citizens in general and not specifically for women as provided for in the Maputo Protocol. No Bill of Rights has so far been passed into law by Sierra Leone that comprehensively speaks to the rights in the Maputo Protocol. There are however few existing legislations in the country that partially guarantee women's rights in line with the Maputo Protocol.<sup>29</sup>

The Truth and Reconciliation Commission (TRC) recommended a 30 per cent representation of women in governance.<sup>30</sup> Women's movements in Sierra Leone like the 50/50 Women's Group<sup>31</sup> have long been pushing for the enactment of a Gender Equality and 30 per cent Quota Bill. Women representatives in parliament have also been pushing for the enactment of this proposed bill. All of these have been done in line with the relevant provisions of article 13<sup>32</sup> under the Maputo Protocol. So far, only a gender equality and women empowerment policy has been adopted. A Bill is yet to be tabled in that direction.

## 5 Legislative reforms or adoption

According to a senior official at the Ministry of Gender and Children's Affairs, there was no comprehensive study undertaken by the state of Sierra Leone before the ratification of the Maputo Protocol. The then Ministry of Social Welfare, Gender and Children's Affairs only did basic popularisation to the general public about the Maputo Protocol and why it was necessary for Parliament to ratify it.

Since the Maputo Protocol was ratified, Sierra Leone, save for the 2019 Sexual Offences Amendment Act,<sup>33</sup> has not taken any bold step to comprehen-

26 AS Marrah 'The impact of the African Charter and the Maputo Protocol in Sierra Leone' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected Africa states* (2016) 204.

27 As above.

28 Marrah (n 26) 204.

29 Marrah (n 26) 206.

30 V Remoe 'Sierra Leone Women's Movement, the 30% quota, and the fight for gender equality – These three women are #Generation Equality #IWD2020' <https://vickieremoe.com/blog/sierra-leones-women-s-movement-and-the-fight-for-gender-equality> (accessed 10 July 2021).

31 A women organisation that is pushing for the advancement of equality in Sierra Leone.

32 See the Protocol to the Africa Charter on Human and Peoples' Rights on the Rights of Women (2003) 14.

33 A legislative framework that protects women and girls' rights from sexual abused in Sierra Leone.

sively revolutionise its existing legislations that are pushing for the advancement of women's rights in order to give effect to the spirit, object and purpose of the Maputo Protocol in practical terms.

The four gender justice laws (the Domestic Violence Act of 2007,<sup>34</sup> the Registration of Customary Marriage and Divorce Act of 2007,<sup>35</sup> the Devolution of Estates Act of 2007<sup>36</sup> and the Sexual Offences Act of 2012)<sup>37</sup> that guarantee women's rights, were passed into law prior to the ratification of the Protocol.

The Domestic Violence Act<sup>38</sup> was passed into law in 2007 to deal with the increasing spate of physical, psychological and economical violence that has continued to be meted against women and girls in the country. Article 4 and 5 of the Maputo Protocol guarantee the rights to life, integrity, security and dignity of women which are also guaranteed by the said act in the country.<sup>39</sup>

In line with the relevant provisions under articles 6 and 7<sup>40</sup> of the Maputo Protocol which speak to women's rights in relation to marriage, separation, divorce and annulment of marriage, the

Registration of Customary Marriage and Divorce Act<sup>41</sup> 2007 gives effect to the Protocol in this regard. This Act has helped to address the many challenging issues women have been experiencing over the years especially in customary marriage which is most prevalent in the country.<sup>42</sup>

The fundamental spirit, object and purpose of the Devolution of Estate Act 2007 gives effect to the relevant provisions under articles 20 and 21<sup>43</sup> of the Maputo Protocol. Prior to enactment of this Act, women that were not legally wedded to their spouse were not allowed to inherit their spouse's property after their demise regardless of how many children they had together. Even those women who were legally wedded but whose husbands died intestate were not allowed to inherit property due to draconian customary laws prevalent in the country. This Act therefore makes it abundantly clear as to how women can inherit the property or estates of their husbands who died testate or intestate.<sup>44</sup>

In a bid to further advance the realisation of women's rights, the state of Sierra Leone in 2012 passed into law the Sexual Offences Act.<sup>45</sup> This Act was revolutionary as it sought to robustly deal with the despicable state of affairs of rape and other sexual offences perpetrated against women in the country. The Act also makes it clear that marriage is not a defence for sexual assault and further makes room for victims of sexual offences to access free legal and medical support.<sup>46</sup> In 2019,

34 A legislative framework that protects women and girls' rights from physical, economical and psychological violence in Sierra Leone.

35 A legislative framework that legalised customary marriage and explain the procedures to divorce a marriage in Sierra Leone.

36 A legislative framework that explains how property should be devolved in Sierra Leone.

37 A legislative framework that seeks to address the issue of sexual offences in Sierra Leone.

38 A legislative framework that seeks to address all forms of physical, psychological and economical violence meted against women in Sierra Leone.

39 Maputo Protocol arts 7 and 8.

40 Maputo Protocol arts 9 and 10.

41 A legislative framework that legalises customary marriage and explain the procedures to divorce a marriage in Sierra Leone.

42 As above.

43 Maputo Protocol arts 19 and 20.

44 Devolution of Estate Act of 2007 arts 37-39.

45 Domestic Violence Act of 2007.

46 As above, 6.

the Sexual Offences Act of 2012 was amended to now create punitive sanctions for perpetrators of sexual penetration of children. This was done against the backdrop of the rising statistics on rape and sexual penetration on women and girls in the country respectively. Under the Sexual Offences Act of 2012 (as amended in 2019), rape and sexual penetration are two different offences. Police statistics of the Family Support Unit reported in 2019 that there were 3,252<sup>47</sup> recorded rape and sexual penetration cases in Sierra Leone. In 2019, the Rainbow Centre recorded 3,701 cases<sup>48</sup> of sexual assault nationwide.

Under article 4(2)(a)<sup>49</sup> of the Maputo Protocol, state parties to the Protocol are called upon to enforce laws at the local level that seeks to discourage unwanted or forced sex perpetrated against women in society. With the passing into law and amendment of this Act, it is safe to say that this was a tangible step taken by Sierra Leone in fulfilling its obligations under international human rights law.

In 2015, an attempt was made by the government of Sierra Leone to pass into law a Safe Abortion Bill. The Inter Religious Council of Sierra Leone (IRCSL)<sup>50</sup> protested the Bill citing that it was contrary to religious practices and moral standards of society. The bill was developed in a bid to give effect to article 14(2)(c)<sup>51</sup> of the Maputo Protocol.

No significant increase in allocation of resources has so far been provided by

the state of Sierra Leone to its relevant institutions after the ratification of the Maputo Protocol. The pattern of resource allocation to state institutions has virtually remained the same. The state of Sierra Leone has continued to disburse resources in piece meal to Ministries, Departments and Agencies (MDAs) on the basis of need assessment.

## 6 Policy reform or formulation

The state of Sierra Leone has formulated as well as undertaken major policy reforms through its line MDAs in a bid to advance the rights of women and girls in the country thereby giving effect to the Maputo Protocol.

In 2018, the government of Sierra Leone through the Office of the First Lady<sup>52</sup> launched the Hands off our Girls campaign.<sup>53</sup> This is an official government campaign and is geared towards advocating for the advancement of the rights of women and girls in the country. Speaking at the 74th United Nations General Assembly (UNGA), her Excellency, Fatima Bio pointed out that she was enthused to embark on this revolutionary campaign because of the passion of her husband in advancing the rights of women before becoming president.<sup>54</sup>

As a result of this governmental policy initiative,<sup>55</sup> a Sexual Offences

47 'Sexual Gender Base Violence in Sierra Leone.' Available at <https://africaymca.org/gbv-in-sierra-leone/> (accessed 5 July 2021).

48 As above.

49 Maputo Protocol art 7.

50 An organisation that comprises of religious leaders from both the Christian and Muslim religion in Sierra Leone.

51 Maputo Protocol art 16-17.

52 The State Office is occupied by the wife of the President of the Republic of Sierra Leone.

53 An official government initiative run by the First Lady to help advocate against Rape and Sexual violence in the country.

54 Statement made by Fatima Bio on the 74th UN General Assembly. Sierra Leone's First Lady takes 'Hands Off Our Girls' Campaign to the United Nations' *The State House Media and Communication Unit* 27 September 2019.

55 As above.



Model Court<sup>56</sup> has been established; the Sexual Offences Act of 2012<sup>57</sup> has been amended with tougher sentencing guidelines; free sanitary pads have continued to be provided to girls; laudable awareness raising about women's rights have continued; employment opportunities for women and girls have been enhanced; and a 'One Stop Centre for Rape Survivors' has been introduced.<sup>58</sup>

In 2020, the Ministry of Gender and Children Affairs launched the Gender Equality and Women's Empowerment Policy (GEWE).<sup>59</sup> This is a policy that seeks to mainstream gender into all developments and processes in the country as well as to ensure livelihood and social protection for women, girls, men and boys for both sustainable peace and economic growth. During the launching of this policy, Dr Mary Okumu<sup>60</sup> thanked the government of Sierra Leone for setting up a stand-alone Gender Ministry for the very first time and also described the policy as a gift for the advancement of women rights in the country. This policy was formulated by the government of Sierra Leone through the Gender Ministry and fulfils its obligation under article 19<sup>61</sup> of the Maputo Protocol and its sub provisions.

Following the ruling of the Economic Community of West Africa States (ECOWAS) Court<sup>62</sup> that overturned the discriminatory ban on pregnant girls to access formal education, the government through the Ministry of Basic and Senior Secondary Education (MBSSE)<sup>63</sup> welcomed the ruling and decided to launch a Radical Inclusion Approach<sup>64</sup> to education in the country. The approach seeks to guarantee that all pregnant women and girls fully access formal education and schooling rights. In a statement delivered to the nation, the President of Sierra Leone, Julius Maada Bio, affirmed that his government prides itself in its commitment and focus on inclusive national development through the radical inclusion of every citizen.<sup>65</sup>

Dr David Moinina Sengh holds the view that the state of Sierra Leone has an obligation at both the international and regional levels to take action that will eliminate all forms of discrimination against women as evident under article 2 of the Maputo Protocol.<sup>66</sup> Thus, the very reason led to the formulation of this new inclusive education approach.<sup>67</sup>

56 A specialised court that deals with sexual offences in Sierra Leone.

57 Domestic Violence Act (n 45).

58 'Sierra Leone's President Julius Bio unveils One-Stop Centres, says among Early Adopters of the Concept in Africa' *The State House Media and Communication Unit* 9 July 2020.

59 A governmental policy that seeks to advance the right of women in Sierra Leone.

60 The UN Women Representative in Sierra Leone. Available at <https://za.linkedin.com/in/mary-okumu-phd-35888764> (accessed 10 July 2021).

61 Maputo Protocol arts 18 and 19.

62 A regional human rights court in West Africa.

63 The lead government institution for basic and secondary education in Sierra Leone.

64 A government policy that gives equal rights to boys, girls, women and men to access formal education in Sierra Leone.

65 'Victory for girls in Sierra Leone as the government as the government lifts the ban that prohibits pregnant schoolgirls from attending school!' available at [https://www.equalitynow.org/press\\_sierra\\_leone\\_victory\\_mar\\_2020](https://www.equalitynow.org/press_sierra_leone_victory_mar_2020) (accessed 10 July 2021).

66 Minister of Basic and Senior Secondary Education in Sierra Leone.

67 D Sengh 'We are proud of the first ever policy on inclusive education in Sierra Leone: the National Policy on Radical Inclusion in School' *The Gem Report* 8 April 2021.

Sierra Leone adopted a Free Healthcare Initiative in 2009<sup>68</sup> and successive governments have continued to maintain and increase support towards it through initiatives by the Ministry of Health and Sanitation (MOHS) to provide free healthcare for under five children as well as for pregnant and breastfeeding women. The policy was launched as part of government's commitment to further actualise the overall aim of the Health Sector Strategic Plan,<sup>69</sup> the Agenda for Prosperity,<sup>70</sup> as well as goal 4 and 5 of the Millennium Development Goals (MDG).<sup>71</sup> This policy has now been expanded to cater for women with disabilities which has helped in many ways to give effect to article 14 of the Maputo Protocol<sup>72</sup> in the country.

In 2017, the Ministry of Social Welfare, Gender and Children's Affairs<sup>73</sup> enacted a governmental policy known as the Zero Tolerance Towards the Circumcision of Girls Below 18 Years.<sup>74</sup> The policy makes it impermissible for girls below the age of 18 years to be initiated into any secret society. And for those girls that have attained the 18 years limitation, they must consent, and nobody should force them to be initiated into any secret society. A Memorandum of Understanding (MOU) was signed between the Ministry of Social Welfare, Gender and Chil-

dren's Affairs and the Bondo Society leaders<sup>75</sup> in the country so as to uphold this policy that is geared towards protecting and promoting the rights of women and girls in the country.<sup>76</sup> This policy was formulated in an attempt to give effect to Pillar 8 of the Agenda for Prosperity and corresponds with article 5 of the Maputo Protocol.<sup>77</sup> The practice of FGM still remains a challenge and the government has not done much to address it because of the fear of the political ramifications as it is deeply entrenched within the society.

Additionally, Cluster 5 of Sierra Leone's Mid-Term National Development Plan<sup>78</sup> (2019-2023) speaks about government's commitment to empower women, children, adolescents and persons with disabilities. This cluster<sup>79</sup> mainly touches on the role of government in advancing inclusiveness and empowerment for women, children and vulnerable groups in the country. Increasing investments for women, children and adolescents as well as for persons with disability is the main priority of government under this cluster. This policy aims to give effect to articles 8, 9, 12, and 19<sup>80</sup> of the Maputo Protocol.

All these initiatives were instituted by the government of Sierra Leone against the backdrop of complying with its obligations under international law.

68 'Policy on free health care services for pregnant and lactating women and young children in Sierra Leone' (2009).

69 Ministry of Health working strategies that seeks to enhance the health sector in Sierra Leone.

70 The then Ernest Bai Koroma government manifesto that was transformed into his second term of office working plan.

71 A former UN global development goals that elapsed in 2015.

72 Maputo Protocol arts 16 and 17.

73 Ministry of Social Welfare Gender and Children's Affairs.

74 The government policy on FGM Practice in Sierra Leone.

75 This is a local name given to those traditional leaders that are initiating women and girls into FGM in Sierra Leone.

76 'Gender Ministry, LAB signs MOU on Rape and SGBV' *The AYW Newspaper* July 2020 at 2.

77 Maputo Protocol arts 8 and 9.

78 Government of Sierra Leone Mid-Term National Development Plan 2019-2020.

79 See cluster 5 of Government of Sierra Leone Mid-Term National Development Plan 2019-2020.

80 Maputo Protocol arts 11, 13 and 18.

## 7 Impact on the judiciary

The judiciary of the Republic of Sierra Leone has not been very effective in giving effect to the Maputo Protocol. The failure of the state of Sierra Leone to domesticate the Maputo Protocol has further compromised the work of the judiciary in giving meaningful effect to the Protocol.

Save for a few judges like Justice Miatta Samba<sup>81</sup> (alumna of the Centre for Human Rights at the University of Pretoria), Justice Jamesina King<sup>82</sup> (Commissioner of the African Commission), the majority of the judges and magistrates hardly reference the Maputo Protocol in their rulings on critical human rights cases.

Some efforts have been made in the area of securing protection of the rights of women and girls who have been sexually abused. In 2020, a Sexual Offences Model Court was established to deal with sexual offence cases in an expeditious manner.<sup>83</sup> This facility it is hoped, will perhaps increase the rulings and jurisprudence on the Maputo Protocol.

In conclusion, there are hardly any references made to the Maputo Protocol

in domestic rulings, instead judges and magistrates prefer to cite the domestic gender justice laws as a basis of dispensing effective remedies to women victims of sexual and gender-based violence.<sup>84</sup> Some of the provisions of these gender justice laws, however, are in consonance with the Maputo Protocol.

## 8 Awareness and use of the Maputo Protocol by civil society

CSOs<sup>85</sup> have over the years been instrumental in calling on the state to respect its obligations under the Maputo Protocol. These organisations have also continued to sensitise and raise the awareness of the Protocol among Sierra Leoneans. Some of them have openly challenged the government on critical women rights issues by bringing legal action against the state in court at both the national and regional levels.<sup>86</sup>

The 50/50 Women's Group<sup>87</sup> has become a household name among those organisations pushing for women's rights in the country. This organisation has been working tirelessly to change the traditional stereotypes and prejudices that have discriminated against, and reduced the status women in the Sierra Leonean society over time. As part of its commitment to promote gender equality, the organisation is driving its core objective through awareness campaign

81 Justice of the Supreme Court in Sierra Leone and Judge-elect at the International Criminal Court and also Alumnus of the Centre.

82 Justice of the Court of Appeal in Sierra Leone and Commissioner of the African Commission on Human and Peoples Rights. She is one of the few Justices in the Republic of Sierra Leone that has been making references to the Maputo Protocol in her rulings on sensitive legal matters. See Activity of the Working Group on Economic Social and Cultural Rights of the Africa Commission: 'Debating Access to Land and Water Rights of Women and Girls in Africa.' Available at <https://www.achpr.org/news/viewdetail?id=67> (accessed 5 March 2020).

83 News Update from the Head of Communications Unit in the Judiciary of Sierra Leone 2020.

84 Marrah (n 26) 207.

85 These are independent organisations that complement the work of government in Sierra Leone (n 18).

86 See Centre for Accountability and Rule of Law action brought against the Government of Sierra Leone to the ECOWAS Court on behalf of Ebola Survivors (2016).

87 A women organisation that is pushing for the advancement of equality in Sierra Leone (n 31).

messages to Sierra Leoneans on TV and Radio programmes.<sup>88</sup> The spirit of these media campaigns is centred on issues related to women's political, socio-economic and cultural rights so as to give effect to the Maputo Protocol and other international instruments at the domestic level. Members of this group were actively involved in urging the state of Sierra Leone to ratify the Maputo Protocol – and are still calling for its domestication at the domestic level.<sup>89</sup>

Legal Link<sup>90</sup> is another organisation that defends the rights of vulnerable groups in Sierra Leone through the provision of quality, effective and timely legal assistance. This organisation has been very effective in providing free legal assistance to abused women and children particularly women living with disabilities in the country. On 9 March 2020, Legal Link held a national symposium with state institutions, CSOs, media institutions and school going pupils as it joined the UN to commemorate the International Women's Day.<sup>91</sup> The event educated invitees about the Maputo Protocol and also called on the government to establish an Equal Opportunities Commission (EOC) that would ensure equal employment opportunities for women and men in the country.<sup>92</sup>

#### Legal Access through Women Yearning for Equal Rights and Social

Justice (LAWYERS)<sup>93</sup> comprises of female legal practitioners that have done extensive work to promote and protect women's rights in the country. The organisation has been sensitising the nation about the Maputo Protocol as well as providing legal support for sexually abused women and girls in the country on a pro bono basis.<sup>94</sup>

Campaign for Good Governance (CGG)<sup>95</sup> is promoting democratic participation, capacity building, gender equality and empowerment, human rights, constitutionality and the rule of law in Sierra Leone. This organisation has over the years raised many concerns about the violations and abuses of women's rights in the context of leadership positions, inhumane treatment, systemic discrimination and ignorant marginalisation by the powers that be. The organisation has further recommended to the UN<sup>96</sup> for more actions to be taken by the state of Sierra Leone with respect to its legal obligations at the international and regional levels particularly for women and girls.

Other CSOs in the country like Smart Women Initiatives,<sup>97</sup> Women and Disability Forum,<sup>98</sup> Aberdeen

88 See the website of the 50/50 Group. Available at <https://www.fiftyfiftySierraLeone.org/what-we-do/> (accessed 14 July 2021).

89 As above.

90 A legal organisation in Sierra Leone that provides free legal assistance to religious communities and vulnerable groups.

91 The day set aside by the UN to celebrate socio-economic, cultural and political achievements of women across the world.

92 'CSO Calls For Equal Opportunities Commission' *The Awareness Times* 19 March 2020 at 1-2. Available also at Legal Link's Annual Report 2020.

93 A legal organisation comprising of female lawyers that provides legal defense for women and girls in Sierra Leone.

94 Email from lawyers\_sl@yahoo.co.uk in December 2020.

95 A local civil society organisation in Sierra Leone that was established to promote good governance, democracy and human rights.

96 See CGG Report submitted to the UN for the Universal Periodic Review of Sierra Leone, 2011.

97 An organisation that provides support to women and girls in Sierra Leone.

98 An organisation that advocates for and on behalf of women and girls with disability.

Women Centre,<sup>99</sup> Asmaa James Foundation,<sup>100</sup> have all been contributing to the ongoing awareness process on the Maputo Protocol and the attendant impacts of the protocol in promoting and protecting the rights of women if domesticated in the country. These organisations have also been highly involved in providing support to victims of sexual and gender-based violence particularly women and girls.

## 9 Awareness and use of the Protocol by lawyers and judicial officers

Few lawyers in Sierra Leone have demonstrated astute knowledge of the Maputo Protocol. This is partly because most lawyers in the country have little education on international human rights legal instruments. They rarely cite legal authorities at the international level in their legal submissions in court. It is important to emphasise that the majority of those lawyers that have demonstrated astute knowledge about the Maputo Protocol are alumni of the Centre for Human Rights, University of Pretoria.

Melron Nicol Wilson Esq,<sup>101</sup> Human Rights Lawyer and Head of Melron Nicol Wilson Chambers, has been exemplary. This legal practitioner is an alumnus of the Centre for Human Rights, University of Pretoria. He has been passionate about defending the rights of women in the country. In 2020, he was the lead defence counsel that represented female journalist, Dr Sylvia

Olyinka Blyden,<sup>102</sup> who was charged with seditious libel by the state<sup>103</sup> and was able to secure bail release for her at the Magistrate Court using the international and regional frameworks to convince the Magistrate. The accused has subsequently been discharged on all counts.<sup>104</sup>

Augustine Sorie-Sengbeh Marrah Esq,<sup>105</sup> human rights lawyer and alumnus of the Centre for Human Rights, University of Pretoria, has also been outstanding. He has over the years provided free legal representation to victims of sexual and gender-based violence. His quest for human rights activism has made him become critical about the legal system in the country to the extent that in 2020, a bench warrant was issued against him by the Supreme Court<sup>106</sup> due to a critical comment he posted on social media impugning a judgment of the Supreme Court. He has cited many of the provisions in international and regional frameworks guaranteeing women's rights to persuade judges and magistrates to admit women to bail.

Sonkita Conteh,<sup>107</sup> Lawyer and Executive Director of NAMATI,<sup>108</sup> an organisation that promotes legal empowerment and women's access to

99 A medical organisation that provides free medical supports to victims of sexual and gender-based violence.

100 A charitable foundation that provides support particularly for women and girls.

101 A human rights lawyer that has continued to provide legal assistance to women and girls in Sierra Leone.

102 A female journalist in Sierra Leone.

103 Government of Sierra Leone Press Release dated 16 November 2020 from the Directorate of Information and Communications Office. Available at <https://www.thesierraleonetelegraph.com/government-of-sierra-leone-quashed-seditious-libel-count-charges-against-dr-blyden/> (accessed 2 July 2021).

104 As above.

105 A human rights lawyer and public defender in Sierra Leone.

106 'Supreme Court of Sierra Leone The Arrest Of Augustine Sorie Sengh Marrah Esq' *The Sierra Network* 28 October 2020.

107 A human rights lawyer, executive director of NAMATI and civil activist in Sierra Leone.

108 A legal empowerment network in Sierra Leone.

land rights and justice has been far-reaching. He is a human rights lawyer that has been doing great work in the area of advancing women's rights in the country. NAMATI organisation has been doing extensive work on legal empowerment programs and also on public interest litigation on women's access to land in the country. They have also made use of legal frameworks such as CEDAW and the Maputo Protocol in their public interest litigation law suits in the courts.<sup>109</sup>

Fatmata Sorie Esq,<sup>110</sup> Lawyer and President of Legal Access through Women Yearning for Equal Rights and Social Justice, is a legal practitioner and feminist that has been proactively challenging the excesses of the government on issues relating to women's rights. LAWYERS organisation has become a household name in the country for the defence of women and girls' rights.<sup>111</sup> In fact, it is the only female legal organisation in the country comprising of lawyers that are pushing for the advancement of women and girls' rights.

Justice Jamesina King,<sup>112</sup> Justice of the Court of Appeal of Sierra Leone and Commissioner at the Africa Commission, has been reputed for her passion

for human rights in the country. With her lobbying strategies at the international level, she has influenced many training opportunities that have been conducted for judges, magistrates and support staff of the judiciary on the effective implementation of global, regional, and sub-regional human rights norms and expeditious justice delivery.

Justice Miatta Samba, Justice of the Court of Appeal of Sierra Leone and Judge-elect at the International Criminal Court has been doing great work so as to give meaningful effect to the Maputo Protocol in Sierra Leone. Her references to the Protocol in some of her rulings on critical legal matters have just been superb and revolutionary.<sup>113</sup> She is currently a Judge at the International Criminal Court.

## **10 Influence of the Maputo Protocol on higher education and academic writings**

The Departments of Law at both Fourah Bay College (FBC)<sup>114</sup> and the University of Makeni (UNIMAK)<sup>115</sup> in Sierra Leone have introduced two modules in their curricula that teach on the Maputo Protocol. These modules are Public International Law and Human Rights Law. Both modules have been taught in the law programs since 2016. These modules were introduced against the backdrop of the growing need for higher institutions of learning in the country to be a part of the advancement of human rights which includes women rights.

109 Court Orders Oil Palm Company to Return Land and Pay Arrears of Rent to Landowners In Sierra Leone: press release dated 6 November 2018. Available at <https://namati.org/news-stories/court-orders-oil-palm-company-to-return-land-pay-arrears-sierra-leone/> (accessed 5 January 2021).

110 A human rights lawyer and president of LAWYERS organisation.

111 LAWYERS has been in existence since 14 February 1997 and they are an organisation of female lawyers who use the law to protect and promote the rights of women and girls in Sierra Leone. Available at <https://www.facebook.com/L> (accessed 10 February 2020).

112 Justice of the Court of Appeal in Sierra Leone and Commissioner of the African Commission.

113 See Giraffe Heroes Project. Available at <https://www.giraffe.org/miatta-maria-samba> (accessed 5 January 2021).

114 A higher institution of learning and one of the colleges that makes up the University of Sierra Leone.

115 A higher institution of learning in Sierra Leone.

The Law Department at Fourah Bay College,<sup>116</sup> University of Sierra Leone, for example, has been organising moot court debates on contentious women's rights issues under international law over the past few years for students in the department. The same is also true for the Department of Law at the University of Makeni.<sup>117</sup> The relevant provisions of the Maputo Protocol have been referenced by students that normally take part in these debates and moot competitions in their legal submissions.

Other departments within Fourah Bay College, such as the Peace and Conflict Department,<sup>118</sup> the Gender Department,<sup>119</sup> and the Social Work Department,<sup>120</sup> have recently introduced human rights law courses. These courses have been introduced with the growing recognition of the need to build and consolidate a culture of respect for human rights and best practices in the country. Fourah Bay College has also established an Institute of Gender Research and Documentation.<sup>121</sup> This institute is mandated to undertake research work on gender issues and make meaningful recommendations to the state for reforms.

Lecturers<sup>122</sup> have continued to formulate academic discussions in the classrooms around the Maputo Protocol so as to enlighten students about it.

Some final year students writing their dissertations on regional legal instruments that guarantee women rights have been using the Maputo Protocol as a case study.<sup>123</sup> The Department of Law Fourah Bay College and the University of Makeni have also established Law Societies and Clinics<sup>124</sup> to provide support for vulnerable students whose rights have been trampled upon. Female students have mostly benefited from these projects.<sup>125</sup>

## 11 Impact on independent state institutions

Sierra Leone has established specialised institutions that are working in the realm of protecting and promoting women's rights in the country. Chief among these institutions are the Human Rights Commission of Sierra Leone (HRCSL), the Office of the Ombudsman<sup>126</sup> and the Sierra Leone Legal Aid Board.<sup>127</sup>

The HRCSL is the official state institution that promotes and protects human rights in the country. This institution maintains a treaty body unit that follows up on government's compliance with its human rights obligations under international law. Recently, a gender

116 An academic department that pursues law course at Fourah Bay College.

117 An academic department that pursues law course at UNIMAK.

118 An academic department that pursues peace and conflict studies at Fourah Bay College.

119 An academic department that pursues law course at Fourah Bay College.

120 An academic department that pursues law course at Fourah Bay College.

121 An Institute of Gender, Research and Documentation at Fourah Bay College.

122 Academics teaching at the University in Sierra Leone.

123 KO Gbla 'The implementation of the Maputo Protocol in Sierra Leone' Dissertation, 2020 (LLB 4-FBC); M Fofanah 'The effectiveness of custodial sentencing in the criminal justice system of Sierra Leone', 2019.

124 Formal students' legal entities established to seek the welfare of students.

125 Law Society overseas moot court project and internships have greatly benefited female law students in the Department.

126 The institution that deals with administrative injustice and maladministration issues in Sierra Leone.

127 A legal institution that provides free legal service in Sierra Leone for those who cannot hire the service of a lawyer.

directorate was established in the Commission.<sup>128</sup> HRCSL is a grade A' Commission<sup>129</sup> and is amongst the few National Human Rights institutions in West Africa that have done tremendous work on issues related to women's rights. It produces a report on the state of human rights in the country every year<sup>130</sup> and was involved in the first progress report that was sent to the African Commission by Sierra Leone in 2014.<sup>131</sup>

The Office of the Ombudsman and the Sierra Leone Legal Aid Board have all done great work geared towards the implementation of the relevant provisions of the Maputo Protocol. The Legal Aid Board for example has provided and is still providing free legal services for women and girls whose rights have been violated or abused. The Office of the Ombudsman continues to deal with administrative injustices and maladministration with the public service that affects women's rights.<sup>132</sup>

## 12 State reporting

Article 26(1)<sup>133</sup> of the Maputo Protocol places obligation on states that have ratified it to submit a report that clearly shows steps that have been taken towards the realisation of the rights guaranteed in the instrument at the domestic level.

Ever since Sierra Leone ratified the Maputo Protocol, it has not presented any report to the African Commission under the Protocol. The state has failed to submit a report to the African Commission under the Maputo Protocol mainly as a result of administrative challenges and the lack of clarity as to who is supposed to do the reporting. There is an apparent confusion between the Ministry of Foreign Affairs and International Cooperation and the Ministry of Gender and Children's Affairs as to who should take the lead. So far Sierra Leone has submitted its 'Initial and Combined Reports' under the African Charter covering the period 1983-2013.

## 13 Communications

Few decisions have been taken against the state of Sierra Leone by the African Commission and the ECOWAS Court of Justice but none of the cases filed have alleged violation of the Maputo Protocol.

In 2017, a Sierra Leonean Non-Governmental Organisation (NGO), WAVES,<sup>134</sup> in partnership with Equality Now<sup>135</sup> and IHRDA,<sup>136</sup> filed a case before the ECOWAS Court to challenge the ban on pregnant girls accessing formal education in the country.<sup>137</sup> The Court in its ruling found that the ban on pregnant girls accessing formal education in Sierra Leone is in contravention

128 Interviewed made by Mohamed Kuyateh on 10 November 2020.

129 The Human Rights Commission of Sierra Leone is accredited with an 'A' status by the UN Human Rights Committee and the Office of the High Commissioner for Human Rights in Geneva.

130 The Human Rights Commission produces a state of human rights report every year in Sierra Leone since 2004.

131 Marrah (n 26) 210.

132 The institution that deals with administrative injustice and maladministration issues in Sierra Leone.

133 Maputo Protocol art 22.

134 A non-profit organisation formally known as Women Against Violence and Exploitation in Society.

135 An organisation that seeks to protect and promote the Human Rights of Women and Girls in Sierra Leone.

136 An organisation formally known as Institute for Human Rights and Development in Africa.

137 A former discriminatory government policy that deprives pregnant girls' access to formal education.



of provisions of the African Charter on Human and Peoples' Rights and several other international and regional treaties to which the country is a party. However, the case did not specifically deal with a violation of the Maputo Protocol. The Court ordered for the policy to be revoked forthwith.<sup>138</sup>

The government of Sierra Leone welcomed this judgment and decided to formulate the Radical Inclusion Approach<sup>139</sup> to Education in the country. The policy confers rights on both boys and girls to have equal access to formal education regardless of their status or condition.

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

A delegation<sup>140</sup> from the African Court on Human and Peoples' Rights visited Sierra Leone for a sensitisation mission in 2018. During their meeting with president of the Republic of Sierra Leone, Julius Maada Bio, the President of the African Court, Judge Sylvain Ore, congratulated President Bio on his recent election victory, sensitised him about the role of the Court and also pleaded with him for the country to ratify the Protocol establishing the African Court.<sup>141</sup> President Bio in his response thanked the team and made a strong commitment that his government will look into the document<sup>142</sup> and do the ratification.

In 2017, a delegation from ECOWAS,<sup>143</sup> AU,<sup>144</sup> and UNOWAS<sup>145</sup> visited Sierra Leone so as to engage the leadership of the country to continue upholding the tenets of democracy and best practices. During their visit, the delegations held consultative discussion with the president and other stakeholders in governance. In this regard, the delegation used this opportunity to encourage stakeholders to do their job with utmost professionalism and impartiality, thereby promoting an inclusive society that guarantees equal opportunities for all.<sup>146</sup>

In 2010, the Special Rapporteur on Prison and Places of Detention<sup>147</sup> in Africa was invited to a workshop in Sierra Leone. The Special Rapporteur utilised the opportunity to carry out a fact-finding mission at the Freetown Correctional Centre<sup>148</sup> as well as engage with the relevant state authorities in the country on the challenges within the prison sector and steps that ought to be taken by the state to address those challenges.

The African Commission is yet to visit Sierra Leone for a fact-finding mission. It did propose to visit Sierra Leone sometime in 2014 but due to Ebola Virus outbreak,<sup>149</sup> such proposal was cancelled. There has never been a

138 Available at <https://www.amnesty.org>.

139 A government policy that gives equal rights to boys, girls, women and men to access formal education in Sierra Leone (n 67).

140 The president and other dignitaries of the African Court.

141 Available at <https://www.african-court.org> (accessed 23 June 2021).

142 The Protocol to the Africa Court to the Human and Peoples' Rights.

143 Economic Community of West African States (a sub-regional organisation in West Africa).

144 African Union (a regional integration block in Africa).

145 The United Nations Office for West Africa and the Sahel based in Dakar, Senegal.

146 Available at <https://www.unowas.unmisions.org> (accessed 20 May 2021).

147 Maria Teresa Manuela, Commissioner, Special Rapporteur on Prison and Places of Detention in Africa.

148 The government institution that is set up to detain convicted persons and other remanded.

149 A deadly virus that broke out in West Africa in 2014.

visit specifically on women's rights issues by any Africa special mechanism or procedure.

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

### 15.1 Factors that are enhancing the impact of the Maputo Protocol

Discussed below are some of the factors that are enhancing the impact of the Maputo Protocol in the country.

First, the new Gender Equality and Women's Empowerment Policy that was launched in 2020 is enhancing the realisation of the provisions of the Maputo Protocol in the country. Following the formulation of this new policy, women and girls now have a better chance of having a gender mainstreaming policy in the country.<sup>150</sup> The Gender Equality and Women Empowerment policy has been transformed into a Bill and tabled before Parliament for consideration.<sup>151</sup>

Second, the establishment of a Sexual Offences Model Court to look into sexual and gender-based violence cases is also enhancing the impact of the Maputo Protocol in the country. Before now, it was the general courts that had jurisdiction to deal with both civil and criminal matters. As a response to the rampant rape and sexual offences committed against women and girls within the state, the government set up a separate court that has original jurisdic-

tion to deal with all sexual related offences. This newly established court has helped in the speeding up of trials and reduced the congested heavy workload as was evident in the conventional court system. This Court is also helping to give effect to the spirit, object and purpose of the Maputo Protocol.

Furthermore, the amendment of the Sexual Offences Act in 2020 has also enhanced the Maputo Protocol in the country. Prior this amendment, the Sexual Offences Act of 2012 had loopholes that allowed for perpetrators to receive lighter punishment or sometimes go unpunished. With this amendment, women have better protection from sexual predators.<sup>152</sup>

Again, the formulation of the policy of Radical Inclusion in the educational sector has fundamentally helped to give meaningful effect to the Maputo Protocol. This policy embodies the reinstatement of young girls who had dropped out of school because they became victims of teenage pregnancy. The policy saw the need to lift the ban on pregnant young girls in the country. Pregnant girls can now continue their education and realise their potential of becoming contributing members in society.<sup>153</sup>

The Hands off our Girls campaign initiative has also helped to promote and protect women and girl's rights in the country. In light of sexual abuse meted on women and young girls either by rape, sexual penetration or through undue influence, perpetrators can now face the full force of the law for their

150 Ministry of Gender and Children's Affairs, 'Gender Equality and Women's Empowerment Policy' (2020). Available at <https://www.sierraleone.org/lawshtml> (accessed 1 December 2020).

151 'President Bio's cabinet approves Gender Empowerment Bill for parliamentary debate' *The Sierra Leone Telegraph* 22 July 2021.

152 Domestic Violence Act (n 49).

153 B Chernor 'Sierra Leone: Radical inclusion approach to education an extraordinary victor for pregnant girls' *Freetown* 2020. Available at <https://allafrica.com> (accessed 1 December 2020).

wrong doings. The campaign which was launched by the Office of the First Lady is now a household name to stop systemic sexual and gender-based violence meted against women and girls.<sup>154</sup>

The continued support given by successive governments towards the free health care initiative for pregnant and lactating women and also women with disabilities has also been helpful towards giving practical effect to the Maputo Protocol in the country. This policy has continued to guarantee the health security of pregnant and lactating women in line with article 14 of the Protocol.<sup>155</sup>

The establishment of institutions that are pushing for the advancement of women and girls' rights like the Ministry of Gender and Children Affairs, the One Stop Centre for Rape Survivors, the Legal Aid Board, the Family Support Unit (FSU), etc has also enhanced the Maputo Protocol in fundamental terms at the domestic level. The Legal Aid Board for example has achieved a lot in terms of promoting peaceful coexistence within hostile communities by mediating community disputes, marital, family, tenancy, minor disputes, to name but a few. A total of 384,488<sup>156</sup> people have benefited from this institution's intervention since its inception in 2015. The Family Support Unit has also addressed hundreds of thousands of family disputes involving women and girls in the country.<sup>157</sup>

The enactment of the gender justice laws (Devolution of Estate Acts 2007, Domestic Violence Act 2007, the Registration of Customary Marriage and Divorce Acts 2007 and the Sexual Offences Act 2012 as amended) has also helped enhance the Maputo Protocol in the country. These laws, though enacted before the ratification of the Protocol, have helped to guarantee the rights of women and girls in many respects as dictated by the Maputo Protocol.<sup>158</sup>

The appointment of women to key international human rights and legal institutions<sup>159</sup> has been impactful to the Maputo Protocol as well. At the domestic level, a few women in the country have been appointed to prominent positions in key international justice mechanisms.<sup>160</sup> All of this has been done to give effect to articles 9, 13 and 19 of the Maputo Protocol.

The repeal of part 5 of the Criminal Libel Law<sup>161</sup> in 2020 by the government of Sierra Leone has also enhanced women participation in the media. Women journalists in both the electronic and print media have become incentivised to raise awareness about women and girls' rights in the country. For example, station Manager for Radio Democracy, Asmaa James, who also doubles as the founder of the Asmaa

154 R Vickie 'Hands of our girls in Sierra Leone: right message, wrong messengers' (2019). Available at <https://vickieremoe> (accessed 30 November 2020).

155 Alex James and others 'Evaluation of the Free Health Initiatives in Sierra Leone' (2015). Available at [www.opml.co.uk](http://www.opml.co.uk) (accessed 1 December 2020).

156 See the Legal Aid Board Report available at <https://www.lab.gov.sl>.

157 Family Support Unit (n 10).

158 'Justice for Women in Sierra Leone' (2018). Available at <https://worldjusticeproject.org> (accessed 1 January 2021).

159 Justice Jamesina King was appointed as Justice of the Court of Appeal and Commission in the Africa Commission and Justice Miatta Samba was appointed as Justice of the Supreme Court and currently serving as a judge of the International Criminal Court.

160 'The State of Human Rights Report 2017.' Available at <https://www.hrcsl.org> (accessed 24 February 2021).

161 See the repealed law at the Parliament of Sierra Leone Website. Part 5 of the Criminal Procedure Act among other things used to criminalise press freedom in the country. The law has now been expunged.

James Foundation, has been on the lead pushing for the advancement of women and girl's rights in the country. Her presence in the media has continued to help disseminate information on women and girls' rights in the country.<sup>162</sup>

### 15.2 Factors that are impeding the impact of the Maputo Protocol

Patriarchy and male chauvinism still dominate the Sierra Leonean society. This is an impediment that undermines the impact of the Maputo Protocol. Men are still of the belief that they are the ones in control, hence, they should have hegemony over women.<sup>163</sup>

More fundamental also, the failure by Sierra Leone to domesticate the Maputo Protocol is another impediment. Sierra Leone is a dualist state; hence, international and regional law do not apply except where the state has domesticated the treaty.<sup>164</sup>

Also, in Sierra Leone, international treaties, conventions, protocols and case laws are considered persuasive and not binding within the justice system. The state of Sierra Leone has in some instances refused to comply with the decisions of these international and regional mechanisms. This is a challenge for the applicability of Maputo Protocol in the country.

There is also inadequate representation of women in political and governance positions in the country. The

president of the 50/50 Women Group in Sierra Leone, Dr Fatou Taqi has called on the state on many occasions to increase women participation in politics and governance.<sup>165</sup> Notwithstanding these calls, positions occupied by women in governance are still less than 30 per cent even though women constitute the majority of the population of country. This status quo overtly characterises the societal discrimination and marginalisation being meted against women and girls in the country.<sup>166</sup>

The failure of Sierra Leone to legislate both the Safe Abortion Bill of 2015 and the 30 per cent Gender Quota Bill also compromised the Maputo Protocol in fundamental terms. The Ministry of Gender and Children Affairs together with other women organisations have long been pushing for these two proposed bills to be passed into law but to no avail.<sup>167</sup>

Moreover, continued harmful traditional practices like FGM occasioned by the Bondo Society against women and girls have also served as an impediment to the realisation of the Maputo Protocol in the country. Even though there is a government policy which restricts girls below the age of 18 years from being forcefully initiated into the Bondo Society, the absence of effective implementation and monitoring mechanisms renders the policy an exercise in futility as there is little or nothing to show that

162 More Foundation for West Africa, 'Sierra Leone's parliament repeals criminal libel law that threatens free speech' (2020). Available at <https://ifex.org/> (accessed 23 January 2021).

163 50/50 Women Group in Sierra Leone '2015 Research studies on factors impeding women's rights in Sierra Leone.' Unpublished.

164 Marrah (n 26) 204.

165 '50/50 Group Sierra Leone pays courtesy call on President Julius Maada Bio, Praises his Position on Women' *The State House Media and Communications Unit* 8 January 2020.

166 Remoe (n 30).

167 As above.

it is being respected by initiators of the Bondo Society.<sup>168</sup>

The lack of a comprehensive affirmative gender mainstreaming policy in government institutions has further proven to be an impediment to the Maputo Protocol. The absence of this policy has deprived women and girls of having full access to adequate support systems within public institutions thereby increasing their level of vulnerability.

More controversial still, the existence of discriminatory laws and practices has also posed serious challenges to the realisation of the Maputo Protocol. The 1991 Constitution of Sierra Leone sets no minimum age of marriage. The Registration of Customary Marriage and Divorce Act allows for a woman to be marriage at the age of 16 subject to parental consent.<sup>169</sup> This is below the minimum age of marriage as set by article 6 of the Maputo Protocol.

In Sierra Leone, traditional rulers and custodians of customary law and traditions support this legislation. Customary law has also deprived women in some chieftaincies to have access to paramount chief positions. Even though section 8<sup>170</sup> of the Chieftaincy Act of 2009 allows for women to contest for paramount chief positions, sub section (1)(b) of the same section 8 prescribes that customary law shall determine who qualifies to stand as paramount chief in a particular chieftaindom. Section 72(3)<sup>171</sup> of the 1991

Constitution also provides for the applicability of customary law as far as chieftaincies matters are concerned. Disappointingly also, section 27(4)(d)<sup>172</sup> of the Constitution allows for women to be discriminated against in relation to adoption, marriage, divorce, burial, devolution of property on death and other issues of personal law by deferring to the customary law. Put more simply, the protection from discriminatory laws as provided for under section 27(4) of the 1991 Constitution is not applicable to the provision mentioned above.

Lastly, the lack of a robust implementation and monitoring mechanism to ascertain compliance with international treaties as well as reporting obligations has also been a challenge. No specific body exists in Sierra Leone with a clear-cut mandate to ensure compliance by MDA's to their reporting obligations under international treaties and instruments.

## 16 Conclusion

In sum, while it is apparently clear that Sierra Leone lacks a comprehensive legal framework that addresses the provisions of the Maputo Protocol in specific terms, it is vital to emphasise that some progress has been made particularly in the area of awareness raising of the Maputo Protocol within the population in the country.

With the ratification of the Maputo Protocol, the amendment of the Sexual Offences Act, the repealed section of the Criminal Libel Law, the establishment of a Sexual Offences Model Court, the introduction of a One Stop Centre for

168 E Batha & N Peyton 'Sierra Leone bans FGM in clampdown on secret societies' *Freetown* 2018. Available at [www.reuters.com](http://www.reuters.com) (accessed 30 November 2020).

169 See the Registration of Customary Marriage and Divorce Act of Sierra Leone (2007). Available at [www.sierraleoneweb.org](http://www.sierraleoneweb.org) (accessed 30 November 2020).

170 See the Chieftaincy Act of Sierra Leone (2009) available at [www.sierraleone.org/lawshtml](http://www.sierraleone.org/lawshtml) (accessed 5 December 2020).

171 The 1991 Constitution of Sierra Leone Act 6 (1991) available at [www.sierra-leone.org/lawshtml](http://www.sierra-leone.org/lawshtml) (accessed 6 December 2020) 37.

172 As above, 17-18.

Rape Survivors and the introduction of a new Gender Equality and Women Empowerment Policy, it is safe to conclude that the provisions of the Maputo Protocol are gradually taking a firm grip in Sierra Leone even though domestication of the Protocol has not yet been achieved.

If Sierra Leone is to effectively address the challenges faced by women in the country, much more needs to be done particularly in the area of legal and policy reforms, budgetary support to MDAs working around women and girls' rights issues, training and capacity building support to CSOs and NGOs advocating for women's rights and the passing of the Gender Affirmative Bill that will help increase the quota and participation of women in the socio-economic and political governance architecture in the country.

There is a significant need for empowered, educated and robust women coupled with a transformed parliament and judiciary to demand the changes that are required to put women issues in the limelight in the country.



# THE IMPACT OF THE MAPUTO PROTOCOL IN TANZANIA

Isabela Warioba\*



## 1 Introduction

The Bill of Rights (BOR) was incorporated in the Constitution of the United Republic of Tanzania (the Constitution) of 1977<sup>1</sup> in 1984, following the Fifth Amendment<sup>2</sup> of the Constitution.<sup>3</sup> The incorporation of the BOR in the Constitution was driven by various factors such as pressure from the people who were airing their views in favour of having the BOR incorporated in the Constitution through the media,<sup>4</sup> as well as pressure from Zanzibar, the other part of United Republic which had a BOR in its Constitution.<sup>5</sup> In addition, there was pressure from developments that were taking place on the African continent significantly the adoption by

the Organisation of African Unity (OAU) of the African Charter on Human and Peoples' Rights (African Charter).<sup>6</sup> Tanzania had taken a very active part in its formulation and ratified the African Charter on 31 May 1982.<sup>7</sup>

The BOR predominantly contains civil and political rights. Only three socio-economic rights, which are the right to work, the right to just remuneration and the right to property, are contained in the BOR part of the Constitution.<sup>8</sup> Other socio-economic rights such as health and education are covered in a part of the Constitution which contains the fundamental objectives and directive principles of state policy which are not enforceable.<sup>9</sup> The High Court has been given original jurisdiction in case of alleged violations of the BOR.<sup>10</sup>

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<sup>1</sup> As amended to 2005.

<sup>2</sup> Act 15 of the Constitution of United Republic of Tanzania 1984.

<sup>3</sup> CP Maina 'Five years of the bill of rights in Tanzania: drawing a balance sheet' (1992) 4 *African Journal of International and Comparative Law* at 131.

<sup>4</sup> CP Maina 'Blocking fundamental rights and freedoms in Tanzania' in National Organisation for Legal Assistance (NOLA) (eds) *Twenty years of the justiciability of the Bill of Rights in Tanzania 1988-2008* (2008) at 10.

<sup>5</sup> Arts 14-31 of the Constitution of Zanzibar 1984 (as amended).

<sup>6</sup> Maina (n 4) 10.

<sup>7</sup> As above.

<sup>8</sup> Arts 22-24 of the Constitution of United Republic of Tanzania.

<sup>9</sup> Art 7(2) of the Constitution of United Republic of Tanzania.

<sup>10</sup> Art 30(4) of the Constitution of United Republic of Tanzania.



Article 13 of the Constitution prohibits discrimination based on gender among other things.<sup>11</sup> Furthermore, article 12 of the Constitution states that all human beings are equal and every person is entitled to recognition and respect for his dignity.

However, it is important to note that the legal framework of Tanzania is pluralistic. This means that there are several systems of law operating side by side in the same jurisdiction.<sup>12</sup> There is customary law which is codified under the Customary Law Declaration Order (CLDO) of 1963; Islamic law (predominantly governed by the Holy Quran); and statutory laws.<sup>13</sup> The application of these systems of law is regulated by the Constitution and in part by statutory law to the extent that it supersedes the other two systems. In the case of *Maagwi Kimito v Gibeno Warema*, the Court of Appeal held as follows:<sup>14</sup>

The customary laws of this country have the same status in our courts as any other law, subject to the Constitution and any other statutory law that may provide to the contrary.

The plural nature of the legal system can negatively affect the fundamental rights

of women contrary to relevant international instruments.<sup>15</sup> Most of the provisions contained in the Customary Law Declaration Order<sup>16</sup> contravene the rights of the women and girls.<sup>17</sup> For example, it allows inheritance of widows by a relative of the deceased husband,<sup>18</sup> ousts rights of widows for the custody of their children,<sup>19</sup> has discriminatory inheritance rights against women,<sup>20</sup> and has discriminatory provisions relating to maintenance and division of matrimonial property after divorce.<sup>21</sup> Islamic law which is also applicable in Tanzania on personal issues also has discriminatory provisions against women on various matters for example inheritance whereby women and girls are treated less than men and boys and also minimum age for marriage for girls is lower than that of boys.<sup>22</sup>

As for statutory law, there are still laws in Tanzania which have not been amended to reflect the protection of women's rights, for example, the Law of Marriage Act (LMA) of 1971 which has significant shortfalls.<sup>23</sup> Such shortfalls include issues relating to age for marriage, spousal beating, polygamy and marital rape.<sup>24</sup> The Penal Code<sup>25</sup> also has some shortfalls for example not

11 Tanzania Women Lawyers Association (TAWLA) 'Review of laws and policies related to gender-based violence of Tanzania mainland' (2014) 11.

12 CM Drost and others 'Legal Pluralism and women's rights: a study in postcolonial Tanzania' (2007) 16 *Columbia Journal of Gender & Law* at 471 as quoted by M Matinda 'Implementation of the convention on elimination of all forms of discrimination against women (CEDAW): the Tanzania experience' (2019) 26 *Willamette Journal of International Law and Dispute Resolution* at 108.

13 TAWLA (n 11) 11.

14 *Maagwi Kimito v Gibeno Warema* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 20/1984 para 8.

15 As above.

16 This order codifies customary norms of patrilineal societies in Tanzania.

17 Matinda (n 12) 108-109.

18 Paras 62-70.

19 Paras 62-70.

20 Paras 1-53.

21 Paras 71A, 74.

22 TW Juynboll *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der shafi'itische school* (1943) at 184-189 as quoted by E Van Der Zweep 'The application of Islamic family law and human rights: A case study of Tanzania mainland' (2005) Unpublished Master Thesis, Universiteit Utrecht, 18.

23 TAWLA (n 11) 11.

24 TAWLA (n 11) 13.

25 Cap 16 RE 2019.

recognising marital rape and domestic violence as offences.

However, it is important to also note the milestones that Tanzania has reached regarding women's rights including the enactment of the 1999 Land Act<sup>26</sup> and the Village Land Act<sup>27</sup> which addressed the marginalisation of women in land access and holding rights,<sup>28</sup> enactment of the Sexual Offences Special Provision Act,<sup>29</sup> which forms part of the Penal Code to protect the dignity of women and children, illegalising child marriage through a judicial decision,<sup>30</sup> creation of the Gender and Children Desks<sup>31</sup> designated to respond to issues related to gender-based violence<sup>32</sup> in police stations in Tanzania and the enactment of various policies to promote gender equality.

This chapter gives an overview of the implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in Tanzania by expounding on specific aspects, for example, the ratification process, incorporation of its provisions in domestic law, its impact on legislative and policy reform, its impact on various institutions and organisations such as the judiciary, law society, academia and civil society organisations (CSOs), as

well as the reporting obligations established by the instrument.

## 2 Ratification of the Maputo Protocol in Tanzania

Tanzania ratified the Maputo Protocol on 3 March 2007 with no reservations.<sup>33</sup> There is no specific law in Tanzania that clarifies the procedure for ratification of international instruments.<sup>34</sup> Article 63(3) of the Constitution provides that the National Assembly in discharging its functions may deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification. Further, Tanzania is a dualist country and hence for a treaty to be enforceable, it requires enactment of enabling domestic legislation.<sup>35</sup>

Therefore, ratification of international instruments falls within the ordinary powers and functions of the National Assembly.<sup>36</sup> In that context, the instruments of ratification are presented by the minister responsible to the parliament for discussion and possible ratification pending domestication.<sup>37</sup>

It is not clear why Tanzania decided to ratify the Maputo Protocol.<sup>38</sup> However, the Government through policy had shown a general intention to implement

26 Land Act 4 of 1999.

27 Village Land Act 5 of 1999.

28 Matinda (n 12) 127.

29 1998.

30 *Attorney General v Rebecca Gyumi* (Civil Appeal 204 of 2017) [2019] TZCA 348; (23 October 2019).

31 There are currently 450 gender and children desks according to The Legal and Human Rights Centre (LHRC) 'State of human rights in Tanzania mainland: key issues and highlights for the year 2019' (2020) 189.

32 K Makoye 'Tanzania police set up special desks for gender violence cases' *Thomson Reuters Foundation* <http://news.trust.org/item/20131128131537-fitsc> as quoted by Matinda (n 12) 134.

33 Available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%20S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 20 October 2020).

34 C Mmbando & GK Kazoba 'The impact of the African Charter and the Maputo Protocol in Tanzania' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) at 251.

35 Art 63(3)(d) of the Constitution of the United Republic of Tanzania 1977.

36 As above.

37 As above.

38 Mmbando & Kazoba (n 34).

international agreements on the rights of women.<sup>39</sup>

### 3 Government focal point

The Ministry for Constitutional and Legal Affairs (MoCLA) is responsible for the implementation of all international human rights obligations.<sup>40</sup> Coordination of state response to human rights treaties is under a specific department within the Attorney General's Chambers in the MoCLA called the Division of Constitutional Affairs and Human Rights.<sup>41</sup> However, depending on the subject of the specific treaty, this mandate overlaps with the specific line Ministry which in the case of the Maputo Protocol is the Ministry of Health, Gender, Community Development, Elderly and Children.<sup>42</sup> Within this ministry, the Directorate of Gender is responsible for the coordination of gender equality and women empowerment.<sup>43</sup> These departments are significantly aware of the contents and usefulness of the Maputo Protocol.

### 4 Domestication or incorporation

Unlike civil law countries where ratified international treaties form a direct part of their municipal laws, Tanzania as a common law country follows the dualism principle, which necessitates further domestication of international treaties in its domestic laws through legislation.<sup>44</sup> Tanzania has not enacted a specific law to domesticate the provisions of the Maputo Protocol. Human rights instruments, predominantly those that have been ratified by Tanzania but not yet incorporated in domestic legislation are applied only for persuasive purposes as a guide to interpreting the Constitution.<sup>45</sup>

In the case of *Transport Equipment Ltd and Reginald John Nolas v Devran P Valambhia*,<sup>46</sup> on the aspect of using international instruments as an interpretative guide, the Court of Appeal stated the following:<sup>47</sup>

... our Constitutional protection falls short of that which is provided by the International Covenant on Civil and Political Rights. But since we are party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogation law extremely strictly.

39 Ministry of Community Development, Women Affairs and Children, Policy on Women in Development in Tanzania, 1992 at 16, para 50.

40 As above.

41 The United Republic of Tanzania 'Consolidated second to tenth periodic report submitted by the United Republic of Tanzania to the African Commission for Human and People's Rights' (2006) at 2.

42 The Ministry of Health, Community Development, Gender, Elderly and Children was established in November 2015 after the integration of two Ministries: Ministry of Health and Social Welfare and Ministry of Community Development, Gender and Children.

43 The United Republic of Tanzania (URT) 'Country report on the review and progress made in implementation of the Beijing Declaration and Platform for Action - Beijing +25' (2019) 92.

44 The Constitution of the United Republic of Tanzania, 1977 at art 63(3)(d) and (e) (1977); K Kamanga 'International human rights law as reflected in Tanzania's treaty and court practice' in C Finnegan & W Binchy (eds) *Human rights, constitutionalism and the judiciary: Tanzanian and Irish perspectives* (2006) 55.

45 M Killander *International law and domestic human rights litigation in Africa* (2010) 60 as quoted by NH Msuya 'Challenges surrounding the adjudication of women's rights in relation to customary law and practices in Tanzania' (2019) 22 *Potchefstroom Electronic Law Journal* at 7.

46 *Transport Equipment Ltd & Reginald John Nolas v Devran P Valambhia* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Application 19/1993.

47 *Transport Equipment Ltd & Reginald John Nolas* (n 46) para 10.

There are certain rights applicable to all humans which are found in the justiciable BOR of the Constitution, for example, articles 12 and 13 of the Constitution which implicitly require the respect of the rights of women as provided for by the Maputo Protocol. Article 12(1) asserts that all human beings are born free, and are equal and that every person is entitled to recognition and respect for his dignity. Article 13 provides for the principle of non-discrimination,<sup>48</sup> which outlaws discrimination based on sex and also requires that all laws enacted not to be discriminatory in themselves and also their effect.<sup>49</sup> It should be noted however that these articles of the Constitution are subject to the provision of article 30(2) which is the general limitation clause.

## 5 Legislative and policy reform or adoption

Unfortunately, there was no compatibility study of domestic law with the Maputo Protocol that was undertaken before its ratification in Tanzania.<sup>50</sup> However, there has been the adoption and the amendment of various legislation and policies (explicit and implicit) to give effect to the Maputo Protocol in recent years. These changes have affected five key areas which are poverty alleviation, improvement of access to health services including reproductive health, publishing gender-disaggregated data, ending violence against women and girls and achieving gender parity in education.<sup>51</sup>

In poverty alleviation, the government is implementing the Five Year

Development Plan (FYDP) II<sup>52</sup> which is an overarching national poverty reduction strategy. This is an operational economic framework to operationalise the visions and provide guidance on productive and social sectors such as agriculture, mining, tourism, manufacturing and services.<sup>53</sup> It has prioritised the promotion of gender equality with a specific focus on women's economic empowerment, governance and elimination of violence against women and children.<sup>54</sup> Further, there has been an amendment of Local Government Authorities Financial Act<sup>55</sup> to require all Local Government Authorities (LGAs) to set aside 10 per cent of their revenue collection for purposes of providing interest free loans to registered groups of women, youth and persons with disabilities.<sup>56</sup> The Public Procurement Act of 2011 was also amended in 2016 to require all government bodies to procure at least 30 per cent of their services from services owned by women and youth.<sup>57</sup> Other policies which have been adopted to address poverty against women include the second Financial Inclusion Framework (2018-2022), Food and Nutrition Strategic Plan of 2014-2018, National Skills Development Strategy of 2016-2027, Integrated Industrial Development Strategy of 2011-2025 and the Women Entrepreneurship Development National Action Plan 2016-2020.<sup>58</sup>

To improve access to health services including reproductive health, the Health Sector Strategic Plan III 2013/2014-2018/2019 has been adopted which has resulted in the Integration of

48 Art 13(1).

49 Art 13(2).

50 Mmbando (n 34) 253.

51 URT (n 43) 22.

52 FYDP (2016/2017 - 2021/2022).

53 URT (n 43) 22.

54 URT (n 43) 80.

55 2018; Cap 290 RE 2002 (sec 37A).

56 URT (n 43) 10.

57 URT (n 43) 20.

58 URT (n 43) 10-11.

Reproductive, Maternal, Newborn, Child and Adolescent Health (RMNCAH) services to facilitate the easy provision of these services holistically and efficiently.<sup>59</sup> The Plan has also led to the institutionalisation of a RMNCAH Technical Committee to monitor the implementation of RMNCAH interventions quarterly. Furthermore, Tanzania made a concerted response to the human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) epidemic, even though it continues to claim the lives of thousands of people.<sup>60</sup> Some progress has been made towards achieving the UN AIDS 90-90-90 target particularly linked to HIV treatment. Research shows that the HIV prevalence and incidence estimates indicate a stabilising HIV epidemic in Tanzania.<sup>61</sup> In 2018, a four-year cervical cancer screening project for women aged 21 to 65 years was introduced to prevent and control cervical cancer.<sup>62</sup> Moreover, in 2017, immune *papilloma* vaccine to young girls aged 14 years was also introduced as a routine preventative intervention for cervical cancer.<sup>63</sup>

To publish gender-disaggregated data Tanzania through the National Bureau of Statistics (NBS) has integrated a Gender Statistics Module in the Tanzanian Statistical Master Plan II.<sup>64</sup> NBS is further conducting several national surveys, which are gender-sensitive.<sup>65</sup>

To address violence against women and children (VAWC), the government

developed a National Plan of Action to end Violence against Women and Children (NPA-VAWC 2017/2018 – 2021/2022) along with National Integrated Communications and Outreach Strategy to End Violence against Women and Children and Outreach Toolkit (2017/2018–2021/2022) which are currently being implemented.<sup>66</sup> It further developed NPA-VAWC Coordination Guideline (2018) which decentralised the implementation of NPA-VAWC in Tanzania, Anti-Trafficking in Person Action Plan 2018-2021 and a National Guideline for the establishment and management of shelter/safe houses for victims of trafficking and other forms of violence.<sup>67</sup> Despite the efforts, VAWC is still a concern in Tanzania, for example in October 2019, the National Head of Police Gender and Children Desk, Deputy Commissioner of Police (DCP) Mary Nzuki, revealed that gender-based violence incidents registered by police gender and children desks in Tanzania increased from 41,416 in 2017 to 43,487 in 2018.<sup>68</sup> Further, in 2019, police data indicated that by June, a total of 3,709 incidents of rape of women and children were reported to police stations.<sup>69</sup>

Various legislations have been adopted and/or amended such as Legal Aid Act<sup>70</sup> which has been enacted to facilitate support to indigent people the majority of which are rural women, widows, and persons with disability.<sup>71</sup> Laws amended include the Criminal Procedure Act,<sup>72</sup> whereby section 151(1) was amended to the effect that anyone accused of VAWC is prevented from qualifying for bail and has

59 As above.

60 Mmbando (n 34) 255.

61 Centre for Disease Control and Prevention and others, 'Tanzania HIV Impact Survey 2016-2017' (2017).

62 URT (n 43) 43.

63 As above.

64 URT (n 43) 12.

65 As above.

66 URT (n 43) 13.

67 URT (n 43) 84.

68 LHRC (n 31) 177.

69 As above.

70 Act 1 of 2017.

71 URT (n 43) 13.

72 Act 7 of 2018.

increased sentences that courts can pass for VAWC related crimes. As a result, domestic regional courts can now give sentences of between 7 and 14 years, with sentences from the High Court ranging between 30 years and life imprisonment.<sup>73</sup> The Education Act<sup>74</sup> was also amended in 2016<sup>75</sup> to include a provision which penalises any person who impregnates a school girl to a minimum of 30 years imprisonment sentence.<sup>76</sup> The Penal Code was also amended in 2018<sup>77</sup> to increase punishment for sexual offences such as rape, sodomy and defilement.<sup>78</sup> The Chief Justice has also made rules to ensure that courts dispose of VAWC cases in six months.<sup>79</sup>

To achieve gender parity in education, the 2014 Education and Training Policy was adopted which emphasises access and equity to quality education for all. The policy acknowledges, promotes and advocates for deliberate actions aimed at assuring that children, including girls, are not denied the right to access quality education. Further, the government came up with a policy<sup>80</sup> for the abolition of school fees and contributions in pre-primary up to secondary education which among other things is also a strategy to achieve gender parity in education in Tanzania.<sup>81</sup> The government also developed the National Strategy for Inclusive Education (2018-2021) which promotes gender equality and children development regardless of their gender.<sup>82</sup>

Unfortunately, despite the progress that has been made regarding the enactment and amendment of legislation and policies, implementation of the same has been slow. This is due to budgetary constraints. The Ministry opines that despite initiatives around Gender Responsive Budgeting, resource allocation for gender programmes and plans has not increased significantly which remains an ongoing challenge.<sup>83</sup> In particular, concerns are around annual budgeting processes and ensuring gender priorities are visible in emerging policy changes.<sup>84</sup> This is reflected in the varying degree to which different sectors articulate gender issues and priorities in their plans and budgets. Development Partners continue to fund the majority of gender initiatives.<sup>85</sup>

## 6 Impact on the judiciary

There is a general awareness of the rights of women as provided for in international and regional instruments for the judiciary. This general awareness is captured through reference to various international instruments as interpretative sources in their judgments even before Tanzania ratified the Maputo Protocol.<sup>86</sup>

73 URT (n 43) 63.

74 Cap 353 RE 2002.

75 With the Written Laws Miscellaneous Act 2 of 2016.

76 URT (n 43) 63.

77 Act 6 of 2018.

78 URT (n 43) 63.

79 The Judicature and Application of Laws (Practice and Procedure of Cases Involving Vulnerable Groups) Rule 110 of 2019.

80 Free basic education policy, 2015.

81 URT (n 43) 51.

82 URT (n 43) 14.

83 As above.

84 As above.

85 As above.

86 *Ephraim v Pastory* (1990) LRC (Const) 757; *Ndewawiosia d/o Ndeamtzo v Imanuel s/o Malasi HCD 1967-1968*, High Court Digest, vol. 1 & 11, at 461-462; *Bi Hawa Mohamed v Ally Seifu* Court of Appeal (Dar es Salaam), Civil Appeal 9 (1983); *Salome Herman Chitumbi v Mohamedi Iddi Mtandika* PC. Civil Appeal 24 of 2003 (HC 2005); *Ndossi v Ndossi* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 13/2001; *Naftal Joseph Kalalu v Angela Mashirima* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 145/2001; *Leonard Jonadhan v R* (High Court of Tanzania at Dar es Salaam) (unreported) Criminal Appeal 53/2001.

However, the decisions of the judiciary regarding the rights of women have not been consistent. As much as there are positive decisions which have been inspired by international instruments, there are also many decisions which have failed to uphold the rights of women for reasons, for example customary law.<sup>87</sup>

The strategic litigation case of *Rebecca Gyumi v Attorney General*<sup>88</sup> is an example of a decision that heavily relied on international instruments especially the Maputo Protocol. In this case, the High Court was petitioned to strike out all provisions in the Law of Marriage Act,<sup>89</sup> which allow a girl under 18 years old to get married with her parent's consent specifically sections 13 and 17.<sup>90</sup> The petition further contended that the two sections contravened articles 12, 13 and 18 of the Constitution of Tanzania, which give people equal rights before the law and the right not to be discriminated against. In this decision, the Court ruled that the two sections were unconstitutional, hence they did not qualify to be part of the Law of Marriage Act.

In the case, even though the High Court was referred to several international and regional instruments to assist it in the interpretation of the Constitutional provisions on the right to equality and against discrimination, in the decision, the Court relied only on the Mapu-

to Protocol to conclude that the right to equality provided for in the Constitution was violated. The Court stated the following:<sup>91</sup>

... the right to equality is negated where there is a differential treatment. The Maputo Protocol formed under the African Charter on Human and Peoples' Rights referred to us by the petitioner's counsel, in its article 6 encourages State parties to ensure that there is equality between men and women and both are regarded as equal partners in marriage. The article provides further that State parties should enact appropriate legislative measures that guarantee that no marriage takes place without the free will and full consent of both parties and that the minimum age of marriage for women should be 18 years. It is in that respect that we agree with the petitioner that Tanzania having ratified the said Regional instrument, it is high time that it takes the appropriate legislative measures to ensure that the rights guaranteed under article 21(2) of the Constitution are realised by all.

Article 21(2) of the Constitution gives all citizens the right and freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.

The judgment was positively received and is being used by practitioners in their advocacy work against child marriage. The government through the Attorney General appealed the decision of the High Court to the Court of Appeal, which, fortunately, upheld the decision of the High Court.<sup>92</sup>

Apart from *Rebecca's* case, it is important to note that recently, it is not strange to find judges rely on the Maputo Protocol when deciding on issues relevant to the Protocol. There are many cases especially cases on the division of

87 *Elizabeth Stephen and Another v Attorney General*, High Court of Tanzania (Dar es Salaam) Misc. Civ. Cause 82, 408 (2005), (TLR 2006); *Elizabeth A Komakoma v Zephania M Andendekisye* Civil Appeal 171 of 2005 (HC 2008).

88 Misc Civil Cause 5 of 2016 (*Rebecca Gyumi* case).

89 1971 [Cap 29 RE 2002].

90 I Warioba 'Child marriage in Tanzania: A human rights perspective' (2019) *The Journal of Law, Social Justice and Global Development* at 8.

91 *Rebecca Gyumi* case at 20.

92 Civil Appeal 204 of 2017 (2019) TZCA 348; (23 October 2019).

matrimonial property where judges have referred to the Protocol for persuasive purposes to reach decisions on equality in the division of matrimonial property.<sup>93</sup> This shows that awareness of the judiciary on the Protocol is satisfactory and that the Protocol has started to make an impact on the rights of women.

## 7 Awareness and use by civil society

The awareness of the Maputo Protocol among CSOs in Tanzania is significant. There are many CSOs which use the Maputo Protocol in their work explicitly and impliedly. In the first place, considering that the Protocol has not been domesticated in Tanzania, there are several CSOs which do advocacy work to promote the domestication of Maputo Protocol. For example, an organisation working to promote sexual and reproductive health and rights in Tanzania which preferred to remain anonymous stated that they have conducted various training of Members of Parliament (MPs), especially women MPs, on the importance of the Maputo Protocol for the protection of the rights of women. They also have been doing advocacy to motivate women MPs to trigger a dialogue on the domestication of Maputo Protocol in parliamentary sessions.<sup>94</sup>

Further, many CSOs use the Maputo Protocol in their work. The organisation mentioned above, for example, stated that they have explicitly used the

Maputo Protocol in several advocacy sessions to advocate for sexual and reproductive health and rights with policymakers such as MPs, the Ministry of Health, Community Development, Gender, Elderly and Children, the Ministry of Constitutional and Legal Affairs and also media.<sup>95</sup> They have also used the Protocol to draft and design fact sheets on unsafe abortions practices and complications in Tanzania and develop information, education and communication materials on unsafe abortion for different stakeholders, for example, the media, medical professionals and communities.<sup>96</sup>

Some seven non-governmental organisations (NGOs) working on sexual and reproductive health and rights have formed a coalition called Coalition to Address Maternal Mortality due to Unsafe Abortion and its Complications (CAMMAC) whose main mission is to contribute to the reduction of maternal mortality in Tanzania by reducing the prevalence of unsafe abortion and increasing access to safe abortion and post-abortion care services. Their work is predominantly influenced by article 14 of the Maputo Protocol.<sup>97</sup>

Women's Legal Aid Centre (WLAC)'s work to promote women's rights is largely informed by the Maputo Protocol. For example, they create awareness on women's rights to women and children, magistrates and judges and advocate for law reform by among other things, making sure to give their opinion on bills for the enactment of new laws and/or for amendment of the existing laws to improve the rights of women.<sup>98</sup> Their work also includes the

93 See for example *Mnyonge Idrissa v Kiumbe Hussein*, PC: Matrimonial Appeal 4 of 2020; *Anna Aloyce v Zacharia Zebedayo Mgeta*, PC: Matrimonial Appeal 1 of 2020; *George Mhando Nyungu v Hadija Rashid*, Civil Appeal 137 of 2017; *Ahmed Abubakar Kahamba v Madina Kihupi*, Civil Appeal 251 of 2016; *Godfrey Edward Malole v Sara Joseph Masaka*, Civil Appeal 184 of 2016.

94 As above.

95 As above.

96 As above.

97 As above.

98 As above.



institution of public interest litigation. So far, they have instituted two public interest litigation cases.<sup>99</sup> The first one was to challenge discriminatory customary inheritance laws and the other to seek the declaration that widows are entitled to half of the matrimonial property upon the death of the husband.<sup>100</sup> Unfortunately, both cases were struck out on technicalities.

Furthermore, there are also CSOs working on preventing and combating VAWC. Legal and Human Rights Centre (LHRC) and other NGOs such as Msichana Initiative raise awareness about VAWC through different platforms and also work with human rights clubs at schools, as part of their strategy to combat VAWC.<sup>101</sup> Other CSOs including Child Dignity Forum (CDF), WLAC, Twaweza, HakiElimu, Tanzania Women Lawyers Association (TAWLA),<sup>102</sup> Tanzania Media Women's Association (TAMWA), Save the Children, and Plan International, work with government and non-government actors to address VAWC, including supporting the work of police gender and children desks.<sup>103</sup> For instance, in October 2019, a new police gender and children desk was launched at Kawe Police Station in Dar es Salaam, supported by Save the Children.<sup>104</sup> CDF provided training to 270 police officers (118 female and 152 male) in 2019 to boost the capacity of police gender and children desks to address VAWC and provide related services.<sup>105</sup>

CDF also supported the work of the police gender and children desk in Tarime by providing working facilities.<sup>106</sup>

However, CSOs have not participated in the preparation of state reports to the African Commission on Human and Peoples' Rights (African Commission), because Tanzania has never reported on Maputo Protocol. It follows, therefore, that the four NGOs,<sup>107</sup> which have observer status, have also never submitted shadow reports on the implementation of the Maputo Protocol to the Commission.

## 8 Awareness and use by lawyers (law societies and other practising lawyers)

The Tanganyika Law Society (TLS) is the bar association for Tanzania mainland founded in 1954.<sup>108</sup> The Tanganyika Law Society is currently governed by the Tanganyika Law Society Act.<sup>109</sup> One of the core components of the TLS statutory mandate outlined in the TLS Act is to assist the government, judiciary, parliament and the public in all matters affecting legislation, and the administration and practice of the law in Tanzania.<sup>110</sup> In the implementation of this mandate, TLS in collaboration with its development partners, implement various projects to promote human rights in Tanzania. This is how they have implemented various projects to

99 *Elizabeth Stephen and Salome Charles v The Attorney General*, Civil Appeal 4 of 2007.

100 Misc Civil Appeal 10 of 2016.

101 LHRC (n 31) 190.

102 TAWLA inspired by also Maputo Protocol is implementing various projects to promote gender equality. See <https://www.tawla.or.tz/our-history/> (accessed 4 January 2021).

103 As above.

104 As above.

105 As above.

106 As above.

107 According to <https://www.achpr.org/ngos> (accessed 21 October 2020) the four NGOs are Under the Same Sun Fund, Asylum Access, Tanzania Human Rights Defenders Coalition and PINGO's Forum.

108 The Tanganyika Law Society Ordinance 1954; see also <https://tls.or.tz/> (accessed 20 October 2020).

109 Cap 307 RE 2002.

110 <https://tls.or.tz/2020/03/> (accessed 21 October 2020).

promote the rights of women in Tanzania. Their work is inspired by domestic law, in particular, the BOR but also international instruments that Tanzania has ratified such as the Maputo Protocol.

An example of various projects which they have implemented which have been inspired by the Maputo Protocol includes Legal Empowerment Project whose main objective is to have a holistic approach in addressing various challenges faced by women, for example poverty, access to justice, access to land and labour related challenges.<sup>111</sup> Another project they have implemented in collaboration with the judiciary is related to timely disposal of probate and administration of estate cases to make sure that beneficiaries particularly women and children are not affected by undue delays and also a project on the impact of the extractive sector for women. TLS has also instituted several public interest litigation cases to promote the rights of women in Tanzania.<sup>112</sup>

TLS in collaboration with Pathfinder International has implemented various activities including training of members of parliament and journalists on sexual health and reproductive rights and have conducted advocacy for medical abortion under exceptional circumstances for example in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus to various groups including MPs as inspired by the provisions of the Maputo Protocol.<sup>113</sup> They have also trained

advocates<sup>114</sup> on strategic litigation on sexual health and reproductive rights.

Apart from the law society itself, general awareness of the Maputo Protocol for lawyers is low except for those who work for and in collaboration with CSOs. An interview with TLS revealed that when they started their programme for Continuing Legal Education (CLE) for advocates in 2006, this programme was being sponsored by the Canadian Bar and hence through their influence, advocates were being trained on predominantly human rights issues.<sup>115</sup> However, in 2013, advocates complained that the topics covered by the CLE programme were irrelevant to their private practice and demanded that they be involved in the designing of CLE topics. Thereafter, topics for CLE predominantly relate to corporate issues.

However, as stated above, there are still advocates who are aware of the Maputo Protocol and use it, for example, the landmark case of *Rebeca Gyumi* was argued by Advocate Jebra Kambole who submitted among other things that provisions in the LMA which allow a girl of 14 and 15 years to get married are discriminatory and invited the High Court to look at some regional and international instruments opposed to discrimination, for example, article 2 of the Maputo Protocol.<sup>116</sup>

## 9 Higher education and academic writing

Higher academic institutions have human rights courses in their curricula, for example, the Law School of Tanza-

111 As above.

112 As above.

113 Art 14(2)(c).

114 Lawyers licensed to practice law in Tanzania.

115 As above.

116 The *Rebeca Gyumi* case at 8.

nia, Mzumbe University, University of Dar es Salaam, Tumaini University and Ruaha University College.<sup>117</sup> These courses involve the discussion of the African human rights system which includes a discussion on the Maputo Protocol.

Academics, predominantly those specialising in human rights law, women's rights and children's rights, significantly refer to and discuss the Maputo Protocol.<sup>118</sup> They discuss the importance of the document to further the rights of women in Tanzania. They discuss how domestic laws fair in comparison with the standards established by Maputo Protocol in different issues covered by the Protocol specifically the gaps of domestic law in relation to the Protocol, they discuss the significant disadvantages of not domesticating the Protocol and finally call for the domestication of the protocol and fulfilment of the obligations acquired by Tanzania by being a party to the Protocol.

## 10 Impact on independent state institutions

The Commission for Human Rights and Good Governance (CHRAAG) is an independent government institution, established as a national focal point institution for the promotion and protection of human rights and corresponding duties as well as good governance in Tanzania.<sup>119</sup> CHRAAG was established under article 129(1) of the Constitution as amended by Act 3 of 2000. The Commission became operational on 1 July 2001 after the coming into force of the Commission of the Human Rights and Good Governance Act<sup>120</sup> and Government Notice No 311 of 8 June 2001. It is one of the NHRIs in Africa established in accordance with the Paris Principles<sup>121</sup> and granted affiliate status by the African Commission.<sup>122</sup>

In their role of promotion and protection of human rights, CHRAAG is mandated to conduct various activities including handling of complaints and giving their recommendations, monitoring of human rights situation in the country, research, fact-finding missions and education to the public. Regarding the rights of women, CHRAAG has implemented various activities which have been informed by among other things, the Maputo Protocol. Example of these activities includes

- 117 See <https://www.mzumbe.ac.tz/site/images/MU20192020PROSPECTUS.pdf>; <https://www.lst.ac.tz/index.php/academic-programmes>; [https://www.udsm.ac.tz/upload/20200316\\_102623\\_UNDERGRADUATE%20PROSPECTUS%20-%202019\\_2020%20.pdf](https://www.udsm.ac.tz/upload/20200316_102623_UNDERGRADUATE%20PROSPECTUS%20-%202019_2020%20.pdf); [https://www.udsm.ac.tz/upload/20200316\\_110608\\_POSTGRADUATES%20PROSPECTUS%202019\\_2020.pdf](https://www.udsm.ac.tz/upload/20200316_110608_POSTGRADUATES%20PROSPECTUS%202019_2020.pdf); [https://makumi.ra.ac.tz/docs/tuma\\_prospectus\\_2018-2021.pdf](https://makumi.ra.ac.tz/docs/tuma_prospectus_2018-2021.pdf) (accessed 21 October 2020).
- 118 See for example HO Mwenegoha 'Violence against women in Tanzania: a call for an anti-domestic violence legislation' (2017) 1 *Institute of Judicial Administration Journal* at 38; I Kajiru & JC Mubangizi 'Human rights violations of persons with albinism in Tanzania: the case of children in temporary holding shelter' (2019) 19 *African Human Rights Law Journal* at 246-266, available at <http://dx.doi.org/10.17159/1996-2096/2019/v19n1a12>; I Kajiru & I Warioba 'Access to justice for child victims of sexual violence in Tanzania' (2019) 1 *Journal of Institute of Judicial Administration*; I Kajiru & I Warioba 'Access to justice for persons with disabilities: challenges and barriers to the implementation of the Persons with Disabilities Act of 2010 in Tanzania' (2019) 1 *Journal of Institute of Judicial Administration*;

I Warioba 'Translation of human rights: a solution against child marriage in Africa?' (2018) 5 *The Journal of Law, Society and Development*; Matinda (n 12) 99-137; Msuya, (n 45) at 1-29; Warioba (n 90).

- 119 <https://www.chragg.go.tz/index.php/who-we-are/78-about-chragg> (accessed 2 November 2020).

120 Act 7 of 2001 (as amended).

121 Adopted by UNGA Resolution 48/134 of 20 December 1993.

122 African Commission Res.31(XXIV) 98 Resolution on granting of Observer Status to NHRI in Africa, 1998.

research on the killings of elderly women in Tanzania, a fact-finding mission on sexual harassment against college students in Tanzania, capacity building of local level officers on the enhancement of access to justice for women.<sup>123</sup>

CHRAGG is involved in the preparation of state reports to the African Commission and various other international forums, for example, it was involved in the preparation and submission of the combined 2<sup>nd</sup>-10<sup>th</sup> report on the African Charter.<sup>124</sup> CHRAGG also follows up on the implementation of concluding observations of the African Commission by conducting workshops of all relevant stakeholders after receiving concluding observations which include government departments and CSOs to come up with a way forward on how the concluding observations will be implemented. Thereafter, they keep making a follow up with specific departments responsible for the implementation.<sup>125</sup> CHRAGG acknowledged that their main challenge is budgetary constraints which is why they have not been able to follow up on reporting on the Maputo Protocol.<sup>126</sup>

## 11 State reporting

Coordination of human rights reporting is the responsibility of a specific department within the Attorney General's Chambers in the MoCLA.<sup>127</sup> The

preparation of reports is coordinated by this office working with the line Ministry on the specific treaty. The preparation of a report involves multi-stakeholder consultations including, among others, other relevant government departments, CSOs, trade unions, professional organisations, the private sector, academia and research institutions.<sup>128</sup>

So far, Tanzania has not reported on the implementation of the Maputo Protocol.<sup>129</sup> It has only reported on the African Charter twice, the first report in 1992 and a consolidated second to tenth report in 2006.<sup>130</sup> Reasons for their failure and delays in reporting include a lack of coordination between and amongst stakeholders and government departments, human and financial resources, delays/inefficiency in responding to issues within government departments, lack of prioritisation, and that the reporting period between two reports of two years is too short considering the number of reporting obligations that they have.<sup>131</sup>

## 12 Communications

There have only been seven communications against Tanzania submitted to the African Commission.<sup>132</sup> These

123 Local level officers included education officers, social welfare officers, economic and planning officers, legal officers, community development officers of local government authorities as well as ward executive officers (WEOs). In this project, 120 local government officers were trained and 601 WEOs.

124 Kazoba & Mmbando (n 34) 257.

125 As above.

126 As above.

127 The Constitution of the United Republic of Tanzania (n 41) 2.

128 URT (n 43) 7.

129 <https://www.maputoprotocol.up.ac.za/index.php/tanzania> (accessed 4 January 2021).

130 <https://www.achpr.org/states/detail?id=49> (accessed 4 January 2021).

131 URT (n 43) 44.

132 *Southern Africa Human Rights NGO Network and Others v Tanzania* Communication 333/06; *Alberto Capita v Tanzania* Communication 53/91 8AR; *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others; Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC) and Zambia* Communication 157/96; *Women Legal Aid Centre (On behalf of Sophia Moto) v Tanzania* Communication 243/01 & *Lawyers' Committee for Human Rights v Tanzania* Communication 66/92.

communications alleged the violation of the African Charter out of which Tanzania was found in violation of the African Charter in one.<sup>133</sup> No communication alleging the violation of the Maputo Protocol has ever been submitted.

NGOs do not seem too eager to take cases to the African Commission. Factors which contribute to their lack of eagerness include the lack of optimism that the decisions will be implemented due to among other things, the lack of a national mechanism for the implementation and follow-up of communications. Further, they have a belief that the government will not take it too kindly if they decide to institute communications against it at the international level especially considering that they have eliminated the avenue for public interest litigation at the domestic level.<sup>134</sup> One NGO was of the opinion that their strategy is to work with the government towards the realisation of rights of women which in their opinion is a strategy that works and hence instituting communications at the African Commission, even cases in domestic courts will be against this strategy.<sup>135</sup>

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

The Commission has conducted two promotional visits to Tanzania, in 2002<sup>136</sup> and 2008.<sup>137</sup> Both of these visits intended to promote the African Charter and the activities of the Commission.

During these visits, the African Commission engaged the government on measures it is taking or has taken to implement its international human rights obligations and its obligations under the African Charter; exchanged views with the government on the challenges it faces in fulfilling its international and regional human rights obligations and the extent to which the Commission can assist; and exchanged views with other human rights stakeholders on ways and means of promoting and protecting human rights in the country.<sup>138</sup>

Further, the Working Group on the Rights of Indigenous Peoples/Communities (WGIP) led by Dr Naomi Kapuri made a research and information visit to Tanzania from 21 January to 6 February 2013.<sup>139</sup> During the visit the delegation engaged with government officials, indigenous peoples' representatives, leaders and communities, CSOs, the media and other stakeholders through meetings, interviews and focused group discussions.<sup>140</sup>

The delegation found that while the situation of indigenous communities is generally depressed, that of women and children, especially girl children, is even more so.<sup>141</sup> They found out that girl children are faced with a violation of their rights for example being discriminated, negative cultural practices, limited education opportunities and child marriages.<sup>142</sup> Such practices are caused by among other things, traditions and customs, lack of awareness especially in

133 *Women Legal Aid Centre (On behalf of Sophia Moto) v Tanzania* Communication 243/01.

134 As above.

135 As above.

136 <http://www.achpr.org/states/tanzania/mis-sions/promo-2000/> as quoted by Kazoba & Mmbando (n 34) 260.

137 As above.

138 Kazoba & Mmbando (n 34) 260.

139 WGIP 'The research and information visit to the United Republic of Tanzania 21st January to 6th February 2013 Report' (2013) 7.

140 WGIP (n139) 7.

141 WGIP (n 139) 69.

142 As above.

rural areas of the consequences traditional harmful practices, gaps in the law and sometimes vigorous enforcement of the law which drives some practices underground.<sup>143</sup> The Working Group recommended that the government of Tanzania takes deliberate measures to implement regional instruments to protect and promote the rights of women and children against negative cultural practices.<sup>144</sup>

Unfortunately, Tanzania has not adopted legislation on harmful traditional practices in general.<sup>145</sup> Only female genital mutilation (FGM) has been criminalised<sup>146</sup> although its prevalence rate in Tanzania is still 10 per cent of all women aged between 15 and 49 even after the criminalisation.<sup>147</sup> Other harmful traditional practices like child marriage have not been criminalised. Fortunately, child marriage was recently declared unconstitutional by the Court in the *Rebeca Gyumi* case.

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

The implementation of the Maputo Protocol in Tanzania is affected by many factors. Factors which enhance the implementation include the following:

##### *Some goodwill of the government*

To some extent, the Government of Tanzania shows goodwill towards the implementation of the Maputo Protocol. The first sign of the goodwill of the government was the signing and ratification of the Protocol without any reservations. Even though the Protocol needs to be domesticated to be enforced in Tanzania, the government knows that based on the international law principle of *pacta sunt servanda*,<sup>148</sup> it is obliged to implement the Protocol in good faith and not to do anything that goes against the objective of the Protocol.<sup>149</sup> Also, the Protocol can be used by the judiciary for interpretative purpose which is currently being done. Further, even though the government might have weaknesses in the implementation of the Protocol, for example, the failure to domesticate, failure to amend some legislation as shown earlier which are incompatible with the protocol and the failure to take other measures towards the realisation of women's rights, the government has allowed many CSOs which work on the implementation of the Protocol to operate in Tanzania towards the implementation of the Protocol.

##### *The role of the judiciary*

An active bench can be very instrumental in the implementation of the Maputo Protocol in Tanzania. As it has been seen above, even though at the moment the Protocol can only be used for interpretative purposes, some of the judges have actively referred to it and were guided by it to reach decisions. However, some judges are still reluctant to refer

143 As above.

144 As above.

145 Warioba (n 90) 11.

146 Cap 16 RE 2002.

147 Female genital mutilation/cutting: data and trends <http://www.prb.org/pdf17/FGMC%20Poster%202017.pdf> as quoted by A Abdalah 'The violence against women in Tanzania: female genital mutilation' (2019) *Social science* at 29.

148 Art 26 of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331.

149 Matinda (n 12) 136.

to international instruments which have not been domesticated. More lobbying, training and sensitisation of the Judiciary on the Maputo Protocol is also required.

### *Awareness creation*

Awareness creation of the Maputo Protocol directed at different groups being done by different stakeholders for example CSOs and academics enhance the impact of the Protocol. More sensitisation needs to be done by CSOs focusing on MPs, legal practitioners and academics should enhance awareness creation through conducting various events on the Protocol such as moot courts, seminars and conferences.

The implementation of Maputo Protocol is being impeded by factors such as:

### *The failure to domesticate the Protocol*

The fact that Tanzania has not domesticated the Protocol is a major impediment towards the full implementation of the Protocol. As discussed above, Tanzania is a dualist country and hence for the Protocol to be applicable, it has to be domesticated. Therefore, as much as the government is obligated to not go against the objective of the Protocol, it is not possible to hold the government accountable in a court of law for the failure to fulfil their obligations under the Protocol.<sup>150</sup>

### *Retrogressive measures in the implementation of human rights obligations*

Furthermore, recently Tanzania has been taking retrogressive measures in the implementation of their human rights obligations. This can be exemplified by the amendment of the law to eliminate provisions which allowed strategic litigation<sup>151</sup> and also their withdrawal of the declaration which allowed individuals and NGOs to directly submit communications to the African Court for Human and Peoples' Rights.<sup>152</sup> The notice of withdrawal of the declaration was made under article 34(6) of the African Court Protocol on 14 November 2019 and sent to the African Union on 21 November 2019. Considering that strategic litigation is an essential tool that was already being used to further the rights of women, this amendment is a significant impediment towards promoting the implementation of the Protocol. Further, the withdrawal of the declaration also eliminates an avenue that could have been used to further the women's rights agenda.

### *Limited role of media*

The media also plays a limited role in the promotion of the implementation of Maputo Protocol and women's rights in general. This is caused by factors such as lack of awareness and technical know-how and a lack of financial resources. Considering the important role that can be played by the media in creating awareness of the Protocol and pushing for the domestication, the fact

151 Section 7 of the Written Laws (Miscellaneous Amendments) (No 3) Act 2020.

152 <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/> (accessed 21 October 2020).

that this role is not realised, impedes the implementation of the Protocol.

*The stigma surrounding the Protocol*

Another aspect that affects the implementation of Maputo Protocol in Tanzania is the stigma surrounding the Protocol, in particular article 14. CSOs who do advocacy work towards the domestication of the Protocol face major challenges because of the negative perception that policymakers and also communities have towards the Protocol. These negative perceptions are fuelled by article 14 for those who are aware of the Protocol.<sup>153</sup> They refuse to even entertain the idea of a medical abortion due to strong religious beliefs. Further, negative perceptions are also fuelled by traditions and customs for example patriarchy which is a source of harmful traditional practices such as child marriage and female genital mutilation which are significantly practised in Tanzania.<sup>154</sup>

153 As above.

154 B Percy-Smith and others 'Study of drivers of violence against children and positive change in Tanzania Mainland and Zanzibar' (2017) 62, available at <https://www.unicef.org/tanzania/reports/study-drivers-violence-against-children> (accessed 17 July 2020).





# THE IMPACT OF THE MAPUTO PROTOCOL IN ZIMBABWE

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## 1 Introduction

Since 2013, Zimbabwe has operated with a new Constitution which was widely regarded as progressive for women's rights.<sup>1</sup> Yet by 2020, many sections of the Constitution relating to gender equality and women's rights were still to be aligned with the legal framework. For example, at the time of writing, the clause that outlaws child marriages is still to be aligned with the criminal code to allow for the arrest and prosecution of perpetrators. At the same time, Zimbabwe is also obliged to adhere to international and regional women's rights' norms and standards. Therefore, it ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) on 15 April 2008 and thus committed itself

to be bound by its provisions. Article 2(1)(a) of the Maputo Protocol enjoins member states to have constitutions which adequately address the rights and needs of women thus, the Constitution of Zimbabwe Amendment (No 20) of 2013 (2013 Constitution); in many ways, took cognisance of the Protocol. The 2013 Constitution and subsequent policy guidelines by the Zimbabwean government speak to the many provisions of the Maputo Protocol. However, this review assesses how in practice the Protocol is being implemented. This chapter recognises how women's rights in Zimbabwe are still contested, yet the basic legal, policy and institutional framework exists for the implementation of Maputo Protocol. To borrow the words by Dube, it is about ratification, rhetoric and rare implementation of the Protocol in Zimbabwe.<sup>2</sup>

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1 <https://www.unwomen.org/en/news/stories/2013/4/zimbabweans-say-yes-to-new-constitution-strong-on-gender-equality-and-womens-rights> (accessed 20 October 2020).

2 R Dube 'Ratification, rhetoric and rare implementation of international and regional standards on women's rights to participate in decision making in Zimbabwe if adopted, will the new Constitution change anything?' (2012) *Sokwanele* at 14-16.

## 2 Overview of the status of women's rights in Zimbabwe

One of the major achievements of the 2013 Constitution was the repeal of the 'claw back' clause that in essence gave customary law precedence over general law in issues such as divorce, inheritance and marriage.<sup>3</sup> Section 23 of the Constitution of Zimbabwe (1980) prohibited discrimination on the basis of sex, gender, creed, race, tribe, place of origin, political opinions and colour. However, the same section 23 had a 'claw back' clause which permitted discrimination in matters of personal and customary law. This was amended by the 2013 Constitution to include marital status to ensure further protections for women. Furthermore, section 80(3) of the Constitution also provides that '[a]ll laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement'. For women and girls, the implication is that they should not be subjected to practices, customs and traditions that are against the Constitution. The new equality provisions in the 2013 Constitution have improved the protection of women's rights. Gender equality has been earmarked as one of the national objectives where the state is obligated to 'promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men'.<sup>4</sup> This national objective on gender equality has introduced a 50 per cent membership quota system in constitutional commissions and other bodies established by government. The

economic empowerment of women is also stressed to enable them to access land on an equal basis with men. To demonstrate its commitment to pioneering and upholding women's rights, the Constitution further advocates the establishment of institutional mechanisms that will be instrumental in the advancement of women's rights, namely, the Gender Commission and the Human Rights Commission (Chapter 12 of Constitution of Zimbabwe). The role of the Gender Commission is to monitor gender equality and investigate any violations of rights related to gender.<sup>5</sup> However, in as much as section 25 of the 2013 Constitution stipulates that the state and all agencies of the government at every level must protect and foster the institutions to adopt measures for the prevention of violence, there have been rampant incidences of politically motivated and domestic violence against women and girls in the country. Domestic violence against women and girls is a violation of the Constitution of Zimbabwe. Yet, a number of factors predispose women and girls to violence as men are the main perpetrators of violence against women in Zimbabwe.<sup>6</sup>

Women find it difficult to participate in politics due to multiple factors chief among them violence. Structural violence speaks to the institutionalisation and normalisation of systems within the electoral and political party system that actively act against women who wish to participate. This includes the work of party leaders that allow sexist actions and languages that lead to

3 R Katsande & T Tandir 'Gender equality and women's rights' in A Moyo (ed) *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) 71.

4 See section 17 of the Constitution of Zimbabwe 2013.

5 R Chinomona 'Analysing the rights of women in the new Constitution of Zimbabwe with reference to international law' unpublished LLM dissertation, University of Pretoria, 2013 at 17.

6 M Zengenene & E Susanti 'Violence against women and girls in Harare, Zimbabwe' (2019) 20(9) *Journal of International Women's Studies* at 83-85.

women shunning politics. Cyber violence was also evident during the 2018 election with women suffering from cyber-attacks and abuse. The attacks centred on women's looks, marital status and other stigmas related to being feminine. To better understand this, one has to only visit the Facebook page of Linda Masarira which is a microcosm of the type of cyber abuse women in politics face in Zimbabwe.

Women and adolescent girls still lack basic human rights, face discrimination, gender-based violence (GBV) and under representation in decision-making. The persistence of discriminatory gender stereotypes and harmful practices, including child marriage, polygamy and virginity testing is notable. From the Zimbabwe National Statistics Agency (ZimStats) Quarterly Digest of Statistics for the fourth quarter of 2016, 8,069 women were raped in 2016; 7,752 cases of rape were reported in 2015; 7,000 cases in 2014; 5,717 cases in 2013; 5,412 cases in 2012; 5,446 cases in 2011; 4,450 in 2010. This translates to 22 women being raped daily or an equivalent of one woman being abused every 75 minutes and an average of 646 women being sexually abused monthly.<sup>7</sup> Of concern is also the widespread impunity for such harmful practices and the absence of convictions in cases of child marriage.<sup>8</sup> Women and girls with disa-

bilities are considered among one of the most vulnerable population groups.<sup>9</sup>

### 3 Ratification of the Maputo Protocol

Zimbabwe has a progressive system with regards to international law as outlined in section 326 of the Constitution that stipulates that customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament, and

when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.

While this is progressive, the full effect of international law such as the Maputo Protocol requires ratification to be fully implemented as section 327(2) states:

An international treaty which has been concluded or executed by the President or under the President's authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.

There is no set model or process for ratification of international treaties in Zimbabwe. Zimbabwe has explicit provisions on ratification and domestication of international law. Section 34 of the 2013 Constitution of Zimbabwe provides: 'The State must ensure that all

7 MK Chiweshe and others *An Assessment of Formal Justice System in responding to Sexual and Gender Based Violence (SGBV), Harmful Practices (HP) and Sexual Reproductive Health Rights (SRHR) in Zimbabwe* (2020) 3-5.

8 Concluding observations on the 6th Report of Zimbabwe CEDAW Committee (10 March 2020) CEDAW/C/ZWE/CO/6Zimbabwe.

9 UN Partnership on the Rights of Persons with Disabilities 'Aspirations, needs and concerns of women and girls with disabilities in Zimbabwe: abridged qualitative study' 2019 <https://unesdoc.unesco.org/ark:/48223/pf0000372503> (accessed 23 October 2020).

international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'. This means domestication of international instruments is part of national objectives that can be used to promote gender equality. In September 2019, the government of Zimbabwe gazetted the International Treaties Bill, which seeks to provide uniform procedure for the approval of international treaties and subsequent ratification by the President. Clause 4 of the Bill, states that the Foreign Affairs Ministry will be the principal custodian and national depository of all international treaties. The Bill provides for the appointment and functions of the Public Agreements Advisory Committee (PAAC), whose core function will be to consider all proposed international treaties and make appropriate recommendations regarding their negotiation, drafting and approval by the executive and legislature.<sup>10</sup> Also importantly, clause 10, obliges the court to take judicial notice of certain matters in connection with international treaties published in terms of the Bill.

In the case of the Maputo Protocol, the directly affected ministry (at the time the Ministry of Women Affairs, Gender and Community Development) took the lead in tabling a proposal for ratification before Cabinet. Once Cabinet approves the ratification, the next stage is parliament which in essence should debate the Maputo Protocol before ratification. In this case, the parliament accepted without debate and took note of the ratification. The papers for ratification were then prepared and lodged with the African Union (AU) through the Ministry of Foreign Affairs which plays this critical role in ratification of all international

instruments.<sup>11</sup> Signing of the Maputo Protocol by the President does not make Zimbabwe a party to it since by law it must go through the Zimbabwe parliament and then official documents ratifying the protocol are drawn up and lodged at the AU. Zimbabwe completed the process on 15 April 2008 and the instrument of ratification was deposited at the AU on 5 September 2008, at which date it took legal effect.

#### 4 Domestication or incorporation

The 2013 Constitution in Zimbabwe was adopted after the ratification of the Maputo Protocol in 2008. Article 2(1)(a) of the Maputo Protocol enjoins member states to have constitutions which adequately address the rights and needs of women. In the constitutional making process, women's organisations actively participated to ensure the inclusion of specific women's rights as outlined in treaties ratified by the government of Zimbabwe including the Maputo Protocol. To note is the fact that the impact and effectiveness of human rights treaties is mostly dependent on commitments of states parties in giving effect to the treaty obligations through domestication into national laws and policies as well as implementation of these obligations. Zimbabwe has demonstrated domestication of international and regional human rights instruments through constitutional provisions that have incorporated the human rights principles; repeal, amendments; enactment of new laws as well as adoption of relevant laws that provide for women's rights. The Constitution is the supreme law in the country and thus forms the

10 <https://www.herald.co.zw/international-treaties-bill-gazetted/> (accessed 7 December 2020).

11 T Mutangi 'The impact of the African Charter and the Maputo Protocol in Zimbabwe' in V Oyen (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 283.

basis of domesticating international treaties. As noted earlier, international treaties also require an Act of Parliament to become law in Zimbabwe. The new constitution broadly provides for the rights of all people in Zimbabwe and affirms the founding values and principles of human dignity, gender equality, and the nation's diverse cultural, religious and traditional values. For women in particular, section 80(3) of the Constitution also provides that '[a]ll laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement'. It also provides protection from traditional practices that can infringe on women's rights as the provision protecting the right to culture explicitly includes a qualification stipulating that no one exercising these rights may do so in a way that is inconsistent with any provision of the Declaration of Rights.<sup>12</sup>

Domestication also takes place through the interpretation of customary international law<sup>13</sup> and international conventions, treaties and agreements by all courts and tribunals in Zimbabwe.<sup>14</sup> This is because customary international law is part of the law of Zimbabwe unless it is inconsistent with domestic law<sup>15</sup> and when interpreting legislation, courts must adopt reasonable interpretation of legislation that is consistent with international conventions treaties or agreements that are binding on

Zimbabwe.<sup>16</sup> This means the judiciary can directly invoke international legal commitments or obligations that, for example, promote access to justice to victims of gender based violence. Chapter 2 on 'National Objectives' spells out gender balance as one of the objectives to guide the State, all institutions and agencies of Government.<sup>17</sup> The Declaration of Rights in Chapter 4 of the Constitution recognises that men and women have the right to equal treatment, including equal protection by the law.<sup>18</sup> Zimbabwe is founded on the values of equality and gender equality. These values are expanded upon by the right to equality and non-discrimination. One of the key areas related to the Maputo Protocol that was successfully implemented in the Constitution relates to setting the age of marriage at 18. Marriage laws in Zimbabwe did not have an agreed definition of a child leading to inconsistencies that were largely blamed for perpetuating child marriages. This is further buttressed by section 78(1) that speaks to consent and marriage rights. Whilst the Constitution sets the age of marriage at 18, the marriage laws and the Criminal Law (Codification and Reform) Act have not been aligned to the criminalisation of marrying a child under 18 years of age. Thus, whilst the Constitution outlaws child marriage, the police department does not have the legal legislation to enforce this.

12 L Sithole & C Dziva 'Eliminating harmful practices against women in Zimbabwe: Implementing article 5 of the African Women's Protocol' (2019) 19 *African Human Rights Law Journal* at 577.

13 See sec 326 of the Constitution of Zimbabwe 2013.

14 See sec 327 of the Constitution of Zimbabwe 2013.

15 See sec 326(1) of the Constitution of Zimbabwe 2013.

16 See sec 327(6) of the Constitution of Zimbabwe 2013.

17 See sec 17 of the Constitution of Zimbabwe 2013.

18 See secs 56 & 80 of the Constitution of Zimbabwe 2013.

Article 9 of the Maputo Protocol calls for equal representation of women in political and decision-making processes.<sup>19</sup> This is provided for in section 17(1)(c) which indicates that the state must promote full gender balance in Zimbabwean society, and, in particular, the state and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men. While significant outcomes have been noted, women's participation is in most cases below the 50 per cent set by article 9. This underperformance emanates from the fact that most legal and institutional measures aimed at ensuring women participation are limited in scope, not effectively disseminated and insufficiently executed due to limited resources and political will.<sup>20</sup> Zimbabwe at the moment is behind in meeting this goal as outlined in the box below.

Institution	Percentage of women
Executive (president and two vice presidents)	0
Cabinet	24
Parliament	31
Local government	13.3

Sources: <https://www.parlzim.gov.zw/about-parliament/who-s-who/> Gender Links<sup>21</sup>

The Constitution domesticates provisions of Maputo Protocol, particularly article 19(c) which mandates states to ensure women have access to and

control over productive resources including land. About 86 per cent of women in Zimbabwe depend on the land for their livelihood and that of their families.<sup>22</sup> However, post-2000 fast track land reform, women-headed households who benefited under the A1<sup>23</sup> model constituted 18 per cent of the total, while less than 12 per cent of the beneficiaries under A2<sup>24</sup> were women.<sup>25</sup> Worthy to note is also that the real income of women is three times less than that of men, with women having a higher structural unemployment rate of 70 per cent compared to 56 per cent for men.<sup>26</sup> It has been noted that women labour force participation and gender equality in the workplace shows increasing improvement.<sup>27</sup>

The failure by the government to come up with equitable employment policies that promote women's rights to work means that women are concentrated in the unpaid care economy. Despite the heavy workload and gender roles that women have, they additionally have the burden of caring for the sick which is ascribed to them by society. Oxfam<sup>28</sup> Household Care Survey for Philippines, Uganda and Zimbabwe

22 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25348&LangID=E> (accessed 12 December 2020).

23 In A1 Model each household is allocated 6 hectares of arable land. Common land such as grazing land, woodlots and water points are shared by the resettlement group.

24 A2 Model scheme was meant to indigenise commercial farming through providing opportunities for previously disadvantaged black people.

25 FAO 'National gender profile of agriculture and rural livelihoods – Zimbabwe: Country gender assessment series'.

26 As above.

27 2019 Draft report of the end of term evaluation of the Zimbabwe United Nations Development Assistance Framework (ZUNDAF 2016-2020).

28 OXFAM 'Infrastructure and equipment for unpaid care work: Household survey findings from the Philippines, Uganda and Zimbabwe 2017 Household Care Survey Report' (2018) 12.

19 EF Zvobgo & C Dziva 'Practices and challenges in implementing women's right to political participation under the African Women's Rights Protocol in Zimbabwe' (2017) 1 *African Human Rights Yearbook* at 62.

20 Zvobgo & Dziva (n 19) at 62-63.

21 Gender Links. Available at <https://genderlinks.org.za/wp-content/uploads/2018/12/50-50-LG-elections-ZIMrev2.pdf> (accessed 13 June 2021).

revealed the following inequality dynamics:

- Women do more hours of care work than men do in all situations.
- On average, women spent 4.5 to 6.5 hours a day on care as a primary activity.
- When supervision of dependents and secondary activities are included, women's average hours of care responsibility increase to 11 to 12 hours per day.
- Unequal distribution of unpaid care work begins in childhood, and it persists over time (girls as young as 8 to 12 spent about two hours a day more on care work than boys).

Article 23 of the Maputo Protocol elaborates state parties' responsibility to provide special protection for women with disabilities by taking measures to facilitate their access to employment, professional and vocational training as well as their participation in decision and also protection from violence and discrimination. Zimbabwe is still far from attaining disability inclusion of women and girls with disabilities in various development domains. UNESCO<sup>29</sup> reported as follows:

Women with disabilities are worse off than women without disabilities, being two times more susceptible to gender-based violence, divorce and separation. They experienced a high proneness to sexual and gender-based violence, especially in the form of sexual abuse, exploitation or manipulation of girls and women with albinism, intellectual, visual, hearing and physical impairments.

School facilities are not disability-friendly and the education system as a whole is still far from being inclusive to chil-

dren with disabilities. Access and attitudinal barriers also prevent women and girls with disabilities from accessing health services and information. Sexual and reproductive health services, including those on human immunodeficiency virus (HIV) do not target women and girls with disabilities, with such myths that girls with disabilities are asexual,<sup>30</sup> still rampant and health infrastructure such as beds is not disability friendly.<sup>31</sup> The government of Zimbabwe has taken legislative measures albeit slowly to meet demands of the Maputo Protocol. For instance, under section 56, the constitution prohibits discrimination on the basis of disability. Section 83 elaborates specific rights for people with disabilities including rights to enable them to become self-reliant and protection from all forms of exploitation and abuse. In practice, however, women with disabilities still face multiple forms of exclusion and violence including the inability to access formal justice systems and sexual and reproductive services.<sup>32</sup> Below is a summary of some of the facts on women and children with disabilities from Sida:<sup>33</sup>

- There are 600 000 school age children with disabilities in Zimbabwe, most of them without access to education.
- Children with hearing, visual and intellectual impairments are significantly more likely never to attend school compared to children with physical impairments.

30 P Rouleider 'Disability and HIV in Africa: Breaking the barriers to sexual health care' (2016) 22 *Journal of Health Psychology* at 1405.

31 Equality Now, available at <https://www.soawr.org/images/JourneytoEquality.pdf> (accessed 23 October 2020).

32 TIZ, available at <http://www.tizim.org/wp-content/uploads/2020/07/Gender-and-Corruption-in-Zimbabwe-2019.pdf> (accessed 2 November 2020).

33 SIDA, available at <https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-zimbabwe.pdf> (accessed 29 October 2020).

29 UNESCO, available at <https://unesdoc.unesco.org/ark:/48223/pf0000372503> (accessed 20 October 2020).



- Up to 87 per cent of women with disabilities are victims of sexual violence and as many as 29 per cent may have HIV/AIDS.
- Women with disabilities face alarming rates of illiteracy, economic dependency, and social exclusion.

## 5 Legislative and institutional reform or adoption

There is no record of Zimbabwe conducting a compatibility study of domestic law with the Maputo Protocol before ratification. What the government does as a matter of practice however is to check whether an international treaty is in line with its own laws and culture. Such a study would have been insightful in understanding how various parts of Zimbabwean law steeped in patriarchal practices would affect the domestication and implementation of the Maputo Protocol. One of the key challenges facing Zimbabwe currently is the slow pace of aligning laws to the 2013 Constitution. As already noted, child marriages are constitutionally barred but the marriage laws or criminal code are still not aligned to this provision. In 2020, Zimbabwe had a draft Marriage Bill under discussion which speaks to article 5 of the Maputo Protocol around elimination of harmful cultural practices. Clause 4 of the Marriage Bill provides that 'A marriage shall not be solemnised or registered in terms of this Act unless each party to the marriage has given his or her free and full consent to the marriage.' This need for consent protects women and girls from practices that force them into unions without their consent. Padare<sup>34</sup> cites the following harmful practices: *Kuzvarira* is a practice where parents marry off a child

at birth or as a baby in exchange for food or cattle and *Nhaka* or wife inheritance occurs when at the death of a husband, a woman is required to become a wife to a male relative who then takes over her late husband's duties for all intents and purposes. All these cultural practices are undertaken by families without the consent of girls and women. They are culturally prescribed and take place in the private sphere of the family. In terms of child marriages, the Bill provides that a marriage officer shall not solemnise or register a marriage without proof of age of the parties involved. Furthermore, it imposes criminal liability on any person involved in the marriage of a child under the age of 18 thus recognises the role of parents and community in this practice.

In response to the Maputo Protocol and other international treaties, the Constitution provides for the creation of the Zimbabwe Gender Commission. The Constitution provides that all Chapter 12 institutions that are independent and are not subject to the direction or control of anyone; must act in accordance with this Constitution; and must exercise their functions without fear, favour or prejudice. As one of the independent institutions supporting democracy, the Zimbabwe Gender Commission is constitutionally mandated to promote gender equality and advance the rights of survivors of sexual gender-based violence and harmful practices. The Gender Commission's mandate is to initiate investigations to any systemic barrier prejudicial to gender equality, gender equity and gender mainstreaming in a specific named sphere of activity or named sector of the society or the economy. The investigations can be in the form of public hearings or closed hearings and

34 Padare *Walking in our daughter's shoes Evaluation Report* (2014) 4.

can issue summons for a person to appear before the Commission to give evidence and further to collaborate with the police in investigations. In practice, however, the Zimbabwe Gender Commission has remained ineffectual and largely absent in the everyday lives of women at the grassroots.

In addition, article 5 of the Maputo Protocol directs state parties to condemn and prohibit all forms of harmful practices affecting the enjoyment of human rights by women in society through legislative and other measures necessary. The Domestic Violence Act remains one domestic law that speaks against harmful practices in Zimbabwe in line with the Maputo Protocol although the law was promulgated in 2007, a year before ratification of the Maputo Protocol.<sup>35</sup> The Act defines domestic violence as including:<sup>36</sup>

abuse derived from the following cultural or customary rites or practices that discriminate against or degrade women – (i) forced virginity testing; or (ii) female genital mutilation; or (iii) pledging of women or girls for purposes of appeasing spirits; or (iv) forced marriage; or (v) child marriage; or (vi) forced wife inheritance; or (vii) sexual intercourse between fathers-in-law and newly married daughters-in-law.

In terms of resources, the research did not find evidence of additional resource allocation as a result of the ratification of the Maputo Protocol. In fact, the lack of resources has hampered the ability of various institutions tasked with promoting gender equality. Article 26 of the Maputo Protocol reads as follows: 'States Parties undertake to adopt all necessary measures and in particular

shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised'. The Zimbabwean government has largely failed to provide adequate budgetary resources to promote women's rights. In any case, the continued human rights abuses after the removal of Robert Mugabe as president in November 2017 places doubt in the political will and commitment of the new government in promoting women's rights. Human Rights Watch,<sup>37</sup> for example, highlights that security forces responded to the January 2019 demonstrations with lethal force, killing at least 17 people, raping at least 17 women, shooting and injuring 81 people, and arresting over 1,000 suspected protesters during door-to-door raids. The abuse of female human rights defenders has also included short term abductions and assaults by state security actors.<sup>38</sup> Curtailing of civil liberties such as limited freedom of assembly rights under the revised Maintenance of Peace and Order Act (MOPA) affects women's abilities to organise and mobilise for action. Some 1.2 million school-age children especially girls are facing challenges accessing education mainly because of a financial constraint and also lack of documentation (birth certificate).<sup>39</sup> The rights of sexual minorities including lesbian and transgender women are not recognised by the Zimbabwean Constitution and these groups continue to suffer stigma, harassment and a lack of basic rights. In essence, these gaps show that the imple-

35 Sithole & Dziva (n 12) 580.

36 Domestic Violence Act sec 3(1) I.

37 <https://www.hrw.org/news/2019/03/12/zimbabwe-excessive-force-used-against-protesters> (accessed 14 September 2020).

38 <https://www.state.gov/reports/2019-count-ry-reports-on-human-rights-practices/zimbabwe/> (accessed 3 November 2020).

39 <https://reliefweb.int/sites/reliefweb.int/files/resources/Situation%20Report%20-%20Zimbabwe%20-%202020Sep%202020.pdf> (accessed 20 November 2020).

mentation of the Maputo Protocol has serious gaps and tends to exclude many categories of women from enjoying their full rights.

Article 7 of the Maputo Protocol states that when a marriage ends, 'women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.' In terms of this article, Zimbabwe has instituted numerous laws to protect women. These laws include the Administration of Estates Act which provides for equal rights for women in unregistered customary unions. The government also passed the Deceased Persons Family Maintenance Act<sup>40</sup> and the Deceased Estates Succession Act,<sup>41</sup> which address questions of marital property upon the death of a spouse, both appear to provide for equal inheritance rights for women and men upon the death of a spouse. Deceased Persons Family Maintenance Act also protects against property grabbing by providing that any person who:<sup>42</sup>

does an act with the intention of depriving another person of any [inheritance] right or interferes with any other person's right ... shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

40 Deceased Persons Family Maintenance Act Chapter 6:03 <https://www.jsc.org.zw/jscbackend/upload/Acts/2001/0603updated.pdf>

41 Deceased Estates Succession Act Chapter 6:02 [https://www.parlzim.gov.zw/actslist/download/464\\_c23b43a34b5effe6ef16c8004b803328](https://www.parlzim.gov.zw/actslist/download/464_c23b43a34b5effe6ef16c8004b803328) (accessed 23 September 2020).

42 <https://www.hrw.org/report/2017/01/24/you-will-get-nothing/violations-property-and-inheritance-rights-widows-zimbabwe> (accessed 23 September 2020).

## 6 Policy reform or formulation

In terms of policy, the Maputo Protocol is cited as a reference point for the National Gender Policy 2013-2017 but as Mutangi argues, 'the Maputo Protocol is so incorrectly cited to the extent that one wonders whether the drafters of the Policy had a copy of the Maputo Protocol during drafting'.<sup>43</sup> The policy itself outlined eight priority areas, including one which focused on gender and health, gender-based violence and gender, constitutional and legal rights. The policy made reference to the gender dimensions of people living with disability; and for the first time the policy is also accessible in braille. Other key policy reforms initiated by the government to promote the various women's rights articulated in international agreements include: National Gender Based Violence Prevention and Response Strategy (2012-2015); Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe (2019); National Health Strategy for Zimbabwe 2016-2020; National Action Plan on ending Child Marriages in 2018; Maternal and Neonatal Strategy (2017-2021); Zimbabwe National Family Planning Strategy 2016-2020; National Adolescent and Youth Sexual and Reproductive Health Strategy II: 2016-2020 and National Adolescent and Youth Sexual and Reproductive Health Strategy.

## 7 Impact on the judiciary

In terms of the judiciary, one landmark case provides an example of how, '[t]he domestication of article 5 of the African Women's Protocol in the local Constitution is proving important in litigation of

43 Mutangi (n 11) 283.

harmful practices such as domestic violence and child marriage'.<sup>44</sup> The *Mudzuri*<sup>45</sup> case involved two female teenage applicants who were once child brides, challenging the constitutionality of section 22(1) of the Marriage Act as it was inconsistent with section 78(1) as read with section 81 of the Constitution.<sup>46</sup> Section 78(1) of the Constitution clearly states that 18 years is the marriageable age. Yet, section 22(1) of the Marriage Act authorises marriage of a person under the age of 18 and the Customary Marriages Act does not specify 18 as the minimum age for marriage. Part of the ruling by the Constitutional Court read:<sup>47</sup>

Section 22(1) of the Marriage Act [Chapter 5:11] or any law, practice or custom authorising a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down; and (3) With effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.

The Maputo Protocol (article 5 in particular) was referenced in the judgment which was critical in striking off all marriage laws inconsistent with the constitution and international best practices.<sup>48</sup>

In another case which indirectly relates to protections around the right to dignity (article 3 of the Maputo Proto-

col) for women involved the 12-month imprisonment of touts that jeered and stripped a woman wearing a mini skirt in Harare on 17 December 2014. The magistrate in the case argued in passing sentence that, 'Zimbabwe not as a nation which according to the Constitution recognises that we have the right to dignity, hence as a nation we will not support that behaviour'.<sup>49</sup>

Tererai Mugwadi, a musician, was awarded USD 10, 000 in damages for a defamatory newspaper report in 2014. The Court found that the newspaper report was motivated by gender biases and stereotypes on the part of the defendant.<sup>50</sup> In making its decision, the court cited article 5 of Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and drew particular attention to articles 2 (elimination of discrimination against women) and 3 (right to dignity) of the Maputo Protocol.<sup>51</sup> Another case, the Court in dismissing the claim for inheritance as a surviving spouse by a woman who could not sufficiently prove existence of a traditional marriage, made reference to international law including article 6(d) of the Maputo Protocol that calls states to put measures to ensure registration of marriages.<sup>52</sup> The Court had cited in principle article 21 of the Maputo Protocol which provides that a widow has the right to continue living in the marital house but in this case, the marriage could not be proven.<sup>53</sup> In sentencing a defendant who was found

44 Sithole & Dziva (n 12) 581.

45 *Mudzuri & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* (Const. Application No 79/14, CC 12-15) [2015] ZWCC 12 (20 January 2016).

46 As above.

47 As above.

48 Sithole & Dziva (n 12) 584.

49 <https://www.herald.co.zw/8-months-for-mini-skirt-touts/> (accessed 23 November 2020).

50 *Mugwadi v Dube & Others* [2014] ZWHHC 314 (High Court of Zimbabwe).

51 S Omondi *Breathing life into the Maputo Protocol: Jurisprudence on the rights of women and girls in Africa* (2018) 21.

52 *Hosho v Hasisi* [2015] ZWHHC 491 (High Court of Zimbabwe).

53 Omondi (n 51) 45.

guilty of nine counts of rape to 290 years imprisonment,<sup>54</sup> the Court in 2015 relied on specific provisions of the Maputo Protocol including article 3 (right to dignity for women), and article 4 which addresses violence against women including the punishment of perpetrators. The Court also referred to article 17 of the Maputo Protocol which states that women have a right to live in a positive cultural context.<sup>55</sup> The Court also relied on the Maputo Protocol in ruling that a will by a husband leaving the matrimonial home to his grandson was null and void as there was a surviving spouse married under customary marriage for twenty years.<sup>56</sup> It argued that the will was against the Constitution as well as international laws such as the Maputo Protocol that recognised the rights of the surviving spouse when dealing with estates of the deceased.

## 8 Awareness and use by civil society

Civil society organisations (CSOs) especially women or gender-based organisations are highly aware of the Maputo Protocol and other international instruments that speak to women's human rights.<sup>57</sup> The work around women's rights and gender equality is largely shaped by international treaties in how they do their programming. Proposals for funding and project implementation includes clear references to the Maputo Protocol.<sup>58</sup> A key example is how CSOs shape and work on sexual gender-based violence (SGBV) and elimination of harmful practices. CSOs play a pivotal

role in ensuring access to services for SGBV survivors mainly due to the state's inability to fund programming. Donor and partner funding is a critical component in the government's response to sexual violence. In 2012, the CEDAW Committee<sup>59</sup> lamented at the lack of effectiveness of the Domestic Violence Act in allocation of resources for the setting up safe shelters for women. It noted that there was only one State-established shelter for women victims of violence (the two other shelters were established by NGOs), and that it is not exclusively for women victims of domestic violence. Since then, the number of safe shelters has slowly increased with CSOs such as Musasa Project and FACT being at the forefront. By 2018, Musasa Project had established three urban and nine community shelters around Zimbabwe for women and girls. These are located in Gweru, Harare Bulawayo, Gokwe, Mwenezi, Chikomba, Bubi, Gutu, Marange, Buhera, Mazowe, Bikita and Insiza.

The 2015 ZDHS, revealed that a total of 1 960 women had received support in these shelters by 2015 from the Harare, Gutu, Bubi, Chikomba, Gweru, Makoni and Marange shelters. Another critical role played by civil society is in regard to tracking progress of the state in meeting its obligation under the Maputo Protocol. When the state submits its report, it is published on the African Commission on Human and Peoples' Rights (African Commission) website to allow civil society, non-governmental organisations (NGOs) and other non-state players to draft a

54 *The State v Chirembwe* [2015] ZWHHC 162 (High Court of Zimbabwe).

55 Omondi (n 51) 85.

56 *Chiminya v Estate & Others* [2015] ZWHHC 272 (High Court, Zimbabwe).

57 Interview, Padare.

58 As above.

59 Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe. Committee on the Elimination of Discrimination against Women Fifty-first session, 13 February-2 March 2012.

shadow report which responds to the information provided by the state. This is an added tier by the African Commission to have a widened and diversified view of the implementation of the Maputo Protocol. Organisations such as Zimbabwe Women Lawyers Association (ZWLA) have been accorded observer status by the African Commission thus increasingly have access to international human rights forums. Other CSOs such as the Zimbabwe Human Rights NGO Forum (the Forum) focus on the protection of human rights by confronting state impunity. The Forum has the ability to approach regional bodies and mechanisms for the protection of human rights such as the Africa Commission and over the years it has filed a number of communications against the Zimbabwean government.<sup>60</sup> CSOs are also involved in litigation as a means to promote human rights. For example, the seminal case of *Mudzuru and Tsopodzi*<sup>61</sup> at the Constitutional Court was sponsored by organisations such as Veritas.

## 9 Awareness and use by lawyers and judicial officers

Lawyers working within the scope of women and human rights are highly aware of the Maputo Protocol and where applicable, utilise it in their work. Lawyers involved in human rights litigation utilise international and regional instruments in their work and these offer the basis of supporting cases related to human rights abuses. Zimbabwe Lawyers for Human Rights (ZLHR) has several programmes which utilise international and regional instruments such

as the Maputo Protocol. The organisation works on<sup>62</sup>

constitutional litigation (challenging the constitutionality of various laws and state policies and practices and seeking to expand the Bill of Rights of the current Constitution); anti-impunity litigation (bringing civil claims for damages against named perpetrators in their official and personal capacities to reduce impunity and increase accountability of state and non-state actors for human rights violations against HRDs; Public interest (strategic/impact) litigation (to expose potential perpetrators, or prevent or expose intended unlawful conduct by state and non-state actors); and socio-economic rights litigation (to promote social and economic justice and further development efforts in Zimbabwe).

ZLHR has also led the way in filing successful communications with the African Commission. The Law Society of Zimbabwe (LSZ) which has the mandate to register and regulate how lawyers and law firms operate in Zimbabwe. It has a specific objective to promote justice, defend human rights, rule of law and the independence of judiciary. Within this objective, the organisation has programmes that focus on human rights including those specific to women and outlined in the Maputo Protocol. In August 2020, LSZ published a statement on the deteriorating human rights situation in Zimbabwe where they cited harassment of journalists, human rights defenders and also relatives of an activist.<sup>63</sup> It also provides regular training for its members on human rights where international treaties such as the Maputo Protocol are introduced.

60 Mutangi (n 11) 287.

61 The *Mudzuru* case (n 45).

62 [https://www.zlhr.org.zw/?page\\_id=71](https://www.zlhr.org.zw/?page_id=71) (accessed 18 October 2020).

63 <http://kubatana.net/2020/08/16/law-society-of-zimbabwe-statement-on-deteriorating-human-rights-situation-in-zimbabwe/> (accessed 23 October 2020).

## 10 Higher education and academic writing

The Maputo Protocol forms an important part of academic space in Zimbabwe within and beyond the law schools in the country. Zimbabwe has numerous universities providing training in law including the University of Zimbabwe, Midlands State University, Great Zimbabwe University and Zimbabwe Ezekiel Guti University. These universities within their curriculums do have courses that speak to specific issues around human rights and thus include discussions around international agreements such as the Maputo Protocol. The University of Zimbabwe for example has optional courses that include Human Rights Law and Women's Law. It also offers a regional programme on Masters in Women's Law under the Southern and Eastern African Regional Centre for Women's Law (SEARCWL) which has a growing library of dissertations and research by students including studies that relate to the Maputo Protocol. Midlands State University has two courses that deal with international treaties, including the Maputo Protocol. These are: Gender and Law as well as Human Rights Law. This university also has a Master of Laws: Constitutional and Human Rights Law. Great Zimbabwe University has courses in Gender, HIV/AIDS and the Law and Human Rights and International Humanitarian Law. Zimbabwe Ezekiel Guti University also has a compulsory course on Human Rights Law. Beyond the law schools, Zimbabwe has many departments focusing on gender or women's studies that have courses that relate to the Maputo Protocol. University of Zimbabwe and Great Zimbabwe University have masters' programmes focusing on gender studies and do have

courses that relate directly and indirectly to the Maputo Protocol.

In terms of research and publishing, Zimbabwe has a growing catalogue of publications on the Maputo Protocol published in both local and international journals. In terms of law research, the Zimbabwe Legal Information Institute has a website that provides access to local journals (numbering six currently), electronic copies of books, legislation and judgements. All these resources provide access to legal research free of charge and some of the documents such as the *Mudzuru* judgement<sup>64</sup> on child marriages have direct links to the Maputo Protocol. Beyond those organisations such as the Centre for Applied Legal Research and Legal Resource Foundation undertake legal research in areas related to the Maputo Protocol. Legal Resource Foundation for example has together with Women's Law Southern Africa produced research in 2020 focusing on women survivors of gender-based violence access to formal and informal justice systems in Zimbabwe.<sup>65</sup>

## 11 Impact on independent state institutions

Zimbabwe has several independent state institutions which work within the scope of women's rights such as Zimbabwe Human Rights Commission (ZHRC), Zimbabwe Gender Commission and National Peace and Reconciliation Commission (NPRC). ZHRC is constituted in terms of section 242 of the Constitution. Its mandate includes

<sup>64</sup> The *Mudzuru* case (n 45).

<sup>65</sup> Scholars beyond law are also publishing in international journals on issues related to the Maputo Protocol though the number is low and there is still needed to increase research on the Protocol in Zimbabwe. An online search of research databases shows a low number of published papers from Zimbabwe.

promotion, protection and enforcement of human rights and freedoms. In its work, ZHRC has developed a specific focus on women through the Gender Equality and Women's Rights Thematic Working Group which collaborates with other gender organisations to research, raise awareness and advance gender issues in Zimbabwe. In its monitoring report on the state of human rights under COVID-19 induced lockdowns, ZHRC argues.<sup>66</sup>

In relation to enjoyment of other socio-economic rights, Article 13(e) of the Maputo Protocol reiterates on the need to put in place measures for protecting rights of women involved in informal economic activities. It emerged from the monitoring mission that women's sources of livelihoods were negatively affected by the lockdown since the majority of them work in the informal sector.

It is thus clear that in its work the ZHRC utilises the Maputo Protocol as a guideline.

The NPRC on the other hand is a mechanism for resolving the burdens of past violent conflicts and building national and sub-national capacities that guarantee a future of peace and reconciliation. It is mandated to ensure post-conflict justice, healing and reconciliation by encouraging truth-telling, the making of amends, the provision of justice and rehabilitative treatment. Section 9 of the NPRC Act outlines the key provisions dealing with gender, mandating the Commission to ensure that women, girls and other vulnerable groups form part of the core of the coun-

try's reconciliation and peacebuilding effort. The NPRC also has a thematic department on Victim Support, Gender and Diversity. While the NPRC does not mention the Maputo Protocol explicitly, the work it does around gender and women in many ways domesticates various articles of the Maputo Protocol including article 4 on the rights to life, integrity and security of the person.

## 12 State reporting

Article 26 of the Maputo Protocol makes it mandatory for state parties to submit a report in two parts: the first on the progress made to implement the African Charter, the second on the Maputo Protocol itself using the 2009 African Commission's guidelines. Zimbabwe as a signatory is thus obligated to provide periodic reports. Reporting on human rights treaties is done under the Inter-ministerial Committee on Human Rights and Humanitarian Law (IMC). IMC has the mandate to write state party reports to different treaty monitoring bodies, dissemination of concluding observations and following up on recommendations of treaty bodies.<sup>67</sup> It is made up of government ministries and departments including Foreign Affairs, Defence, Justice, Interior, Culture, Education, Health and Children, Youth, Equality and Employment, President's Office, Ombudsman, Public Prosecutor's Office and the judiciary. Chairmanship of the Committee and secretariat is under the permanent secretary of the Ministry of Justice and Legal Affairs. This secretariat is responsible for producing the first draft of the state report and sharing it with all members of the IMC. Sub-committees within the IMC will further refine and

66 <https://www.zhrc.org.zw/statement-on-the-human-rights-situation-of-special-interest-groups-during-the-national-lockdown/> (accessed 27 October 2020).

67 Mutangi (n 11) 290.



provide evidence including statistics from all government departments related to the reporting demands of the Maputo Protocol. The draft from this process is then shared for input by other actors such as government departments not part of IMC, independent commissions and civil society. All these stakeholders will be further engaged through consultative meetings or through written submission as a way of gathering their inputs into the draft report. The final report is submitted to cabinet through the Minister of Justice, Legal and Parliamentary Affairs where approval to lodge the report with the AU is given. In August 2019, the cabinet approved a periodic report under the African Charter on Human and Peoples' Rights (African Charter) and the report under the Maputo Protocol. The report was prepared in consultation with and including the participation of NGOs, United Nations agencies, academic institutions, and child-based organisations. The latter were included to ensure that the voice of the girl child is represented. The report outlines the major achievements and steps taken by the government to domesticate the Maputo Protocol which include constitutional and legislative changes that enhance the promotion of women's rights.<sup>68</sup>

### 13 Communications

One of the tools of the Maputo Protocol and other human rights treaties is the ability to lodge communication with the African Commission. Such communication can originate from:<sup>69</sup>

any African or international non-governmental organisation (NGO), whether or not it has observer status with the Commission; any individual who lives in a country which has ratified the Charter and considers himself or herself a victim of a violation; if the victim is unable to submit the communication himself or herself, any other person or organisation may do so on his or her behalf.

Whilst there are numerous communications from Zimbabwe to the African Commission especially post 2000 due to the deteriorating human rights context in the country, there are however limited specifically focusing on issues related to Maputo Protocol and Mutangi<sup>70</sup> outlines some of the communications on Zimbabwe sent to the African Commission between 2002 and 2011. In this paper, we concentrate on those related to women's rights thus in some way speak to the Maputo Protocol. The case *Jenifer Williams, Magodonga Mahlangu and Women of Zimbabwe Arise (WOZA) v The Republic of Zimbabwe* was filed in 2013. The applicants allege that Zimbabwean authorities have systematically suppressed their ability to engage in peaceful protest and public demonstrations through a pattern of threats, harassment, physical abuse and torture, disproportionate and excessive use of force, illegal dispersals as well as arbitrary arrests and detentions. The Zimbabwean government however argued that it had acted lawfully and within its constitutional mandate to maintain law and order.

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

In 2002, the African Commission Special Rapporteur on violence against

68 <https://www.achpr.org/states/statereport?id=128> (accessed 23 October 2020).

69 UO Umozurike 'The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness' (2007) *Annual Survey of International & Comparative Law* at 231.

70 Mutangi (n 11) 291-292.

women outlined key issues around violence against women including domestic violence, sexual violence linked to political campaigns, sexual abuse, sexual harassment in the workplace and increasing incidents of child abuse, including incest, infanticide, child abandonment, and rape.<sup>71</sup> The African Commission in 2020 issued a resolution on human rights in Zimbabwe.<sup>72</sup> Of particular interest was the concern with violations against women such as the arbitrary arrests and detention of journalists and Women Human Rights Defenders, including a member of parliament, who were also allegedly subjected to torture, rape and physical assault.

## 15 Factors that affect the impact of the Maputo Protocol in Zimbabwe

There are many factors that affect the efficacy of the Maputo Protocol in Zimbabwe. In this section, we outline some of the major factors below:

- *Lack of political will:* the Zimbabwean government has been slow in ensuring that mechanisms and legislative changes geared towards improving the welfare of women are implemented. Currently, the constitutional alignment process that will create a legislative measure to criminalise child marriages is still in limbo seven years after the new constitution, yet the government is already fast-tracking constitutional
- amendments to increase the executive powers of the president. Women's rights are often at the periphery and in Zimbabwe most provisions of the constitution are ignored for example the appointment of deputy ministers, members of boards of public entities and key leadership positions in the public sector should follow gender equality yet men dominate all these spaces.
- *Lack of funding for institutions promoting women's rights:* Budgetary allocations to institutions such as Zimbabwe Human Rights Commission and Zimbabwe Gender Commission is inadequate for the institutions. Underfunding affects all institutions including judicial officers, police, health facilities and any other institution that deals with women's rights. For example, Zimbabwe depends on donor funding for the programming of many institutions including the ministry responsible for gender.
- *Role of security agents and capture of institutions:* The continuation of violation of women and girls' rights, and the disregard of the Maputo Protocol should be understood in the context of the role of the security sector and increasing capture of state institutions. The security sector has been implicated in several women's rights abuses including during the post-July 2018 elections where women also died, January 2019 anti-fuel hike protests and violent enforcement of COVID-19 lockdowns.
- *COVID-19 and Maputo Protocol:* A number of processes that could have seen progress in the implementation of the Protocol have been stalled by responses to COVID-19. For instance, parliament was suspended from sitting hence affecting laws such as the Marriage Bill.
- *Slow alignment of laws with the Constitution:* The implementation of the Maputo Protocol depends so

71 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2002/52, E/CN.4/2003/75/Add.1, 27 February 2003.

72 443 Resolution on the Human Rights Situation in the Republic of Zimbabwe - African Commission Res. 443 (LXVI) 2020, <https://www.achpr.org/sessions/resolutions?id=474> (accessed 25 October 2020).

much on the Constitution, yet the process of aligning laws that have a bearing on women's rights has been slow, in part, because of lack of political will to see the value in pushing for women's rights especially with Agenda 2030 in mind.

- *Failure to be accountable and take responsibility by the state:* The government has many times regarded reports on human rights violations as malicious, including reports by its own ZHRC. This approach was also reiterated in 2019 when security agents denied responsibility for sexual violence against women during anti-government protests.<sup>73</sup> In its 2019 report to the African Union on the state of rights in the country, the government was defensive and denied allegations against it of human rights violations.<sup>74</sup>
- *Patriarchy, religion and culture:* Patriarchal cultural practices are at the core of women's exclusion from political, economic and social processes. A number of issues are regarded as tradition, religious and cultural such as harmful cultural practices, lack of women's control of land and other resources and women's absence in key political and decision-making roles. This has a direct bearing on the domestication of women related regional instruments such as the Maputo Protocol. Patriarchal norms are institutionalised and entrenched within key socialising institutions which govern everyday life across Zimbabwe such as schools, churches, Parliament, the judiciary and traditional leadership amongst others. Cultural norms based on traditions and religions relegate women to the private sphere and

negate commitment to regional women's rights norms and standards.

## 16 Conclusion

The chapter shows that while Zimbabwe has made some progress in implementing the Maputo Protocol, the country still has a long way to go. It highlighted how the 2013 Constitution has gone a long way to domesticate many aspects of the Maputo Protocol yet indicators on the ground highlight a situation where women's rights are still being violated. The Maputo Protocol requires more political will by the state to implement the various constitutional, legislative and measures already in place.

73 See Zimbabwe's Activity Report of the 47th Report Activity Report of the African Commission on Human and Peoples' Rights, 14 May-10 November 2019.

74 As above.

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