

# THE IMPACT OF THE MAPUTO PROTOCOL IN ETHIOPIA

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## 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/easternafrica/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/en/planipolis/files/2020/06/11/ethiopia\\_education\\_development\\_roadmap\\_2018-2030.pdf](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiHobblq93tAhXHa8AKHcv9BdUQFjAAegQIAhAC&url=https://www.unesco.org/en/planipolis/files/2020/06/11/ethiopia_education_development_roadmap_2018-2030.pdf) and [https://www.unesco.org/en/planipolis/files/2020/06/11/ethiopia\\_education\\_development\\_roadmap\\_2018-2030.pdf](https://www.unesco.org/en/planipolis/files/2020/06/11/ethiopia_education_development_roadmap_2018-2030.pdf) (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 Setawet 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 Turnro 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, Etschewot 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 Etschewot 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 cooperation 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.