

# 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 Tandii '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/pf00000372503> (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 Oyeni (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-country-reports-on-human-rights-practices/zimbabwe/> (accessed 3 November 2020).

39 <https://reliefweb.int/sites/reliefweb.int/files/resources/Situation%20Report%20-%20Zimbabwe%20-%204%20Sep%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/2001/0603update.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 judgement 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 *Mudzuru & 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 Umzurike '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.