

Article 13

Economic and social welfare rights

Anneth Amin Mnzava

1. States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:
- (a) promote equality of access to employment;
 - (b) promote the right to equal remuneration for jobs of equal value for women and men;
 - (c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
 - (d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
 - (e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
 - (f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
 - (g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
 - (h) take the necessary measures to recognise the economic value of the work of women in the home;
 - (i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;
 - (j) ensure the equal application of taxation laws to women and men;
 - (k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
 - (l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
 - (m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

1 Introduction.....	287
2 Drafting history	288
3 Relationship between article 13 and other rights in the Maputo Protocol and other relevant treaties	290
4 Concepts and definitions	291
5 Nature and content of economic and social welfare rights	293
5.1 Right to equality of access to employment	293
5.2 Right to equal remuneration for jobs of equal value	293
5.3 Right to transparency in recruitment, promotion, and dismissal	295
5.4 Combat and punish sexual harassment	296
5.5 Right of women to choose an occupation.....	297
5.6 Right to protection of women working in the informal sector	298
5.7 Right to social insurance.....	299
5.8 Right to recognition of the economic value of women's work in the home	300
5.9 Right to adequate maternity leave.....	301
5.10 Right to equal application of taxation laws	301
5.11 Right to the same allowances and entitlements	302

5.12 Parents' responsibility for the upbringing and development of children	303
5.13 Right of women against exploitation and abuse in advertising and pornography.....	303
6 Nature and scope of states' obligations	304
6.1 Obligations to adopt and enforce legislative and other measures	304
6.2 States' obligations to protect and promote	305
6.3 Obligation to ensure equality and non-discrimination	305
7 Implementation	305
8 Conclusion	307

1 Introduction

Although existing international and regional human rights instruments addressed economic and social welfare rights at the time the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was adopted, the socio-economic conditions of Africa's women had generally not improved. The African Charter on Human and Peoples' Rights (African Charter), for instance, contains provisions relating to non-discrimination, the right to work and women's rights.¹ However, these provisions have largely been assessed as inadequate.² Article 13 of the Maputo Protocol protects economic and social welfare rights. It also, importantly, responds to concerns about prevalent inequalities in accessing employment and related rights. Given the wide range of inequalities African women experience in this regard, this provision is indispensable in transforming socio-economic conditions.

In Africa, women experience a wide range of violations of their economic and social welfare rights in public and private spheres. 'Calculations using the UNDP gender indices indicate notable gender inequality in almost every African country. Gender gaps in income and non-income dimensions result in lower human development by females compared to males.'³ The 2022 Sustainable Development Goals Report reveals women's high level of working poverty rates.⁴ Data published by United Nations (UN) Women in 2022 reveals that 62.8 per cent of women in Africa live in extreme poverty.⁵ Thus, for every 100 men living in extreme poverty in Africa, there are 127 women in the same position.⁶ Any efforts to reduce overall poverty in Africa must therefore address the female face of African poverty.⁷

There are still sectors of the economy that are largely closed to women. For instance, the mining industry has historically been seen as a masculine occupational culture, despite technological advances

1 Maputo Protocol, arts 2, 15 & 18(3).

2 Center for Reproductive Rights 'The Protocol on the Rights of Women in Africa: an instrument for advancing reproductive and sexual rights' *Briefing Paper* 2 February 2006. See also MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 41.

3 United Nations Development Programme, *Africa Human Development Report 2016: Accelerating Gender Equality and Women's Empowerment in Africa* 4 https://www.afdb.org/fileadmin/uploads/afdb/Documents/AEC/2016/AfHDR_Summary_highres_EN.pdf (accessed 16 May 2023).

4 United Nations *Sustainable Development Goals Report 2022* (2022) 26.

5 Global poverty projections issued in February 2022 by UN Women <https://data.unwomen.org/features/poverty-deepens-women-and-girls-according-latest-projections#:~:text=New%20projections%20of%20global%20poverty,372%20million%20men%20and%20boys> (accessed 16 June 2022).

6 Remarks given by the United Nations Secretary-General Antonio Guterres at the high-level meeting on gender equality and women's empowerment in Africa, in Addis Ababa on 8 February 2020 <https://www.unwomen.org/en/news-stories/statement/2022/03/statement-by-un-secretary-general-antonio-guterres-on-international-womens-day> (accessed 6 March 2022).

7 HM McFerson 'Poverty among women in Sub-Saharan Africa: a review of selected issues' (2010) 11 *Journal of International of Women's Studies* 52.

that have redefined the nature of minework.⁸ There are also fields of education in which women are under-represented, for example, in science, technology, engineering and mathematics (STEM).⁹ This significantly diminishes their earning potential. Furthermore, the economic contribution of most African women is not recognised in national statistics because it is largely in the informal agricultural and domestic sectors. As such, African women's economic contribution in agriculture, entrepreneurship and other related economic sectors is not documented.¹⁰ Women's work such as subsistence agriculture, household maintenance, voluntary work, and other related unpaid services, are excluded from economic measurement.¹¹ The invisibility of women's work translates into exclusion from social security and control over resources.¹²

This chapter analyses the provisions of article 13 of the Maputo Protocol on economic and social rights with the aim of unpacking their nature and content of these rights. The chapter is, therefore, organised in 7 sections. Following this introduction, the section 2 gives the drafting history of article 13 of the Maputo Protocol. Section 3 unpacks the relationship between article 13 and other rights in the Maputo Protocol and in other relevant treaties. Section 4 examines the key concepts of article 13 of the Maputo Protocol. An analysis of the nature of states' obligations is conducted in section 5 of this chapter. Section 6 examines states' implementation of article 13 of the Maputo Protocol and section 7 concludes the chapter.

2 Drafting history

The drafting history of article 13 of the Maputo Protocol reveals the drafters' determination to create substantive equality in the socio-economic conditions of women in Africa. The provision on economic and social welfare rights was included in all the drafts leading up to the final text of the Maputo Protocol. Article 14 of the Nouakchott Draft guaranteed women equal opportunities to work.¹³ It incorporated rights to equality of remuneration and conditions of work, the right to women's freedom to choose their own job, right to decent conditions of work, and freedom from exploitation by their employers. Other rights included the right to insurance for women working in the informal and formal sectors, prohibition of children from working below the minimum age, and prohibition of sexual violation against children, right to protection of domestic work of women, right to adequate pre- and post-natal maternity leave, and equal parental responsibility.¹⁴

8 D Botha 'Women in mining: an assessment of workplace relations struggles' (2016) 46 *Journal of Social Science* 252.

9 C Hill et al 'Why so few? Women in science, technology, engineering, and mathematics' 5-9. A report published by AAUW in 2010.

10 African Union 'African Union set to launch the "What African Women Want" Campaign to rally more action on women's empowerment on International Women's Day' (2022) <https://au.int/en/pressreleases/20220307/african-union-set-launch-what-african-women-want-campaign-rally-more-action#:~:text=The%20%E2%80%9CWhat%20African%20Women%20Want%E2%80%9D%20campaign%20will%20be%20launched%20on,for%20the%20implementation%20of%20programmes> (accessed 23 June 2023).

11 M Waring 'The invisibility of women's work: the economics of local and global "bullshit"' (1997) 17 *Canadian Woman Studies* 31.

12 J Meeker & D Meekers 'The precarious socio-economic position of women in rural Africa: the case of the Kaguru of Tanzania' (1997) 40 *African Studies Review* 35.

13 See Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

14 Nouakchott Draft (n 13) art 14..

These concerns were revised into article 15 of the Kigali Draft.¹⁵ It provided for the promotion of equality in access to employment, terms of remuneration, conditions of work and taxation. Thus, the Kigali Draft focused the article on promoting access to employment and related rights.¹⁶

The next draft – the Addis Ababa draft (2001)¹⁷ – provided for economic and social welfare rights under article 13. It required states to adopt legislative and other measures to guarantee women equal opportunities to work.¹⁸ It listed much the same concerns as the previous draft, focusing on equality in access to employment and equal remuneration for jobs of equal value for men and women.¹⁹ The Addis Ababa draft also required states to ensure transparency in recruitment, promotion and dismissal of women and combating and punishing sexual harassment in the workplace. Women were guaranteed the freedom to choose their occupations. States were also required to create conditions that promote and support occupations and economic activities of women within the informal sector, including setting up systems of protection and social insurance for women in the informal economy. Other elements included minimum age for work and prohibition of child labour, recognition of the economic value of the work of women in the home, adequate and paid pre- and post-natal maternity leave, equality of taxation for men and women, and equality of allowances. States were furthermore called upon to recognise that the upbringing and development of children is the responsibility of both parents. The final clause of the draft article obliged states to take effective measures to prevent the exploitation and misuse of women in advertising practices.²⁰

A non-governmental organisation (NGO) forum convened in 2003 under the auspices of Equality Now gave extensive comments on the Addis Ababa draft (Comments by the NGO Forum).²¹ Attempting to keep the language as close to that of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as possible, the NGO Forum recommended certain improvements. For instance, the word ‘enforce’ in the opening statement was inserted in the NGO mark-up draft. It also proposed the insertion of the phrase ‘career advancement’, to align the language with CEDAW’s article 11(b) and (c). Other elements contained in the Comments by the NGO Forum included the application of non-discriminatory criteria in the recruitment, promotion, and dismissal of women. The Comments by the NGO Forum also strengthened the language by recommending deletion of the phrase ‘allow’ to replace it with the phrase ‘ensure’ (women’s freedom to choose their occupation), also in line with article 11(c) of CEDAW. The inclusion of the right to social benefits, particularly regarding retirement, unemployment, old age, and other incapacity to work, refers to article 11(e) of CEDAW. The Comments by the NGO Forum recognised the right to adequate and paid pre- and post-natal maternity leave.²² Finally, the Comments by the NGO Forum recommended the inclusion of the word ‘abuse’ in the final clause on ‘exploitation and abuse of women in advertising and pornography’.

At the second Meeting of Experts held in Addis Ababa, Ethiopia, in March 2003, amendments made to article 13 were included in the Draft Protocol, which was submitted to the Meeting of

15 Draft Protocol to the African Charter on Women’s Rights, 26th ordinary session of the African Commission on Human and Peoples’ Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

16 Kigali Draft (n 15) art 15.

17 See Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

18 As above, para 98.

19 Article 13(a) of the Addis Ababa draft (n 17).

20 Article 13(b)-(m) of the Addis Ababa draft (n 17).

21 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

22 The NGO mark-up draft proposal to include the phrase ‘address pregnancy needs in the workplace’ similar to art 11(2)(a) of CEDAW, and art 10(2) of the Declaration on the Rights of Women, and art 8 of the European Social Charter, was not successful. The final text summed it all up in the right to adequate pre- and post-natal maternity leave.

Ministers for consideration.²³ No reservations were made by any state regarding article 13, suggesting that the matter of women's economic and social welfare rights is, on the face of it, non-controversial.²⁴ The final draft improves the various drafts of the Maputo Protocol. Its stipulation of states' obligations uses stronger language. It also prohibits sexual harassment in the workplace, unlike earlier drafts that only addressed sexual violations against children. It prohibits the exploitation of employed women's fundamental rights by their employers. The addition of the phrase 'paid' maternity leave strengthens the right to adequate pre- and post-natal maternity leave. The final draft incorporated a wide range of recommendations for the NGO Mark-up draft.

3 Relationship between article 13 and other rights in the Maputo Protocol and other relevant treaties

Article 13 covers a broad subject matter, and so, inevitably, it relates to numerous other articles of the Maputo Protocol, which need to be taken into account to give full meaning to economic and social welfare rights. The main one is the provisions on non-discrimination in article 2, which requires states to combat all forms of discrimination against women through appropriate legislative, institutional, and other measures. Article 2 reiterates almost verbatim CEDAW's article 2.

The right to dignity in article 3, which resembles article 1 of the Universal Declaration of Human Rights (Universal Declaration), and article 5 of the African Charter, is also significant. The right to education and training in article 12, which closely resembles article 10 of CEDAW, is also vital. The right to special protection of elderly women, and women with disabilities in article 23 is also relevant. These rights resonate with the provisions of article 6 of the UN Convention on the Rights of Persons with Disabilities (CRPD). Another relevant right is the right to special protection of women in distress in article 24, which relates with special protection of rural women under article 14 of CEDAW. The rights to health and reproductive rights in articles 14 and 18 relate closely to article 12 of CEDAW.

Economic and social welfare rights also exist in other international treaties. The International Labour Organization (ILO's) various conventions and recommendations elaborate a wide range of employment standards relevant to women. ILO standards relevant to women include freedom of association, industrial relations, prohibition against forced labour, and protection of children and young persons, equality of employment opportunity and treatment, hours of work, night work, and wages including equal pay for work of equal value for men and women, and special consideration of workers with family responsibilities. The African Charter guarantees rights to non-discrimination, equality, property, work, health, education, wealth and natural resources, and development.²⁵ The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the right to work, just and favourable conditions of work, right to form and join a trade union, right to social security, family, an adequate standard of living, health, and education.²⁶ The Convention on the Elimination of All Forms of Discrimination (CEDAW) entrenches similar rights in articles 11 to 14.

23 Summary of the proceedings of the Ministerial Meeting on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the rights of Women in Africa, MIN/PROT.WOMEN/RTS/Rpt, Addis Ababa, Ethiopia, March 2003, para 14.

24 See table of reservations to the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

25 See arts 14-17 and arts 21-22 of the African Charter.

26 See arts 6-3 of the ICESCR.

4 Concepts and definitions

Substantially, article 13 is framed within two related concepts: equality and non-discrimination.²⁷ In the context of socio-economic rights the United Nations Committee on Economic, Social and Cultural Rights (UN CESCR) in its General Comment 20 states that ‘non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of socio-economic rights’.²⁸ Article 13 includes the concept of equality by requiring states to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. The inclusion of the concept of equality in economic and social welfare provisions renders equality a vital content of these rights and offers them substantial protection. Effective protection of economic and social welfare rights will only be attainable if women and men are broadly treated equally in the manner envisaged by the provisions of article 13 without discrimination of any form.

Article 13 entrenches the substantive as opposed to the formal dimension of equality. Formal equality requires that all persons who are in the same situation be accorded the same treatment, and that people should not be treated differently because of arbitrary characteristics such as gender.²⁹ Thus, formal equality presupposes similar or the same treatment. Substantive equality, on the other hand, is concerned to ensure outcomes that are equal in substance, not just on paper. It refers to ‘equality in distribution of economic and social power and of opportunities for people to experience self-realisation’.³⁰ Substantive equality takes cognisance of existing patterns of inequality, taking economic and social conditions into account. The aim is to enable women to realise their full potential as equal members and actors in society. This aim is elaborated in Fredman’s four features and dimensions of substantive equality.³¹ Substantive equality is asymmetric in that it distinguishes between different treatment that causes detriment, and different treatment that redresses past disadvantage to improve the disadvantaged group’s position.³² It moves away from relative equality – the assumption of conformity to a male norm. Rather, it takes difference into account when difference matters. Substantive equality is inherently transformative; it seeks to change existing structures.³³ Moreover, it insists on levelling up rather than down.³⁴ Finally, it entails a positive responsibility to bring about change, regardless of whether individual culpability or violation has been established.³⁵

The dimensions of substantive equality are four-fold. First, it concentrates on remedying disadvantage rather than achieving gender neutrality. It redresses gendered context, including women’s subordinate position in areas such as the workplace. Second, it aims to redress stigma, stereotyping, humiliation and violence on grounds of gender. The third dimension entails recognition of the ways in which the structures of society entrench women’s disadvantage. Instead of requiring women to conform to male norms, substantive equality requires the transformation of existing male-oriented institutions and structures. The final dimension of substantive equality is that it attaches importance to women’s

27 For detailed analysis of non-discrimination in the Maputo Protocol see E Lubaale ‘Article 2’ in this volume.

28 United Nations Committee on Economic, Social and Cultural Rights (ESCR committee) General Comment 20 on Nondiscrimination in Economic, Social and Cultural Rights, 2 July 2009, UN Doc E/C.12/GC/20, para 2.

29 A Smith ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 611.

30 K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 153-154.

31 S Fredman ‘Women and poverty – A human rights approach’ (2016) *African Journal of International and Comparative Law* 505-506. See also R Holtmaat ‘The CEDAW: a holistic approach to women’s equality and freedom’ in A Hellum & HS Aasen (eds) *Women’s human rights: CEDAW in international, regional and national law* (2013) 106.

32 Fredman (n 31) 505.

33 As above.

34 As above.

35 As above.

agency and voice in engendering the socio-economic rights necessary for women's empowerment.³⁶ These dimensions are vital in understanding article 13 of the Maputo Protocol.

The introductory statement to article 13, which obliges states to adopt legislative and other measures to guarantee equal opportunity in work, holistically guarantees substantive equality. It makes sure that laws, regulations and policies adopted to give effect to economic and social welfare rights do not victimise women already suffering from socio-economic inequalities. Substantive equality requires that states adopt laws and policies enable women realise the full potential of their economic and social welfare rights. Laws, policies and practices are evaluated from the vantage point of their impact on a disadvantaged individual or group, so as to eliminate barriers to participation in the workplace.³⁷ The phrase 'other measures to guarantee equal opportunity in work' aims to empower women as equal members of society as their male counterparts. It does not refer to sameness between men and women. The significance of this choice of criterion is that achieving substantive equality for women does not depend on a comparison with men. This is crucial in dealing with the issue of a fair wage in areas of work dominated by or staffed exclusively by women.³⁸

Some other examples of substantive equality in article 13 include states' obligation to protect women from exploitation by their employers violating and exploiting their rights. The requirement that states should create conditions to promote and support the occupations and economic activities of women in the informal sector incorporates substantive equality. The right to equal remuneration for jobs of equal value for women and men is another significant element of substantive equality in article 13. A similar provision on remuneration and equal pay for work of equal value is included in article 11(1)(d) of CEDAW. This right is justified by the need to reverse the negative impact on women's pay that results from occupational segregation.³⁹ Furthermore, the requirement to guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors aims at attaining substantive equality.⁴⁰ Similarly, CEDAW guarantees substantive equality in article 11(1)(c), which protects the women's right to training and re-training, including apprenticeship, advanced and vocational training and recurrent training. These provisions embody substantive equality as they aim to skill or re-skill women so as to position them favourably for entry or re-entry into the workforce and thereby redress women's subordinate position in the workplace.

The Heads of State and Government in their Declaration on Gender Equality in Africa,⁴¹ adopted in Addis Ababa in July 2004, declares that gender equality aims at strengthening measures to reduce women's skewed workload, expand employment opportunities for women, and ensure equal pay for work of equal value.⁴² States should adopt a wide range of measures for eradication of the discrimination that women encounter in the enjoyment of their economic and social welfare rights. The African Commission elaborates equality to include the adoption of special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable

36 Fredman (n 31) 506.

37 Smith (n 29) 613. See also CESCR General Comment 20 (n 28) para 8.

38 F Raday 'Article 11' in MA Freeman et al (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 285.

39 Raday (n 38) 303.

40 As above.

41 'Declaration on Gender Equality in Africa,' Heads of State and Government of Member States of the African Union, adopted at 3rd ordinary session (6-8 July 2004) Addis Ababa, Ethiopia.

42 Declaration on Gender Equality (n 41) para 10.

their equal enjoyment of the rights of a socio-economic nature.⁴³ Concern about substantive equality undergirds each of the respective components of the economic and social welfare rights contained in article 13, as elaborated in the next section.

5 Nature and content of economic and social welfare rights

5.1 Right to equality of access to employment

Article 13(a) of the Maputo Protocol provides for the right to equality of access to employment.⁴⁴ CEDAW incorporates a similar provision in article 11(1)(b) on the right to the same employment opportunities. The right includes access to employment opportunities for which a woman is qualified.⁴⁵ This right broadly incorporates the right of women not to be unfairly deprived of employment opportunities.

Equality of access covers three fundamental elements of employment, namely, availability, accessibility, and acceptability.⁴⁶ Availability is about ensuring that women are equally able to identify and secure available employment. States are required to assist and support individuals in identifying and finding available employment opportunities.⁴⁷ Accessibility refers to physical access and the right to seek, obtain and impart information on the means of gaining access to work. Acceptability is largely about protecting the right of the worker to just and favourable conditions of work.⁴⁸

5.2 Right to equal remuneration for jobs of equal value

The right to equal remuneration for jobs of equal value in article 13(b) is integral to economic and social welfare rights. The right resonates with the African Charter's right to equal pay for equal work.⁴⁹ A similar provision is found in article 11(1)(d) of CEDAW which elaborates on the right to equal remuneration to include benefits and equal treatment in respect of work of equal value.

The Maputo Protocol does not explicitly define the term remuneration. The ILO Equal Remuneration Convention⁵⁰ defines remuneration to include the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.⁵¹ Drawing inspiration from the ILO's Equal Remuneration Convention allows a holistic interpretation of article 13, to include all necessary allowances that employed women are entitled to. Equal remuneration for men and women for work of equal value means rates of pay established without discrimination on the basis of sex.⁵² The essence of article 13(b) is to prohibit pay discrimination against a woman working in the same or comparable position as a man.

43 African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines on the Implementation of Economic, Social and Cultural Rights).

44 Article 13(a) of the Maputo Protocol.

45 Raday (n 38) 288.

46 CESCR General Comment 18 on The right to work (art 6 of the Covenant) 6 February 2006, E/C.12/GC/18, CESCR General Comment 18, para 12(b).

47 CESCR General Comment 18 (n 46) para 12(a).

48 CESCR General Comment 18 (n 46) para 12(c).

49 Article 15 of the African Charter.

50 International Labour Organization (ILO), Equal Remuneration Convention, 29 June 1951, C100 (ILO Equal Remuneration Convention).

51 Article 1(a) of the ILO Equal Remuneration Convention (n 51).

52 As above.

The right to equal pay for jobs of equal value is significant to address the historical underestimation of work done by women in Africa's societies. The ILO has noted the following:

Historical attitudes towards the role of women in society, along with stereotypical assumptions regarding women's aspirations, preferences, capabilities and "suitability" for certain jobs, have contributed to occupational sex segregation in the labour market. As a result, certain jobs are held predominantly or exclusively by women and others by men. These views and attitudes also tend to result in the undervaluation of "female jobs" in comparison with those of men who are performing different work and using different skills, when determining wage rates.⁵³

The right to equal pay for jobs of equal value should be construed broadly to include not only similar jobs but also different jobs of equal value. The framing of the right permits a broad scope of comparison. It includes, but goes beyond equal remuneration for 'equal', the 'same', or 'similar' work and encompasses work that is of an entirely different nature, which is nevertheless of equal value.⁵⁴ Furthermore, the right is not limited to comparisons between men and women in the same establishment but rather it allows comparison between jobs performed by men and women in different places or for different employers.⁵⁵ In its General Recommendation 13, the CEDAW Committee requires states to develop job evaluation systems to facilitate the comparison of the value of jobs of a different nature.⁵⁶ The right should not be confined to equal pay for the same work, but should extend to work of equal value.⁵⁷

Furthermore, the right to equal pay for jobs of equal value holistically intends to address the issue of low remuneration for jobs considered to be women oriented. It takes account of the fact that lower wages for women are not only a result of direct discrimination but also, and perhaps chiefly, of the horizontal segregation of jobs and the payment of lower wages in feminised occupations or professions.⁵⁸ The right to equal remuneration for jobs of equal value is integral to the right to dignity. The African Commission held in *Malawi African Association v Mauritania*⁵⁹ that 'the right to remuneration ensures for everyone and his or her family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'.⁶⁰

Integral to the right to equal remuneration is the concept of work of equal value. The question centres on the methods of assessing equal value. The CEDAW Committee in its General Recommendation 13 noted that states should consider the study, development, and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate.⁶¹

The Maputo Protocol in general, and article 13, in particular, does not explicitly prescribe the methods of assessment. This omission does not necessarily mean that such an assessment is irrelevant.

53 ILO Report of the African Children's Committee on the application of Conventions and Recommendations, Report III (Part 1A), 96th Session, 2007 p 271 para 2.

54 ILO Report of the African Children's Committee (n 53) 271 para 3.

55 As above.

56 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 13: Equal remuneration for work of equal value, 8th session (1989) contained in A/RES/44/38. Resolution of the United Nations General Assembly, 1989, para 2.

57 S Fredman 'The right to equal pay for work of equal value' Background paper for the Working Group on discrimination against women in law and practice: economic and social life' <https://www.ohchr.org/Documents/Issues/Women/WG/ESL/BackgroundPaper2.doc> (accessed 22 May 2023).

58 Raday (n 38) 293.

59 *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

60 *Malawi African Association* (n 59) para 135.

61 General Recommendation 13 (n 56) para 2.

In fact, the ILO stated the need to examine the tasks involved to establish whether different jobs are of equal value.⁶² Inspiration may be drawn from the ILO Equal Remuneration Convention that implicitly incorporates the methods of examination. According to ILO, such examination must be undertaken on the basis of entirely objective and non-discriminatory criteria to avoid an assessment being tainted by gender bias.⁶³ In respect of assessment methods, the ILO states further that

analytical methods of job evaluation are effective to ensure gender equality in the remuneration because they apply objective factors (to analyse and classify jobs) relating to jobs to be compared such as skill, effort, and responsibilities or working conditions.⁶⁴

5.3 Right to transparency in recruitment, promotion, and dismissal

Integral to the right to economic and social welfare rights is the right to transparency in the recruitment, promotion and dismissal of women covered in article 13(c) of the Maputo Protocol.⁶⁵ Transparency in recruitment requires job positions to be advertised openly to the public in order to afford both women and men the opportunity to apply on a competitive basis. Applying undisclosed criteria in recruitment processes is contrary to article 13(c). Equality in criteria applied in recruitment is vital to avoid recruitment being tainted by gender bias. Employers, public and private, are obligated not to discriminate against women when taking on new employees, even prior to the existence of a contractual relationship. Hence, recruitment policy must conform to the non-discrimination principles.⁶⁶ Similarly, criteria for promotion at any workplace should be clearly and openly known.

Article 13(c) also requires transparency in dismissal. The Maputo Protocol does not define the phrase dismissal. Inspiration must therefore be drawn from other relevant sources such as the ILO Convention on Termination of Employment.⁶⁷ The ILO Convention on termination defines termination as termination at the initiative of the employer.⁶⁸ Employment shall not be terminated unless there is a valid reason. Valid reasons relate to the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.⁶⁹ Valid reasons may include but are not exclusive to unjustified absence from work. Race, colour, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin are not valid reasons for termination.⁷⁰ Perhaps no employer would overtly give any of these reasons as the basis for termination but rather, use other proxy reasons to mask the real valid reasons. In *RKB v Turkey*,⁷¹ the complainant left the workplace following threats and pressure exerted by the employer's agent, who then forced her to sign a document to the effect that she had been paid all her dues. The employer threatened the complainant, a married woman, that he would spread rumours that the complainant had been engaging in extra-marital relationships with other men. The complainant alleged violation of article 11(1)(a) and (d), in particular, the principle of equal treatment in the workplace following the termination of her employment. She also complained of gender-based discrimination by the employer.⁷²

62 ILO Report of the African Children's Committee (n 53) 271 para 5.

63 As above.

64 As above.

65 Article 13(c) of the Maputo Protocol.

66 Raday (n 38) 289.

67 Article 3 International Labour Organization (ILO), Convention Concerning Termination of Employment at the Initiative of the Employer, 22 June 1982, C158 (Termination of Employment Convention)

68 As above.

69 Termination of Employment Convention (n 67) art 4.

70 Termination of Employment Convention (n 67) art 5(a)-(e).

71 Communication 28/2010 *RKB v Turkey* CEDAW Committee (13 April 2012) UN Doc CEDAW/C/51/D/28/2010 (2012).

72 *RKB* (n 71) para 3.4.

The CEDAW Committee believed that the pressure exerted and the nature of the threat and harassment were made to the complainant because she was a married woman, and therefore constituted a violation of the principle of equal treatment.⁷³ The Committee stated that the former employer's treatment of the complainant in the context of the unlawful termination of her labour contract constituted gender-based discrimination under article 11, paragraphs 1(a) and (d), of CEDAW.⁷⁴

It is worth noting that an employee should be granted an opportunity to be heard before employment is terminated. Right to transparency in dismissal or termination of employment in article 13(c) implies the right to meaningful engagement throughout the termination process. In this regard, inspiration may be drawn from article 7 of the ILO Convention on termination of employment, which provides that employment should not be terminated before an employee is given a chance to defend herself, unless the employer cannot reasonably be expected to provide such opportunity in the specific circumstances.⁷⁵ Considering the ILO Conventions' clarity and explicit meaning of the concepts in article 13(c), the Maputo Protocol's textual clarity might have been enhanced by cross-reference to the ILO Conventions.

5.4 Combat and punish sexual harassment

The right to economic and social welfare rights is weakened or violated when women in the workplaces or in the recruitment process are subjected to sexual harassment. The CEDAW Committee notes that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.⁷⁶ Significantly, the provisions in article 13(c) recognise the right of women against sexual harassment in the workplace. The Maputo Protocol does not explicitly define the phrase sexual harassment. However, the meaning of sexual harassment can broadly be construed through the provisions of article 1(j) on violence against women. According to the Maputo Protocol, violence against women means

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war.⁷⁷

This definition is broad enough to include sexual harassment in the workplace. Moreover, inspiration may be drawn from CEDAW's General Recommendation 19, which defined sexual harassment along similar lines.⁷⁸

CEDAW's General Recommendation 19 was updated vide General Recommendation 35.⁷⁹ The update helps to enrich the understanding of 'sexual harassment' in article 13(c) by considering sexual harassment as a social problem rather than an individual woman problem. Moreover, the use of the phrase 'violence against women' may be considered in line with the broad context of gender-based violence against women in General Recommendation 35. This allows states to consider comprehensive

⁷³ *RKB* (n 71) para 8.9.

⁷⁴ As above.

⁷⁵ Termination of Employment Convention (n 67) art 7.

⁷⁶ CEDAW committee General Recommendation 19 on Violence against women, adopted at the 11th session (1992) para 17.

⁷⁷ Article 1(j) of the Maputo Protocol. See also African Commission on Human and Peoples' Rights, 'Guidelines on Combating Sexual Violence and Its Consequences in Africa', adopted on 22 May 2017 para 3.1.

⁷⁸ CEDAW Committee General Recommendation 19 (n 76) para 6.

⁷⁹ CEDAW Committee General Recommendation 35 on Gender-based violence against women, updating General Recommendation 19, adopted on 14 July 2017, CEDAW/C/GC/35.

responses including legislative, administrative, and other measures to address sexual harassment in workplaces.

In *Anna Belousova v Kazakhstan*,⁸⁰ the Committee found the director's treatment of the complainant, by demanding that she enters into a sexual relationship with him if she wished to continue to work at the school and refusing to extend her labour contract for the following school year, violated the complainant's rights to work and to equal treatment and constituted gender-based discrimination under articles 11(1)(a) and (f) of CEDAW.⁸¹

5.5 Right of women to choose an occupation

The right of women to choose their occupation broadly incorporates the right to resign from a job and join or choose another job at a different workplace. A similar right is incorporated in article 1 of the ILO Convention 122 on Employment Policy,⁸² article 6 of the ICESCR, article 15 of the African Charter, and article 11(1)(c) of CEDAW.

The African Commission, while elaborating on the right to work stated that the right to work includes the right to freely and voluntarily choose what work to accept.⁸³ The right also includes women's access to employment and the right to protection against deprivation of employment.⁸⁴ In its General Comment 18 the UN Committee on Economic Social and Cultural Rights (CESCR) concluded that the right to choose occupation incorporates the right of access to a system of protection guaranteeing each worker access to employment and implies the rights not to be unfairly deprived of employment.⁸⁵ The CEDAW Committee elaborates on women's freedom to choose their occupation in its General Recommendation 28. According to the CEDAW Committee, inherent to the principle of equality between men and women, or gender equality is the concept that all human beings are free to pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.⁸⁶

The right of women to choose their occupation is significant in that it enables them to choose any occupation, including traditionally considered male-dominated occupations. States may take various measures to enable girls and women to acquire skills and knowledge that will enable them to exercise and enjoy the right to choose their occupation. In this regard, the Beijing Declaration and Platform for Action⁸⁷ urges states to diversify vocational and technical training and improve access for and retention of girls and women in education and vocational training in STEM fields.⁸⁸ States should take positive measures to promote training for the full range of occupational choices, including the development of

80 Communication 45/2012 *Anna Belousova v Kazakhstan* CEDAW Committee (12 September 2012) CEDAW/C/61/D/45/2012 (2015).

81 *Belousova* (n 80) para 10.13.

82 International Labour Organization (ILO), Abolition of Forced Labour Convention, C105, 25 June 1957, C105 (Abolition of Forced Labour Convention).

83 Guidelines on the Implementation of Economic, Social and Cultural Rights (n 43) para 58. See also CESCR General Comment 18 (n 46) para 6.

84 CESCR General Comment 18 (n 46) para 6.

85 As above.

86 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 22.

87 Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

88 Beijing Platform (n 87) Strategic objective B.3 para 82(e).

multidisciplinary courses for science and mathematics teachers to sensitise them to the relevance of science and technology to women's lives.⁸⁹

This right also includes protection from employers' actions that would constrain the choice of employment.⁹⁰ The right of women to choose their occupation includes prohibition of forced labour. The CESCR noted in its General Comment 18 that the right to freely choose work implies not being forced in any way whatsoever to exercise or engage in employment. According to the ILO Convention on the abolition of forced labour, labour should not be used as a means of social discrimination.⁹¹

5.6 Right to protection of women working in the informal sector

In developing countries, 92 per cent of women workers are employed in the informal sector.⁹² Considering this substantial number, improving their work conditions will contribute to the overall development of their countries' economies, as well as to the countries' human development indicators.⁹³ High unemployment and lack of secure employment are causes that induce workers to seek employment in the informal sector of the economy.⁹⁴ 'An informal sector is a group of production units, which form part of the household sector as household enterprises, or unincorporated enterprises owned by households'.⁹⁵ It includes 'informal own-account enterprises' and 'enterprises of informal employers'.⁹⁶ The definition of the informal sector depends on the kind of workplace and duration of the operation of the enterprise.

Informal sector includes the agricultural sector, which engages most women in Africa.⁹⁷ Women make essential contributions to the agricultural and rural economies in all developing countries. Rural women often manage complex households and pursue multiple livelihood strategies. Their activities typically include producing crops, tending animals, processing and preparing food, working for wages in agricultural or other rural enterprises, collecting fuel and water, engaging in trade and marketing, caring for family members, and maintaining their homes.⁹⁸ Many of these activities are not defined as 'economically active employment' in national accounts but are essential to rural households' well-being.⁹⁹

Article 13(e) protects the rights of women working in the informal sector. Protection of women working in the informal sector requires the guarantee of various rights, including equal pay for work of equal value, social insurance, and other labour-related rights. Commenting on a similar right, the CEDAW Committee reiterated in its General Comment 16 that states are required to guarantee

89 As above para 82(g).

90 Article 13(d) of the Maputo Protocol.

91 Abolition of Forced Labour Convention (n 82) art 1.

92 WA Pallangyo 'The informal sector and the safety of female traders in Tanzania: a reflection of practices, policies, and legislation' *Wider Working Paper* 2021/160 (2021) United Nations University World Institute for Development Economics Research. The informal sector developed as a concept in the early 1970s through the World Employment Programme (WEP) Research Programme on Urban Unemployment. It was the comprehensive employment mission to Kenya in 1972 that coined the term informal sector. See PE Bangasser 'The ILO and the informal sector: an institutional history' *Employment Paper* 2000/9 at 2 & 8.

93 Pallangyo (n 92) 1.

94 CESCR General Comment 18 (n 46) para 10.

95 Resolution adopted by the International Conference of Labour Statisticians concerning statistics of employment in the informal sector adopted by the 15th International Conference of Labour Statisticians (January 1993).

96 Resolution concerning statistics of employment (n 95) para 6.

97 FAO 'The role of women in agriculture' (*ESA Working paper* 11-02) Environmental Research Institute <https://www.fao.org/3/am307e/am307e00.pdf> (accessed 18 May 2023).

98 As above.

99 FAO (n 97) 2.

payment, social security and social benefits for women working in family enterprises in rural and urban areas.¹⁰⁰ The right to freedom of association, collective bargaining and elimination of all forms of forced labour or compulsory labour for women working in the informal sector is a fundamental human right. The efforts to improve the socio-economic conditions of women cannot be fully achieved until these rights are recognised and protected.

5.7 Right to social insurance

The Maputo Protocol protects the right to social insurance in article 13(f). The right to social insurance is vital to the economic and social welfare rights for women working in the informal sector.¹⁰¹ The emphasis on women working in the informal sector helps to empower women living in abject poverty to enjoy this right. In its General Comment 19 on the right to social security, the CESCR elaborates the right to social security to include social insurance.¹⁰² Social insurance is a contributory scheme involving compulsory contributions from beneficiaries, employers, and sometimes, the state in conjunction with the payment of benefits and administrative expenses from a common fund.¹⁰³ In *Natalia Ciobanu v Republic of Moldova* the CEDAW Committee stated that the right to social security, including social insurance obliges states to ensure right's owners enjoy, at the very least, minimum essential levels of that right. It is an obligation of states to ensure equality of access to social security schemes including old-age benefits and other assistance necessary for the elderly, in particular those who do not have insurance-based pension or pension linked to a source of income. Non-contributory schemes must consider women living in poverty with no contributory pensions, who also have childcare responsibilities.¹⁰⁴

The right to social insurance in article 13(f) is vital based on its potential to reduce risks relating to loss of income, to sickness, disability and other risks that women may encounter. According to the ILO, social insurance encompasses a wide range of functions, including minimising risks, compensating or partially replacing income when workers have to face the risks (illness, loss of a job or working capacity), and reducing pressure on the social assistance system.¹⁰⁵ This right is important in ensuring that women live a dignified life during and beyond the peak of their economically productive years. This right is also important for categories of women such as the elderly.¹⁰⁶ The CEDAW Committee held in *Ciobanu* that the right to social security, including social insurance, is of central importance in guaranteeing human dignity.¹⁰⁷

Social insurance should be construed holistically to include the right to equal access to benefits such as medical care, sickness benefit, maternity benefit, disability benefit, old-age benefit, survivors' benefit, employment injury benefit and unemployment benefit in respect of occupational injuries and diseases, and family benefit.¹⁰⁸ The CESCR notes that social security (including social insurance) encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income.¹⁰⁹ The right of women to social insurance

100 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 16: on unpaid women workers in rural and urban family enterprises, UN Doc A/46/38 at 1 (1993) para c.

101 Article 13(f) of the Maputo Protocol.

102 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 19: The right to social security (art 9 of the Covenant), 4 February 2008, E/C.12/GC/19 (CESCR General Comment 19) para 1.

103 CESCR General Comment 19 (n 102) para 4(a).

104 Communication 104/2016 *Natalia Ciobanu v Republic of Moldova* (4 November 2019) UN Doc CEDAW/C/4/D/104/201.

105 ILSA & ILO 'Social insurance: enhancing social security to everyone' (2014) 3 *Policy Brief*.

106 CESCR General Comment 19 (n 102) para 1.

107 *Ciobanu* (n 104) para 7.6.

108 CESCR General Comment 19 (n 102) para 2.

109 As above.

encompasses essential elements, including availability, accessibility, acceptability, and adequacy. Accessibility encompasses coverage, eligibility, affordability, participation and information, and physical access. Adequacy requires the social insurance benefits to be of a level that prevents women from falling below an adequate standard of living.¹¹⁰ The ability of women in the informal sector to contribute should be considered in developing social insurance schemes. In *Ciobanu* the CEDAW Committee urged states to review restrictions on access to social security schemes to ensure that they do not discriminate against women in law or in practice.¹¹¹ In particular, states must bear in mind that, due to the persistence of stereotypes and other structural causes, women spend much more time than men in unpaid work, including providing care for children and family members with disabilities. States should, therefore, take steps to eliminate the factors that prevent women from making equal contribution to social security schemes that link benefits with contributions or ensure that schemes take account of such factors in the design of benefit formulas, for example by considering time spent providing care for children, family members with disabilities, and adult dependants.¹¹²

5.8 Right to recognition of the economic value of women's work in the home

Article 13(h) establishes the right to recognition of the economic value of women's work in the home. This right addresses home-based care work or family labour, which is often unremunerated. Unpaid care work is both an important aspect of economic activity and an indispensable factor contributing to the well-being of individuals, their families and societies.¹¹³ Work in the home includes, but is not exclusive to, activities such as cooking, cleaning and caring for children, the ill and the elderly.¹¹⁴ Despite its importance for well-being, unpaid care work is commonly left out of policy agendas due to a common misperception that it is a matter for the private sphere and therefore, irrelevant for policy design. Neglecting unpaid care work leads to skewed policies on account of incorrect inferences about levels and changes in individuals' well-being and the value of time, which in turn limit policy effectiveness across a range of socio-economic areas, notably gender inequalities in employment and other empowerment areas.¹¹⁵

Article 13(h) requires that women's work in the home be valued. In its General Recommendation 17 the CEDAW Committee notes that women's domestic activities contribute to each country's development.¹¹⁶ The obligation is placed on states to take necessary measures to give effect to this right. The phrase 'necessary measures' is broad and encompasses a wide range of measures. It requires states to take legislative, administrative, and policy measures to give effect to this right. States should adopt laws and policies that guarantee protection of women's work in the home. The laws should prohibit discrimination against women working in the home. In its General Recommendation 17 the CEDAW Committee in relation to unremunerated domestic activities urges states to encourage and support research and experimental studies to measure and value the unremunerated domestic activities of women. Furthermore, states should take steps to quantify and include the unremunerated domestic activities of women in the gross national product.¹¹⁷

110 See also CESCR General Comment 19 (n 102) paras 11-27.

111 *Ciobanu* (n 104) para 7.10.

112 As above.

113 G Ferrant et al 'Unpaid care work: the missing link in the analysis of gender gaps in labour outcomes' (2014) OECD Development Centre 1.

114 Ferrant (n 113) 1.

115 As above.

116 Preamble, CEDAW General Recommendation 17: Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the Gross National Product, adopted at the 10th Session (1991) A/46/38 para 4.

117 CEDAW Committee General Recommendation 17 (n 116) paras (a) & (b).

5.9 Right to adequate maternity leave

Article 13(i) frames this right as applicable to both the private and public sectors.¹¹⁸ This includes self-employed women.¹¹⁹ Drawing from the Maternity Protection Convention,¹²⁰ this right should be construed broadly in a manner that includes time between the presumed date of childbirth, the actual date, and the post-natal leave.

A woman's right to adequate pre- and post-natal maternity leave broadly includes rights to benefits such as cash and medical care. It also includes protection against discrimination and termination of employment during her pregnancy or following her return to work. The CESCR stated in its General Comment 18 that pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment.¹²¹ In the context of socio-economic rights in the ICESCR the CESCR stated in its General Comment 20 that the refusal to hire a woman, on the ground that she might become pregnant, constitutes discrimination.

The CEDAW Committee has had occasion to interpret what adequate maternity protection means. *Elisabeth de Blok et al v The Netherlands* involved six self-employed women who gave birth between June 2005 and March 2006. They argued that repeal of a public incapacity insurance scheme left them with no protection against loss of income on account of maternity leave, and that this amounted to a violation of the Netherlands' obligation under article 11(2)(b) of CEDAW. The CEDAW Committee affirmed that article 11(2)(b) is also applicable to self-employed women, and therefore by failing to provide an alternative maternity leave scheme in the period in question, the state had failed to discharge its obligation to take all appropriate measures to eliminate discrimination under article 11 of CEDAW.¹²²

5.10 Right to equal application of taxation laws

The right to equal application of taxation laws in article 13(j) of the Maputo Protocol should be read in conjunction with provisions on the elimination of discrimination in article 2 of the Maputo Protocol. The obligation to prohibit discrimination against women and to ensure substantive equality applies to all government policies including taxation.¹²³

Historically, tax laws are one of most important instruments for governments with redistributive ambitions. However, tax systems and fiscal policy decisions may affect men and women differently. The persisting gender differences in rates of employment, gender gaps in unpaid care work, income, old-age security, poverty and wealth are all closely linked to the allocative and distributional outcome of tax regulations.¹²⁴ Women experience uneven tax burdens compared to men. They spend much of their income on value-added tax (VAT)/consumption-taxed goods such as groceries and other household goods. Tax reliefs do not generally cover these basic goods. Tax policies incorporate discriminatory social norms and gender stereotypes that limit women's progression towards equality.¹²⁵ Considering

118 Article 13(i) of the Maputo Protocol.

119 Communication 36/2012 *Elisabeth de Blok et al v The Netherlands* CEDAW Committee (17 February 2014) UN Doc CEDAW/C/57/D/36/2012.

120 ILO Convention 183 on Maternity Protection 2000 (C183).

121 CESCR General Comment 18 (n 46) para 13.

122 *Elisabeth* (n 119) paras 8.4 & 8.9.

123 Å Gunnarsson 'Gender equality and taxation: international perspectives' (2021) an Open Access Article distributed under the terms of the Creative Commons CC-BY4.0 9.

124 Gunnarsson (n 123) 2.

125 PeaceWomen *Why is tax a feminist issue?* <http://peacewomen.org/resource/why-tax-feminist-issue> (accessed 16 May 2023).

the explicit and implicit negative impacts of tax policies on women, including impact on unpaid care, paid work, and unpaid labour, states should progressively review such policies to eliminate gender inequalities.¹²⁶

The right to equal application of taxation laws to women and men requires tax systems to be applied in a manner that guarantees gender equality for all categories of workers. Equally, tax systems should not adversely affect women who are mostly low-income earners. Gender bias may exist explicitly in the tax laws or implicitly through the differential impact of the tax on women and men.¹²⁷ In Africa taxes are mostly generated through direct and indirect taxes. The most common direct taxes are personal income tax, corporate income tax and wealth or inheritance taxes.¹²⁸ Gender equality tax issues do not arise with respect to direct income taxes, but indirect taxes. VAT and other goods and services taxes have been of central importance for resource mobilisation in the majority of low- and medium-income countries, on account of their relatively lower administrative cost. The downside is that since they apply a fixed rate regardless of one's income, they are regressive rather than progressive. As women are over-represented among the poorest, the regressive profile is not only a low-income issue, but also a gender issue.¹²⁹

Policymakers usually do not consider gender inequalities when designing tax laws, even though many aspects of taxation substantially affect gender-related socio-economic inequalities.¹³⁰ Assessments of gender equality in taxation often distinguish between explicit and implicit gender bias. Explicit forms refer to tax provisions that explicitly treat men and women differently. Implicit forms of gender bias describe tax regulations that are written in gender-neutral terms, but affect men and women differently due to socio-economic inequalities or gender-specific roles in the economy.¹³¹ Article 13(j) obliges states to monitor the impact of tax policies and laws and adopt them to ensure substantive equality for women.

5.11 Right to the same allowances and entitlements

The obligation to prohibit discrimination in article 2 and ensure substantive equality applies to salaried women too. The protection of the salaried women's allowances and entitlements is significant because employed women have been experiencing differential treatment compared to their male counterparts in workplaces. Unlike article 13(h) and article 13(e) on women working in the home and in the informal sector respectively, the aim of article 13(k) is to address discrimination against women working in paid, structured employment outside the home, whether formal or informal.

Article 13(k) resonates with the provisions relating to equal pay for work of equal value and the right to remuneration. As noted above, remuneration includes the ordinary wage or salary and any other additional emoluments payable directly or indirectly to the worker arising out of the worker's employment.¹³² Equality in allowances requires such allowances to be established in a transparent

126 A submission of the women's working group on financing for development to the *Report of the Secretary-General to the Economic and Social Council on options for further strengthening the work and operational capacity of the African Committee of Experts on International Cooperation in Tax Matters 2* https://www.un.org/esa/ffd/wp-content/uploads/2015/03/ICTM2015_wwg.pdf (accessed 16 May 2023).

127 K Barnett & C Grown *Gender impacts of government revenue collection: the case of taxation* (2004) 9. This report is part of the Commonwealth Economic Paper Series published by the Economic Affairs Division of the Commonwealth Secretariat. <https://gender-financing.unwomen.org> (accessed 16 May 2023).

128 Barnett (n 127).

129 Gunnarsson (n 123) 7.

130 As above.

131 As above.

132 Article 1(a) of the Equal Remuneration Convention.

manner and paid without discrimination based on sex. These allowances may include but are not exclusive to hardship allowances for workers working in hazardous/dangerous workplaces such as in mines. Moreover, article 13(k) broadly obliges states to establish a wide range of allowances and entitlements for salaried women including maternity benefits, leave and other social benefits and allowances.

5.12 Parents' responsibility for the upbringing and development of children

In most cultures, women are mothers both biologically and socially- they are the ones in charge of childcare.¹³³ The CEDAW Committee expressed its concerns over the persistence of skewed deep-rooted traditional attitudes and stereotyping of women as mothers and caregivers and men as breadwinners only.¹³⁴

The provisions of article 13(l) recognise the responsibility of both parents for the upbringing and development of children, similar to article 6(i) of the Maputo Protocol and article 5(b) of CEDAW. Article 13(l) is significant in that it aims to abolish discriminatory attitudes and practices that treat women as only (or the only) caregivers, advocating for equality of parental roles. Writing on the corresponding provision in CEDAW (article 5(b)), Holtmaat notes that article 5(b) concerns the stereotypical assignment of sole or major responsibility for childcare to women. The provisions on common responsibilities of men and women in the upbringing and development of their children elaborate parental gender roles. They incorporate the obligation to modify gender stereotypes in parenting.¹³⁵ Vesting the responsibility on both parents is vital in that it affords women an opportunity to engage in paid work and other opportunities for their economic advancement. The provisions allow parents – male or female – to choose to participate in the labour market freely.¹³⁶ The UN Committee on the Rights of the Child stated in its General Comment 7 that states parties should respect the primacy of parents to their children.¹³⁷

The right in article 13(l) should be construed to include states' measures to avail men opportunity and time to effectively participate in raising their children and taking up family responsibilities. In circumstances where people are engaged in multiple roles, such as employees and parents, government policies such as paternity leave facilitate parents' choice to spend more time with their children.¹³⁸ Having men participating fully in the upbringing of children offers women opportunities to engage in the workforce.

5.13 Right of women against exploitation and abuse in advertising and pornography

Article 13(m) of the Maputo Protocol obliges states parties to take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography. States are therefore required to adopt legislation, regulations and policies that prohibit exploitation and abuse of women in order to combat, punish and criminalise exploitation and abuse of women in advertising and

133 R Holtmaat 'Article 5 CEDAW' in MA Freeman et al (eds) *UN Convention on Elimination of All Forms of Discrimination against Women: a commentary* (2012) 148.

134 Concluding Observations on the 6th Periodic Report of Austria, Committee on the Elimination of Discrimination against Women (20 February 2007) UN Doc CEDAW/C/AUT/CO/6 (2007) para 17.

135 Holtmaat (n 134) 142-143.

136 Raday (n 39) 301.

137 UN Committee on the Rights of the Child General Comment 7 on Implementing child rights in early childhood (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 (2006) para 18.

138 K Feldman & BK Gran 'Is what is best for dads best for families? Paternity leave policies and equity across forty-four nations' (2016) XLIII *Journal of Sociology & Social Welfare* 95-96. See also L Addati et al *Maternity and paternity at work: law and practice across the world* (2014) 52.

pornography. Commenting on the situation in Germany, the CEDAW Committee stated its concerns about the persistent depiction of women as sex objects in media and in advertising. It recommended that states adopt policies and strengthen programmes including awareness-raising and educational campaigns directed at women and men and media and advertising agencies. These policies and programmes would ensure the elimination of stereotypes to project a positive image of women and make efforts to change men's and society's perception of women as sex objects.¹³⁹

6 Nature and scope of states' obligations

6.1 Obligations to adopt and enforce legislative and other measures

Article 13 of the Maputo Protocol broadly formulates states' obligations to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. For states to give effect to economic and social welfare rights, domestic legislation and effective enforcement of such legislation is vital.¹⁴⁰

The obligation to legislate implies that states must pass legislation consistent with the economic and social welfare rights protected in the Maputo Protocol. In addition, this obligation requires states to amend all existing legislation that is inconsistent with the economic and social welfare rights recognised in the Maputo Protocol. In *Lawyers for Human Rights v Swaziland (Swaziland)*,¹⁴¹ the African Commission (while deciding on the obligation to adopt legislative measures under the African Charter) held that a state's failure to take steps to ensure the conformity of its domestic laws with the provisions of the African Charter amounted to a violation of the obligation to adopt legislative measures.¹⁴²

Additionally, the obligation to legislate indicates that the adopted domestic legislation should be able to guarantee substantive economic and social welfare rights. Laws should provide for effective enforcement mechanisms and means that can ensure governmental accountability. Legislation should also provide for effective and adequate redress and remedy for violations of these rights. The African Commission states in its Guidelines on the Implementation of Economic, Social and Cultural Rights that the adoption of legislative or other measures requires states to protect socio-economic rights by guaranteeing appropriate administrative, as well as judicial remedies, to redress the violations of such rights.¹⁴³ The CESCR stated in its General Comment 9 that for states to justify their failure to provide remedies, they must show that the remedies are either not appropriate or are unnecessary.¹⁴⁴

The obligation to adopt and enforce measures in article 13 does not limit states exclusively to legislative measures. States are also required to adopt administrative, financial, educational, and social measures. This broad and flexible formulation allows states to consider a variety of necessary measures that can facilitate the enjoyment of economic and social welfare rights. This formulation implies that legislative measures are necessary but insufficient for fully realising human rights.¹⁴⁵

139 Report of the Committee on the Elimination of Discrimination against Women CO Germany A/59/38 31st Session (2004) para 384.

140 See also CESCR, General Comment 3 on The nature of States parties obligations (art 2, para 1) adopted at the 5th session of the Committee on Economic, Social and Cultural Rights, 14 December 1990) UN Doc E/1991/23 para 3.

141 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

142 *Swaziland* (n 141) para 51. See also I Brownlie *Principles of public international law* 6 ed (2003) 35.

143 Guidelines on the Implementation of Economic, Social and Cultural Rights (n 43) para 2.

144 General Comment 9: The domestic application of the Covenant, 3 December 1998, UN Doc E/C.12/1998/24 para 3.

145 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2013) 45.

6.2 States' obligations to protect and promote

The formulation of states' obligations in article 13 incorporates the obligations to protect and promote.¹⁴⁶ The African Commission held in *Social and Economic Rights Action Centre (SERAC) v Nigeria (SERAC)*¹⁴⁷ that the state is obliged to protect right-holders against third-party violations through legislation and effective remedies. This is very much intertwined with the tertiary obligation of the state to promote the enjoyment of all human rights. The last layer of obligation requires the state to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is a positive expectation that the state will deploy its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote. It could consist in setting up a national health insurance scheme that does not depend on employment contributions. In this regard, women working in the informal sector or in unpaid care work will be able to benefit.

States are therefore required to respect the existing rights to employment opportunities, freedom of association through trade unions, maternity rights and all related employment rights. States must protect women's economic and social welfare rights against interference from their employers, family members, political, economic, and social institutions. States also have an obligation to promote social insurance and social security policies.

6.3 Obligation to ensure equality and non-discrimination

Article 13 should be read in conjunction with articles 2 and 8 of the Maputo Protocol on non-discrimination and access to justice and equality before the law respectively. It implies further that states are required to protect women's economic and social welfare rights against discriminatory practices by non-state actors. For example, non-state actors (such as employers) may conduct discriminatory practices in different labour circumstances, such as recruitment processes, working conditions, training opportunities, remuneration, promotion, termination, and retirement.¹⁴⁸ Social attitudes and practices may subtly circumscribe women's employment and business opportunities. States' measures must therefore address both direct and indirect discrimination. The latter can occur even in the absence of intent to discriminate.¹⁴⁹

The obligation of non-discrimination does not rule out special measures to correct existing inequalities in women's enjoyment of economic and social welfare rights. Such measures are valid provided they are 'reasonable, objective and proportional' to remedy *de facto* discrimination.¹⁵⁰

7 Implementation

States have been making efforts to implement article 13 of the Maputo Protocol through legislative and other measures. Gender policies have been developed in almost all countries, resulting in legislative and policy reforms.¹⁵¹ For example, Rwanda enacted legislation that guarantees women

146 See also the *Updated study on the right to food* submitted by A Eide in accordance with Sub-Commission Decision 1998/106 E/CN.4/Sub.2/1999/12 paras 52-53.

147 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 44.

148 D Kinley & J Tadaki 'From talk to walk: the emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 977.

149 IT Winkler *The Human right to water: significance, legal status and implications for water allocation* 112-113.

150 CESCR General Comment 20 (n 28) para 9.

151 Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa issued by Justice Lucy Asuagbor Commissioner, Special Rapporteur on Rights of Women in Africa (African Commission on Human and Peoples' Rights) issued at the 60th Meeting – Commission on the Status of Women 18 March 2016 New York at 3 & 12.

equal rights with men on land access, ownership, and utilisation. In 2009 Rwanda enacted a law on equal opportunities and pay for women and men, and prohibition of sexual harassment in the work place.¹⁵² The African Commission's Concluding Observations on Rwanda's initial report commended Rwanda for this development.¹⁵³ In its Concluding Observations on Burkina Faso's Combined Periodic Report the African Commission commended Burkina Faso for adopting labour law on equality of access of employment between men and women.¹⁵⁴ Correspondingly, the Democratic Republic of the Congo (DRC) has enacted labour legislation protecting workers in the informal sector, which employs more women than men.¹⁵⁵ It also prohibits discrimination against pregnant women in workplaces, in recruitment processes and with respect to maternity benefits.¹⁵⁶

In Namibia, the Labour Act makes explicit provision for maternity benefits.¹⁵⁷ In addition to laws governing equality of access to employment between men and women,¹⁵⁸ Namibia has adopted a National Employment Policy guiding the government to achieve decent employment for men and women.¹⁵⁹ The African Commission commended South Africa for enacting the Employment Equity Amendment Act 47 of 2013 entrenching the concept of equal pay for work of equal value.¹⁶⁰ However, the Commission was concerned about the high level of unemployment among women, and required South Africa to adopt appropriate measures to correct the situation.¹⁶¹ In Sierra Leone, strides have been made in ensuring and guaranteeing women's rights to work, including paid maternity leave, social security benefits, and guarantees against dismissal for working mothers during a reasonable period before and after childbirth.¹⁶²

Despite the strides made there still remain areas of concern. The African Commission was concerned with the lack of current statistical data regarding the employment of women in public institutions at community and national levels in Angola.¹⁶³ It recommended that Angola adopt legislation, policies, and plans to give effect to the provisions of the Maputo Protocol, including article 13.¹⁶⁴ The African Commission was also alarmed about Eswatini's delay in adopting legislation on employment.¹⁶⁵

The CEDAW Committee has had comparable Concluding Observations on African states' reports regarding the implementation of the corresponding provision in CEDAW (article 11). It

152 Status of implementation (n 151) 5.

153 Concluding Observations and Recommendations on the combined 11th, 12th and 13th Periodic Report of the Republic of Rwanda on the implementation of the African Charter on Human and Peoples' Rights 2009-2016 and Initial Report under the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 61st ordinary session (1-15 November 2017) Banjul, The Gambia para 63.

154 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 38(vi).

155 Democratic Republic of the Congo combined 11th, 12th and 13th Periodic Reports 2008-2015 on the African Charter and Initial and 1st, 2nd and 3rd Periodic Report on the Maputo Protocol para 252 (Combined Report of the DRC).

156 Combined Report of the DRC (n 155) para 253.

157 Status of implementation report (n 151) 9.

158 Namibia's Initial Report on the Implementation of the Maputo Protocol 2015 para 43.

159 Namibia's 2nd Report under the Maputo Protocol 2020 para 25(1).

160 2nd Periodic Report of South Africa 2003-2014 adopted at the 58th ordinary session (6-20 April 2016) paras 10-11.

161 African Commission Concluding Observations South Africa 2016 (n 160) paras 33(vii) & 47(iv).

162 Status of implementation report (n 151) 9.

163 Concluding Observations on the Cumulative Periodic Reports (2nd, 3rd, 4th and 5th) of the Republic of Angola, 12th extraordinary session, 30 July-4 August 2012 para 31.

164 Concluding Observations on Angola (n 164) para 41(IV).

165 Concluding Observations on the 1st to 9th Periodic Reports of Eswatini 2001-2020, adopted at the 70th ordinary session (23 February-9 March 2022) para 54(iv).

applauded Rwanda on its 2009 legislation prohibiting discrimination against women in employment and prohibition of sexual harassment against women in workplaces. Rwanda was also applauded for including equal opportunities in employment and equal pay for work of equal value in its legislation. However, the CEDAW Committee was uneasy with the high unemployment rates, persistence of sexual harassment in workplaces, and discrimination in access to employment including low-paid agricultural work and informal sectors staffed largely by women.¹⁶⁶ Tanzania's lack of implementation of the principle of equal pay for work of equal value and tenacity of the wage gap between men and women was also a concern to the CEDAW Committee.¹⁶⁷

8 Conclusion

Most of Africa's women live in abject poverty and experience socio-economic hardship in an absolute sense and relative to their male counterparts. Limited employment opportunities contribute immensely to women's poverty and dire socio-economic conditions. Efforts to empower Africa's women necessitated the inclusion of economic and social welfare rights in the Maputo Protocol. In this regard, the drafters included in article 13 of the Maputo Protocol the concept of substantive equality as a vital tool for women's enjoyment of their economic and social welfare rights. The drafters of article 13 then integrated substantive equality into the myriad aspects of economic and social empowerment, focusing on equal access to formal and informal employment opportunities for women.

The drafters' entrenchment of the concomitant obligations that enable states to realise these rights are relevant to the right to economic and social welfare rights. The states' implementation highlighted in this chapter demonstrates in brief states' efforts, including the adoption of legislative measures, to realise economic and social welfare rights in the Maputo Protocol. However, there remains a mismatch between laws protecting economic and social welfare rights and the reality of women's socio-economic conditions. The substantive equality envisaged by article 13 has not yet been attained.

Finally, considering its relevance to Africa's socio-economic conditions, it is unfortunate that no case law was developed from article 13 of the Maputo Protocol. Only case law of the African Commission on rights similar to economic and social welfare rights has been used to elaborate on the rights in article 13. The non-existence of case law around article 13 is indeed a matter of concern. The invisibility of these rights in the decisions and judgments of the treaty bodies set up to protect women's rights on the African continent is glaring.¹⁶⁸

There is, therefore, a need for awareness that will enable litigation before the African Court and advisory opinions before the African Commission on violations of article 13. Non-state actors have a huge role to play in the protection of the rights in article 13. Private employers should strive to protect economic and social welfare rights. Moreover, NGOs have a huge role to play in litigating economic and social welfare rights. The development of the case law around article 13 requires the vibrant participation of NGOs, similar to NGOs' efforts invested in developing the African Charter's socio-economic rights case law. This way, the object and purpose of economic and social welfare rights in article 13 will be advanced to transform Africa's women's socio-economic conditions effectively.

166 Concluding Observations on the Combined 7th to 9th Periodic Report of Rwanda, Committee on Elimination of Discrimination against Women (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 34.

167 Concluding Observations on the Combined 7th to 9th Periodic Reports of the United Republic of Tanzania, Committee on the Elimination of Discrimination against Women (9 March 2016) UN Doc CEDAW/C/TZA/CO/7-8 (2016) paras 32-33.

168 A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: the effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 323.