

Article 2

Elimination of discrimination against women

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1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
- (a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
 - (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
 - (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
 - (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
 - (e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.
2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped for women and men.

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1 Introduction

Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is at the heart of the Maputo Protocol and operationalises it. It is essential to the spirit of the Protocol, as all other provisions rest on the goal of eliminating discrimination against women. Elimination of discrimination confronts a long history of exclusion based on gender. With women still lagging behind in all spheres of life compared to their male counterparts, the need

to eliminate discrimination against women cannot be overemphasised. As detailed in amongst other chapters 7, 8, 9 and 23 of this Commentary, women continue to endure discriminatory practices such as widow inheritance, female genital mutilation (FGM), forced sterilisation, forced marriage and child marriage, with poor women and girls in rural areas being on the extreme end of the vulnerability continuum.¹

Economically, as further detailed in chapter 15, women are also still largely excluded.² Disparities between men and women regarding access to economic resources such as land and loans continue to hinder women's participation in economic activities in Africa. For example, while women constitute about 40 per cent of active labour in the agricultural sector, their access to agricultural resources remains limited.³ In addition, the wage gap between men and women in Africa remains significantly wide, with women often disadvantaged by factors including lower levels of education.⁴ As analysed in chapter 11, discrimination against women continues in the political arena.⁵ Despite progress in some African countries over the past years, women remain significantly underrepresented in executive, legislative, judicial, and other arenas.⁶ Conclusively, discrimination against women remains an issue of concern on the African continent.

Prohibition of discrimination on the ground of sex is a common provision in international human rights law. Article 2 of the African Charter on Human and Peoples' Rights (African Charter) prohibits discrimination based on sex. Article 18(3) of the African Charter moreover explicitly refers to the 'elimination of every discrimination against women'. The African Commission has occasionally found violations of articles 2 and 18(3) of the African Charter in the communications before it, thus providing clarity to the scope and nature of the obligation to eliminate discrimination against women.⁷ These provisions are referenced in the Preamble to the Maputo Protocol, as discussed in chapter 2, suggesting that they constitute part of the framework to elaborate a more specific treaty on eliminating

1 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children', <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet23en.pdf> (accessed 6 April 2023); MJ Maluleke, 'Culture, tradition, custom, law and gender equality' (2012) 15 *Potchefstroom Electronic Law Journal* 2-22; M Ssenyonjo 'Culture and the human rights of women in Africa: between light and shadow' (2007) 51 *Journal of African Law* 39-67; N Wadesango et al 'Violation of women's rights by harmful traditional practices' (2011) 13 *The Anthropologist* 121-129. See also S Nabaneh 'Article 5', C Musembi 'Article 6', C Musembi 'Article 7' and Z Nampewo 'Article 21' in this volume.

2 See A Amin 'Article 13' in this volume.

3 The World Bank, 'Women, agriculture and work in Africa' (2022) <https://www.worldbank.org/en/programs/africa-myths-and-facts/publication/women-agriculture-and-work-in-africa> (accessed 17 May 2023); The World Bank 'Empower HER to address food and nutrition security in Africa' 13 October 2022, <https://blogs.worldbank.org/voices/empower-her-address-food-and-nutrition-security-africa> (accessed 11 April 2023); A Palacios-Lopez et al 'How much of the labour in African agriculture is provided by women?' (2017) 67 *Food Policy* 52-63.

4 International Labour Organisation (ILO) *Understanding the gender pay gap* (2020) 1-8. The ILO estimates that on average, women are paid 20 per cent less than men globally; A Bosch & S Barit 'Gender pay transparency mechanisms: Future directions for South Africa' (2020) 116 *South African Journal of Science* 1-6. See also A Amin 'Article 13' sec 5.2 in this volume.

5 See T Mkali & A Rudman 'Article 9' in this volume.

6 OO Ilesanmi 'Women's visibility in decision making processes in Africa – Progress, challenges, and way forward' (2018) *Frontiers in Sociology* <https://doi.org/10.3389/fsoc.2018.00038> (accessed 20 May 2023); DH Madsen (ed) *Gendered institutions and women's political representation in Africa* (2021) 1-127.

7 See eg, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/06 African Commission on Human and Peoples' Rights, Combined 32 and 33 Annual Activity Report (2013) para 119. This was a communication against Egypt in respect of acts of gender-based violence committed by state actors and non-state actors under the control of the state actors. These acts went unpunished. In finding a violation of both arts 2 & 18(3) of the African Charter, the African Commission noted, among others, that '[t]he non-discrimination principle generally ensures equal treatment of an individual or group of persons irrespective of their particular characteristics, and the non-discrimination principle within the context of Article 2 and 18(3) of the African Charter ensures the protection from discrimination against women by States Parties to the African Charter'.

all discrimination against women.⁸ Various African Union (AU) and United Nations (UN) treaties also recognise the principle of non-discrimination.⁹ However, article 2 of CEDAW is the treaty provision that most closely mirrors article 2 of the Maputo Protocol.

The discussion on article 2 commences, in section 2 of this chapter, with a brief analysis of the drafting history of the provision. Section 3 then proceeds to discuss the concepts, nature, and scope of state obligations resting on the concepts and definition of discrimination set out in chapter 3.¹⁰ This discussion is followed by an analysis of the national implementation of article 2 in section 4. This is done with reference to state reports and the national legal and policy framework. Selected decisions of national courts are also discussed to assess judicial enforcement of the rights under this article. In section 5, the chapter concludes by highlighting the impact of constitutional, legislative and policy reforms and what remains to be done.

2 Drafting history

Article 2 can be traced back to the Nouakchott Draft.¹¹ This draft has two provisions, articles 3 and 4, with phrasing similar to article 2 of the Maputo Protocol. Article 3 of the Nouakchott Draft provides that ‘in order to eliminate effectively all forms of discrimination against women, state parties to [this] protocol shall take all necessary measures to integrate a gender perspective in their policy decisions, legislation and development plans’. A reading of article 3 of the Nouakchott Draft reveals that just like article 2 of the Maputo Protocol, the emphasis of the provision is the elimination of discrimination against women. However, it is evident that in the Nouakchott Draft, the means for eliminating discrimination were limited to integrating gender perspectives in laws, policies, and plans.

Article 4 of the Nouakchott Draft stipulates that,

‘[i]n order to attain equality between the sexes and redress the gender imbalance, State Parties to this Protocol shall take specific positive action in those areas where discrimination against women in law and in fact continues to exist’.

The crux of article 4 is eliminating discrimination against women, despite its use of different terminology – to ‘attain equality’ and ‘redress the gender imbalance’. However, the means through which to attain equality emphasises the role of the media. Article 4 indicates that ‘State Parties shall promote a positive image of women in the media in order to ensure that women are accorded their rightful place in society and to enhance their dignity’. In this regard, states are obligated to ‘[e]liminate stereotypes in the treatment of women by the media’. Furthermore, article 2(2) of the Maputo Protocol, which mandates states to modify the social and cultural patterns of conduct of women and men, can be traced back to article 4 of the Nouakchott Draft, which provides for the alteration of the ‘socio-cultural model of behaviours for women and men’.

8 See A Rudman ‘Preamble’ secs 4.2 & 4.3 in this volume.

9 See eg African Charter art 2; African Charter on the Rights and Welfare of the Child (African Children’s Charter) art 2; UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) art 2; UN Convention on the Rights of the Child (CRC) art 2; UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) art 2; UN International Covenant on Economic, Social and Cultural Rights (ICESCR) art 2; UN International Covenant on Civil and Political Rights (ICCPR); UN Convention on Protection of the Rights of All Migrant Workers and Members of their Families (CRMW) art 7.

10 See M Kamunyu ‘Article 1’ in this volume.

11 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).

The Kigali Draft¹² followed the Nouakchott Draft, which made the goal of eliminating discrimination against women more explicit. A subheading was introduced to this provision – ‘Discrimination against women’, under which article 4 of the Kigali Draft provided as follows:

State parties to this Protocol shall undertake to:

- (a) Take specific positive action in those areas where discrimination against women in law and in fact continues to exist;
- (b) Modify through special measures such as public education, the social and cultural patterns of conduct of men and women, with a view to achieving elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or the stereotyped roles for men and women.

In the Kigali Draft, the terms ‘elimination of’ were not part of the heading of the article. It also discarded the explicit mention of the media as the main channel through which discrimination against women would be addressed.

The Final Draft of the Maputo Protocol,¹³ which was presented to the Meetings of Experts, Ministers, and the NGO Forum, included major changes to the provision on ‘Discrimination against women’ as contained in the Kigali Draft. It set out four obligations critical to the elimination of discrimination against women.¹⁴ First, states are to include the principle of equality between women and men in their national constitutions and other legislative enactments.¹⁵ Second, states should enact and implement legislation geared towards eliminating harmful practices.¹⁶ Third, states must integrate gender perspectives into their law, policies, plans and activities.¹⁷ The fourth obligation on taking positive action in areas where discrimination against women exists is similar to the first obligation listed in the Kigali Draft.¹⁸ Another major change in the Final Draft was the incorporation of specific actions states must take to modify social and cultural patterns of men’s and women’s conduct.¹⁹ In this regard, public education and support of initiatives directed at eliminating discrimination against women were listed as key actions to be taken by states. This is arguably an outcome of the merger of the Kigali Draft with the OAU Convention on Harmful Practices.²⁰

Based on the Final Draft, the Meeting of Experts held in 2001 provided further input.²¹ Notably, it was proposed that the words ‘through appropriate legislative, institutional and other measures’ be added to paragraph 1 of article 2. The terms ‘if not already’ done were proposed for inclusion in paragraph 1(a), thus, taking cognisance of the fact that some states were progressive enough to already have

12 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).

13 Draft Protocol to the African Charter on Human and Peoples’ Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in 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* 53-63.

14 As above.

15 As above.

16 As above.

17 As above.

18 As above.

19 As above..

20 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

21 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, 12-16 November 2001 Addis Ababa, Ethiopia Expt/Prot.Women/Rpt(I) (Meeting of Experts 2001), creating the Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft).

incorporated provisions on non-discrimination. It was proposed that paragraph 1(b) be reformulated to read ‘enact and effectively implement appropriate legislative and regulatory measures, including prohibiting and combating all forms of discrimination and harmful practices which endanger the health and general well-being of women and girls’. It was further proposed that the word ‘programmes’ be added to paragraph 1(c) after the word ‘plan’. Regarding paragraph 1(d), it was agreed that the words ‘corrective and’ be inserted between the word ‘take’ and ‘positive’. This widened the scope of the obligation of states parties – not to merely take positive action, but also to ‘correct’. Some proposals were also made to paragraph 2, with suggestions that the word ‘modify’ as used in the previous drafts be amended to read, ‘commit themselves to modify’.

In December 2002, the African Union Office of the Legal Counsel (AUOLC) commented on the Revised Final Draft. It was suggested that the word ‘including’ in article 2(1)(b) be deleted and substituted with the word ‘and’ to ensure readability.²² It was also proposed that the word ‘girls’ be deleted since the definition section already defined the term ‘women’ to include girls.²³ Regarding article 2(2), it was recommended that the terms ‘through’ in line 2 and ‘education’ in line 3 be deleted to avoid repetition.²⁴

In 2003, the NGO Forum also provided feedback on the Revised Final Draft.²⁵ It is worth noting that the Revised Final Draft that the NGO Forum commented on had six action points on the elimination of discrimination against women under article 2(1).²⁶ This can be seen in article 2(1)(a)–(f) of the Revised Final Draft. These action points include a provision on equality between women and men in national constitutions and legislation, enacting and implementing legislation to eliminate discrimination against women, and integrating a gender perspective in policy decisions and legislation.²⁷ There is also an obligation to take positive and corrective action in areas where discrimination against women exists. Measures should also be taken to eliminate discrimination regardless of marital status in access to, acquisition and control of, and financing for land and property, and supporting local, national, regional, and continental initiatives directed at eliminating discrimination against women.²⁸

The NGO Forum suggested that the term ‘combat’ in article 2(1) be replaced with ‘condemn and eliminate’.²⁹ In the NGO Forum’s view, using the term ‘combat’ fell below the international standard that both the African Charter and CEDAW had already set.³⁰ In addition, instead of using the term ‘discrimination’, it was suggested that the word ‘sex’ be inserted before discrimination so that article 2(1) referred to the elimination of ‘sex discrimination’ rather than ‘discrimination’.³¹ In respect of article 2(1)(a), it was proposed that the words ‘and policies’ be included.³² This addition meant that the obligation to incorporate the principle of equality between women and men included policymaking, the same position as in respect of constitutions and legislation.

22 Comments by African Union Office of the Legal Counsel (AUOLC), CAB/LEG/66.6/Rev.1, 2002 (Comments by the AUOLC).

23 Comments by the AUOLC (n 22).

24 As above.

25 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003 (Comments by the NGO Forum).

26 Comments by the NGO Forum (n 25).

27 As above.

28 As above.

29 As above.

30 As above.

31 As above.

32 As above.

The NGO Forum further suggested that the words ‘sex-based violence including unwanted or forced sex in or outside marriage’ be included in article 2(1)(b).³³ This meant that the obligation to enact legislation, policy and regulations had to also cover the area of sex-based violence. This suggestion was arguably redundant, considering that article 1 of the Final Draft had already defined discrimination to mean differential treatment based on sex.³⁴

Moreover, suggestions were made for the words ‘including violence’ to be included in article 2(1)(d).³⁵ This addition meant that the corrective and positive actions envisaged in this provision had to target, violence, amongst others. It is, however, notable that the term ‘violence’ had already been defined, through a footnote, to mean a form of gender-based discrimination.³⁶ Thus, implementing this suggestion would have amounted to a repetition. As noted, the Revised Final Draft on which the NGO Forum commented had six action points, including an obligation on states under article 2(1) to ‘take all necessary measures to eliminate discrimination against women, regardless of marital status, in access to, acquisition and control of, and financing for land and property’.³⁷ However, with articles 6, 7, 19 and 21 all referring to different aspects of property, this provision on property seemed redundant. This suggestion, and all others made by the NGO Forum, were excluded in the Addis Ababa Draft.³⁸

All considered, the rights contained in article 2 of the Protocol differ significantly from the first attempt to craft this provision under the Nouakchott Draft. Earlier versions were vague, with very few obligations on the part of states. Aspects of article 2 of the Protocol could also be traced back to two different articles in the Nouakchott Draft. The content of these two articles was consolidated into one single article on ‘elimination of discrimination against women’ containing a comprehensive provision with far-reaching obligations for states. Given the focus of article 2 on the elimination of all discrimination against, any reservation by states to this article strikes at the core of the Protocol and has the effect of rendering its implementation at the national level illusory.

3 Concepts, nature and scope of state obligations

3.1 Combat all forms of discrimination

The obligation of states under article 2(1) is to combat discrimination against women. This provision makes use of the term ‘shall’ in its emphasis on addressing discrimination against women. The use of this term suggests that the obligation regarding the elimination of discrimination against women is an imperative command, thus, mandatory on states parties. For this purpose, a state party may not, for example, rely on culture to justify failure to act to combat harmful cultural practices that constitute discrimination against women. This is different from the word ‘may’, which implies some degree of discretion on the part of state parties.

The term ‘combat’ as used in this provision was subject to some debate during the drafting process. There was some indication that it imposed a standard lower than that established by other international treaties such as CEDAW and the African Charter. In guaranteeing non-discrimination, both CEDAW and the African Charter mandate states to ‘eliminate’ discrimination against women. The drafting history shows that there were concerns that ‘to merely combat sex discrimination is below

33 Comments by the NGO Forum (n 25).

34 As above.

35 As above.

36 As above.

37 As above.

38 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).

the international standards set forth both in CEDAW and in the African Charter'.³⁹ Considering the difference in meaning between the terms 'combat' and 'eliminate', these concerns appear to hold weight. Combat means to fight with or to struggle for victory against discrimination while eliminating connotes completely defeating discrimination. This suggests that 'elimination' imposes a higher standard on states parties than 'combating'.

In combating discrimination against women, article 2(1) requires states to take 'appropriate' measures. 'Appropriate' in the view of the UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) suggests that the intervention responds specifically to the resistance and obstacles to the elimination of discrimination against women.⁴⁰ Despite requiring states parties to take appropriate legislative and other measures, article 2(1) is silent on the timeline for the realisation of this right. This is arguably an oversight on the part of the drafters of the Maputo Protocol that could impact the enforcement of this provision by states parties. CEDAW, on the other hand, has made it explicit in its article 2 that a policy on the elimination of discrimination against women should be implemented 'without delay'. The CEDAW Committee has, in turn, interpreted the phrase 'without delay' under CEDAW to mean that this obligation is 'of an immediate nature'.⁴¹ Effectively, progressive realisation is not envisaged under article 2 of CEDAW and no justification for inadequate resources, culture, social norms, religion, or other considerations, suffices to vary this obligation.

Although the Maputo Protocol is silent on the immediate nature of the obligation to adopt a policy on eliminating discrimination against women, comparative insights from other treaties with similar provisions could lead to the conclusion that the obligation under article 2 of the Maputo Protocol is immediate. For example, like article 2 of the Maputo Protocol, article 2(2) of the International Covenant on Civil and Political Rights (ICCPR) mandates states parties to take necessary steps to adopt laws and other measures necessary in giving effect to the rights under the ICCPR. The Human Rights Committee has interpreted this obligation as unqualified and having immediate effect.⁴² On the issue of taking legislative measures the African Commission has adopted a similar stance regarding article 1 of the African Charter, which is similar in content to article 2(2) of the ICCPR. The African Commission has concluded that article 1 of the African Charter imposes obligations of an 'absolute character, with effect immediate, requiring the States Parties to take legislative, judicial, administrative, educational and other appropriate measures to fulfil their obligations'.⁴³

3.2 Include the principle of equality

National constitutions are generally considered the supreme laws, and any other national enactments or actions inconsistent with constitutions are invalid. The inclusion of provisions on equality between women and men is therefore critical to the elimination of discrimination against women in that all enactments and actions would have to measure up to the Constitution; otherwise, they are considered invalid.

39 Comments by the NGO Forum (n 25).

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

41 CEDAW Committee General Recommendation 28 (n 40) para 29.

42 Human Rights Committee (HRC) General Comment 31(80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13 para 14.

43 *Association of Victims of Post Electoral Violence & Interights v Cameroon* (2009) AHRLR 47 (ACHPR 2009) para 76.

This provision imposes an obligation on states to make concrete reforms in national laws, including specific provisions for equality between women and men in national constitutions and legislation. This obligation requires states to go a step further than making provision for gender equality but also ensuring the implementation of national provisions on gender equality. The obligation to ensure equality between genders requires states to guarantee ‘the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys’.⁴⁴ This obligation can also be interpreted to require states to ensure ‘the absence of discrimination on the basis of one’s sex in the allocation of resources or benefits or in access to services’,⁴⁵ or, ‘equal access to the opportunities that allow people to pursue a life of their own choosing and to avoid extreme deprivations in outcomes’.⁴⁶ Drawing inspiration from the tripartite typology on obligations, respecting this obligation requires states to avoid enacting constitutional and legislative provisions that undermine equality between women and men. The obligation to fulfil imposes on states, *inter alia*, the responsibility to enact laws that ensure the equal enjoyment of rights and access to opportunities and outcomes, including resources.

The obligation to ensure equality between women and men is at the heart of article 2(1)(a). Some gender policies have described gender equality as ‘the absence of discrimination on the basis of one’s sex in the allocation of resources or benefits or in access to services’.⁴⁷ Similar to this definition is that offered by the SADC Protocol on Gender and Development, which conceptualises it as the ‘equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys’.⁴⁸ However, as presented in the introduction to this chapter, equality between women and men remains a far-reaching goal, with women generally considered inferior and not equal to men.

3.3 Enact and effectively implement legislative measures

Legislation and regulations provide a framework for the implementation of norms on gender equality. The obligation enshrined in article 2(1)(b) requires states to enact legislation. The provision goes a step further to require states to implement the said legislation effectively. The term ‘appropriate’ suggests that the intervention responds specifically to the resistance and obstacles to the elimination of discrimination against women.⁴⁹ Africa is a diverse continent, and so are the women in it. ‘Appropriate’ in this regard means the ability of legislation and regulations to address the diverse experiences of women across regions rather than a one-size fits all approach. The CEDAW Committee has concluded that ‘each State party must be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result’.⁵⁰ Therefore, the emphasis must be on results. These interventions must be ‘action- and results-oriented in the sense that [states] should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals’.⁵¹

44 Article 1 Southern African Development Community (SADC) Protocol on Gender and Development 2016 (SADC Protocol on Gender and Development).

45 East African Community Gender Policy 2018, 53 (EAC Gender Policy).

46 Economic Community of West African States (ECOWAS) Policy for Gender Mainstreaming in Energy Access 2017, 5.

47 EAC Gender Policy (n 45) 53.

48 SADC Protocol on Gender and Development (n 44) 53.

49 CEDAW Committee General Recommendation 28 (n 40) para 23.

50 As above.

51 CEDAW Committee General Recommendation 28 (n 40) para 28.

3.4 Integrate a gender perspective

If discrimination against women is to be eliminated, it is important to consider the concerns and experiences of men and women in all contexts. These perspectives must be integrated into all laws, policies, and programmes.

The terms ‘mainstream’ and ‘integrate’ have been used interchangeably in some instruments on gender, including the SADC Protocol on Gender and Development. In this instrument, gender mainstreaming means ‘the process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally’.⁵² The 2018 East African Community Gender Policy (EAC Gender Policy) considers mainstreaming to mean:

The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all the areas and at all levels. It is a strategy for making women’s and men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.⁵³

Integrating a gender perspective in accordance with article 2(1)(c), therefore, imposes an obligation on states to ensure that laws, programs, and policies in all spheres of society ensure equality between women and men. Laws, policies, programmes, and activities must be scrutinised to evaluate whether they combat or exacerbate discrimination against women.

3.5 Take corrective and positive action

Article 2(1)(d) recognises the need for states to put in place measures that rectify or address past and existing discrimination. These measures recognise existing exclusion, discrimination, and disadvantage patterns.

The terms ‘corrective action’, ‘positive action’ and ‘affirmative action’ have often been used interchangeably to mean ‘positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded’.⁵⁴ Affirmative action is defined as ‘a policy programme or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life’.⁵⁵ These measures aim to eliminate barriers preventing women from participating in various spheres of life.⁵⁶ They are considered ‘a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms’.⁵⁷ Moreover, the measures have to be time-bound, thus, presupposing that when goals are attained, these measures lapse.⁵⁸ These measures are ‘designed to secure to disadvantaged

52 SADC Protocol on Gender and Development art 1.

53 EAC Gender Policy (n 45) 53.

54 R Fullinwide *Stanford Encyclopedia of Philosophy* (2001) 1.

55 SADC Protocol on Gender and Development art 1. See also E Domingues-Redondo & E Howard ‘Introduction’ in E Howard et al (eds) *Affirmative action and the law: efficacy of national and international approaches* (2022) 3.

56 SADC Protocol on Gender and Development arts 2(2) & 5.

57 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 25 on art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004 (CEDAW Committee General Recommendation 25) para 18.

58 CEDAW Committee General Recommendation 25 (n 57) para 15 & 20; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 32 The meaning and scope of special measures in the International

groups the full and equal enjoyment of human rights and fundamental freedoms'.⁵⁹ Gender quotas can be considered an example of affirmative action. Through the quota system, certain percentages in areas where women have suffered discrimination, such as political positions, jobs, and so forth, are reserved for women. It could also entail special consideration or preference being given to women in the selection processes. The aim is to include women based on their gender on account of the history and reality of discrimination against them.

The African Commission has moreover welcomed affirmative action aimed at tackling gender disparity in schools. However, it has cautioned that such actions should be implemented in a manner that does not negatively affect the standard of education for girls.⁶⁰ Effectively, quality must not be sacrificed on the altar of numbers. Moreover, the positive action invoked to address past discrimination should reflect the full diversity of women in a country, be they poor, migrant, minority, rural, or other considerations.⁶¹

3.6 Support local, national, regional and continental initiatives

The eradication of discrimination against women requires support from states. The CEDAW Committee has offered some guidance on what that support should look like. For example, states are mandated to provide financial support to independent centres and organisations that educate women about their rights to equality and help them to pursue remedies to address discrimination against them.⁶² Other types of measures include setting up structures at the national level that ensure the implementation of initiatives on gender equality and the promotion of education. It also includes all forms of support that ensure that the goal of eliminating all discrimination against women is realised, as well as the encouragement of women's rights organisations at local, national and international levels.⁶³ Support may also take the form of establishing the necessary machinery and national human rights institutions critical to eliminating discrimination against women. In addition, supporting gender equality throughout education systems and communities is equally included.⁶⁴ The role of financial resources in enforcing the rights of women cannot be overemphasised. Thus, the provision of adequate financial and administrative support to ensure that the measures adopted have tangible results in eliminating discrimination against women is a form of support envisaged.⁶⁵

3.7 Commitment to modify social and cultural patterns

As further discussed in chapter 7, discriminatory social and cultural norms are often rooted in traditions and cultures that cannot be dismantled through the mere enactment of legislation and policies.⁶⁶ While not all social and cultural norms are harmful, many pose threats to women, thus, perpetrating discrimination against them. Most of these practices reflect beliefs and values held by members of

Convention on the Elimination of All Forms of Racial Discrimination, 24 September 2009, CERD/C/GC/32 (CERD Committee General Recommendation 32) para 16. See also OVC Ikepeze 'Legislating women's affirmative action and its constitutionality in Nigeria' (2011) *Journal of International Law* 173.

59 CERD Committee General Recommendation 32 (n 58) para 11.

60 African Commission Concluding Observations and Recommendations – Tanzania: Consolidated 2nd to 10th Periodic Report adopted at 43rd ordinary session 7-22 May 2008, in Ezulwini, Swaziland para 11.

61 Concluding Comments of the Committee on the Elimination of Discrimination against Women: Norway 39th session, 23 July-10 August 2007, CEDAW/C/NOR/CO/7 para 23.

62 CEDAW Committee General Recommendation 28 (n 40) para 34.

63 CEDAW Committee General Recommendation 28 (n 40) para 36.

64 As above.

65 As above.

66 See S Nabaneh 'Article 5' in this volume.

communities for periods that often span generations, thus, necessitating interventions beyond legal enactments.

Article 2(2) recognises that enacting legislation is insufficient to eradicate harmful practices that perpetuate discrimination against women. It, therefore, implores states to invoke measures geared towards changing attitudes through education and communication. A similar obligation exists under CEDAW, which the OHCHR explained as follows: states are not only ‘to modify laws, but also to work towards the elimination of discriminatory customs and practices’.⁶⁷ Unlike CEDAW, which requires states ‘to modify or abolish’, the Protocol requires states to modify. By using the term ‘modify’, article 2(2) recognises that some cultural practices do not necessarily need to be abolished to foster equality. Moreover, article 17 of the Protocol recognises the fact that some cultures are positive, and women enjoy the right to live in a positive cultural context.⁶⁸ However, despite not using the term ‘abolish’, article 2(2) makes it clear that the aim of such modification should be to eliminate harmful practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of women and men. It follows that the term ‘modify’ envisages abolishing harmful cultural and traditional practices that perpetuate the inferiority of women.

Article 2(2) also recognises that harmful social and cultural patterns are based on gender stereotypes. Gender stereotyping refers to the ‘constant portrayal in the media, the press or in the education system, of women and men occupying certain roles according to the socially constructed gender division of labour and expectations in behaviour’.⁶⁹ It occurs when ‘specific attributes, characteristics, or roles’ are ascribed to women because they are women.⁷⁰ Gender stereotyping can either be overt or subtle. An example of the former is the assumption that women are irrational, while the latter is exemplified by the assumption that women are nurturing.⁷¹ These stereotypes are directly linked to gender inequality, limiting women’s ‘capacity to develop their personal abilities, pursue their professional careers and/or make choices about their lives’.⁷² The wrongfulness of gender stereotyping lies in its violation of women’s rights. Accordingly, in terms of article 2(2), an obligation rests on states to use public education, information, education, and communication strategies to dismantle these stereotypes.

4 State practice and implementation

4.1 Insights from state reports, Concluding Observations, reports of special rapporteurs and national frameworks

A perusal of the constitutions of African states reveals that sex-based discrimination is outlawed.⁷³ However, implementation remains a major challenge. South Africa, which ratified the Maputo

67 OHCHR ‘Fact Sheet No.22, Discrimination against Women: The Convention and the Committee’ (1995) 5. This was in respect of art 1(1)(f) which is similar but not identical to art 2(2) of the Maputo Protocol.

68 See A Johnson ‘Article 17’ in this volume.

69 EAC Gender Policy (n 45) 54.

70 United Nations Human Rights Office of the High Commissioner ‘Gender stereotyping’ <https://www.ohchr.org/en/women/gender-stereotyping> (accessed 23 June 2023).

71 As above.

72 As above.

73 In East Africa, Uganda, Kenya, and Tanzania exemplify this. See Constitution of Uganda, 1995 art 21; Constitution of Kenya, 2010 art 27; Constitution of Tanzania, 1977 art 12. In West Africa, Nigeria, Ghana, and Senegal exemplify this. See Constitution of the Federal Republic of Nigeria, 1999 art 42; Constitution of Ghana, 1992 art 17; and Constitution of Senegal, 2001 art 7. In Southern Africa, South Africa, Botswana, and Zimbabwe exemplify this. See Constitution of the Republic of South Africa, 1996 sec 9; Constitution of Botswana, 1966 art 3; and Constitution of Zimbabwe, 2013 art 17. In North Africa, Egypt and Morocco’s Constitutions demonstrate this. See Constitution of Egypt, 2014 art 53 and art 19 of the Constitution of Morocco 2011.

Protocol in 2004, guarantees the right of equality under its Constitution.⁷⁴ Discrimination on several grounds, including sex and gender, is prohibited in South Africa.⁷⁵ South Africa has gone a step further to enact legislation that gives force to the notion of equality as guaranteed under the Constitution.⁷⁶ While the operationalisation of the Protocol through the Constitution and legislation is commendable, implementation challenges continue to linger. For example, in one of its Concluding Observations on South Africa, the CEDAW Committee expressed concern over the lack of implementation of legal measures despite the commendable effort by South Africa to enact legislation.⁷⁷ The African Commission has also noted similar concerns, concluding that despite the enactment of laws on gender equality, the representation of women in key sectors, such as the judiciary continues to fall short of the legislative commitment.⁷⁸

In its Concluding Observations of 2007, the African Commission recommended that Zimbabwe ratify the Maputo Protocol.⁷⁹ Heeding this recommendation, Zimbabwe ratified the Protocol in 2008 and has implemented article 2 at the national level. The Constitution of Zimbabwe guarantees the right to freedom from discrimination and requires the adoption of specific policies and measures that address discrimination issues. Various institutional measures have been established and laws and policies have been enacted to this effect.⁸⁰ Despite these developments, the African Commission observed in its 2021 Concluding Observations that discrimination against women remains rife in Zimbabwe ‘contrary to the provisions of the National Laws, Maputo Protocol and other human rights legal instruments’.⁸¹ Notably, women continue to be discriminated against in terms of political representation.⁸² Discrimination against women is generally much worse for rural women in Zimbabwe.⁸³ The heightening of discrimination against them is attributable to several factors, including exclusion, marginalisation, absence of rights empowerment and the deeply entrenched patriarchal tendencies in rural communities.⁸⁴

74 South African Constitution sec 9 (as set out in the Citation of Constitutional Laws Act 5 of 2005 sec 1(1)).

75 South African Constitution sec 9(3) & 9(5).

76 See eg, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which provides an extensive legislative framework for the right to equality as guaranteed under the South African Constitution sec 9; National Health Act 61 of 2003 which emphasises equal access to health care between men and women; Employment and Equity Act 55 of 1998 which operationalises equal access to work between men and women and the National Education Policy Act 27 of 1996 which establishes a framework for equal access to education for all including marginalised women.

77 Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 23 November 2021, CEDAW/C/ZAF/CO/5 paras 31 & 39.

78 Concluding Observations and Recommendations on the Combined Second Periodic Report under the ACHPR and the Maputo Protocol of the Republic of South Africa, adopted by the African Commission at its 20th extraordinary session held from 9-18 June 2016, The Gambia para 33.

79 Concluding Observations on the Second Periodic Report of the Republic of Zimbabwe presented to the 41st ordinary session of the African Commission on Human and Peoples’ Rights 16th to 30th May 2007, Accra, Ghana para 29.

80 See eg Zimbabwe Gender Commission Act Chapter 10:31, Domestic Violence Act Chapter 5:16 and The National Gender Policy (2013-2017). Institutional measures in the promotion of gender equality such as the Zimbabwe Gender Commission have also been established.

81 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Zimbabwe on the Implementation of the African Charter on Human and Peoples’ Rights (2007-2019) and the Initial Report on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) (2008-2019), 69th ordinary session held virtually from 15 November-5 December 2021 para 48.

82 F Mahere, ‘Women need to see themselves in politics. It’s the only way change will come to Zimbabwe’ 15 March 2022 <https://www.theguardian.com/global-development/2022/mar/15/fadzayi-mahere-women-in-politics-zimbabwe> (accessed 11 April 2023). Zim Fact ‘Fact Sheet – Zimbabwe, Women and politics’ 13 April 2013, <https://zimfact.org/factsheet-zimbabwe-women-and-politics/> (accessed 11 April 2023).

83 Concluding Observations and Recommendations Zimbabwe (n 81) para 45.

84 Z Ncube ‘Socio-economic challenges of women in Ntepe Village, Gwanda District, Zimbabwe’ Masters dissertation, University of South Africa, 2021 i.

Similarly, to exemplify, the Constitution of Uganda⁸⁵ also contains provisions that refer to article 2. Article 33 makes provision for affirmative action and equal treatment of women and men in political, social, and economic matters and stipulates that women shall be accorded full and equal dignity of the person with men. Discrimination is also explicitly defined under the Constitution.⁸⁶ In its Concluding Observations of 2009, the African Commission implored Uganda to ratify the Maputo Protocol.⁸⁷ The African Commission further recommended that Uganda enact legislation addressing the harmful cultural practice of FGM. Such legislation was consequently enacted in 2010.⁸⁸

In its subsequent Concluding Observations of 2015, the African Commission noted with concern Uganda's failure to report on the implementation of the Maputo Protocol despite its ratification in 2010.⁸⁹ The African Commission raised concern about Uganda's failure to pass the Marriage and Divorce Bill⁹⁰ and the Succession Act⁹¹ – legislation with the potential to address issues of discrimination against women in marriage, divorce and succession. To date, the Marriage and Divorce Bill continues to sit in Parliament after close to two decades. However, in April 2022, Uganda passed several amendments to the Succession Act into law. These amendments have seen the demise of provisions discriminating against women in inheritance.⁹² While the progress made by Uganda is commendable, studies reveal that 'implementation of these laws remains limited'.⁹³

Moreover, some proposed laws directly threaten Uganda's obligations in terms of article 2 of the Maputo Protocol. For example, the Sexual Offences Bill,⁹⁴ first introduced before Parliament in 2014, despite having progressive provisions on the protection of women from sexual violence, is a step backwards in other respects. Notably, the Act criminalises sex work, a discriminatory move considering that women are the majority in the field of sex work, thus, most likely to be the ones to suffer the brunt of criminalisation. In addition, it exposes sex workers to further abuse, thus, increasing the risk of them falling prey to violence.⁹⁵ Such violence often stems from the stigma that comes with the criminalisation of sex work. It may take the form of extortion, harassment by law enforcement officials, sexual violence, assault and even murder.⁹⁶ This exposure often prompts sex workers to work in unsafe places that are out of reach by the Police.⁹⁷ Moreover, the criminalisation of sex work limits sex workers' right of access to justice, with victims of abuse being unable to obtain redress as to do so requires disclosure of their involvement in the 'criminal' conduct of sex work.⁹⁸ This discriminatory stance against women in Uganda falls short of the recommendations made by the CEDAW Committee

85 Constitution of the Republic of Uganda 1995, as amended to 2018 (Constitution of Uganda).

86 Constitution of Uganda art 21(3) – 'to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.'

87 Concluding Observations and Recommendations – Uganda: 3rd Periodic Report, 2006-2008, 2009 para 41.

88 Prohibition of Female Genital Mutilation Act 2010.

89 Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012), 57th ordinary session 4-18 November 2015, Banjul, The Gambia, para 50.

90 Marriage and Divorce Bill 2009, Bill 19.

91 Succession (Amendment) Bill, 2021.

92 Succession (Amendment) Act, 2022.

93 International Federation for Human Rights 'Women's rights in Uganda: gaps between policy and practice' (2012) <https://www.fidh.org/IMG/pdf/uganda582afinal.pdf> (accessed 11 April 2023).

94 Human Rights Watch 'Uganda: Reject Sexual Offenses Bill Draft Law criminalizes consensual sex, lets down assault survivors' 6 May 2021, <https://www.hrw.org/news/2021/05/06/uganda-reject-sexual-offenses-bill> (accessed 11 April 2023).

95 Human Rights Watch 'Why sex work should be decriminalized' 7 August 2019 <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized> (accessed 11 April 2023).

96 Human Rights Watch (n 95).

97 As above.

98 As above.

in its Concluding Observations requiring Uganda to take targeted steps to address discriminatory stereotypes of women's participation in various sectors, including the labour market, the family setting, and the political arena relevant also to article 2 of the Maputo Protocol.⁹⁹

Kenya ratified the Maputo Protocol in 2010. In the African Commission's Concluding Observations of 2007, Kenya had been implored to ratify the Protocol.¹⁰⁰ In these Observations, the Commission raised concerns about discrimination against women. It recommended that Kenya undertake deliberate and concrete steps and policies to address discrimination against women. Although in its subsequent report to the African Commission, Kenya registered progress in terms of enactment of legislation and putting in place institutional measures to give effect to article 2 of the Maputo Protocol,¹⁰¹ the African Commission observed that discrimination against women across all sectors remained rife 'despite the concerted efforts made at ensuring gender equality in all sectors, policies and programmes'.¹⁰² The Commission recommended that Kenya enacts a comprehensive equality and non-discrimination law.¹⁰³ However, this recommendation has not yet been implemented.¹⁰⁴

Malawi ratified the Maputo Protocol in 2005. The Protocol has since been domesticated, with various national laws speaking directly to article 2 of the Maputo Protocol.¹⁰⁵ The Bill of Rights in Malawi's Constitution¹⁰⁶ guarantees the right to equality and prohibits discrimination on several grounds, including sex. Malawi has also adopted policies, institutional and other measures geared towards improving gender equality.¹⁰⁷ Various legislative and administrative measures have been taken to eliminate discrimination against women. However, in its Concluding Observations of 2015, the African Commission noted with concern the absence of a legislative framework that provides for affirmative action for women.¹⁰⁸ This has undermined efforts to address the history of discrimination against women in Malawi.

Malawi has adopted the Gender Equality Act Implementation and Monitoring Plan,¹⁰⁹ which seeks to ensure that the elimination of discrimination against women is addressed more practically. It

99 CEDAW Committee, 'Concluding observations of the Committee on the Elimination of Discrimination against Women Uganda' 22 October 2010, CEDAW/C/UGA/CO/7. See also CEDAW Committee, 'Concluding observations on the combined 8th and 9th Periodic Reports of Uganda' 1 March 2022, CEDAW/C/UGA/CO/8-9 paras 19 & 20.

100 Forty-first ordinary session 16-30 May 2007, Accra, Ghana Consideration of Reports submitted by states parties in accordance with Article 62 of the African Charter on Human and Peoples' Rights Concluding Observations and Recommendations on the Initial Report of the Republic of Kenya.

101 See eg, National Commission on Gender and Equality Act 2011, Prohibition of Female Genital Mutilation Act 2011, Matrimonial Property Act 2013, Marriage Act 2014, Domestic Violence Act 2015; National Gender and Equality Commission.

102 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya, adopted at 19th extraordinary session 16 February to 25 February 2016 Banjul, Gambia para 39.

103 Concluding Observations and Recommendations Kenya (n 102) para 55.

104 A perusal through the current national laws in Kenya reveals that no such law has been enacted.

105 See eg, Gender Equality Act, Marriage Divorce and Family Relations Act 4 of 2015, the Prevention of Domestic Violence Act Chapter 7:05, and the Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011.

106 Constitution of Malawi, 1994.

107 See eg, the campaign to ensure that there is 50/50 representation of males and females in Parliament; efforts by the Ministry of Education to ensure an equal selection rate for girls and boys from primary to secondary schools; and the adoption of various measures to mitigate the gender disparities in tertiary education, including the 50/50 enrolment policy in Teachers Training, and the non-residential system.

108 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995-2013), 57th ordinary session 4-18 November 2015, Banjul, The Gambia, para 103.

109 Gender Equality Act Implementation Plan (2016-2020), launched in 2016, <https://malawi.unfpa.org/> (accessed 23 June 2023).

has also committed to implementing Section 11 of the Gender Equality Act,¹¹⁰ which provides that an appointing or recruiting authority in the public service shall appoint no less than 40 per cent of either sex in any of the public service departments.¹¹¹ Furthermore, ministries, departments and agencies report on gender indicators and outcomes of the number of women recruited and sent for further studies and training.¹¹² Malawi's progress is indeed commendable. However, as is further mentioned in chapter 11, gender quotas for political positions and in the private sector still remain problematic.¹¹³ In addition, implementing affirmative action in civil service for women continues to be hampered by patriarchal cultural values that limit women's access to leadership opportunities.¹¹⁴

Eswatini ratified the Maputo Protocol in 2004. Article 2 of the Protocol has been implemented through various national enactments and initiatives, including the National Gender Policy,¹¹⁵ the Sexual Offences and Domestic Violence Act,¹¹⁶ and the National Strategy on women's participation in politics and decision-making.¹¹⁷ Despite these efforts, concerns have been raised regarding the persistence of discrimination against women.¹¹⁸ There have been undue delays and failure to repeal existing discriminatory laws, and these continue to perpetuate discrimination against women.¹¹⁹ Efforts to enact corrective laws have also been futile. The lack of resources has meant that the mandate of the Department of Gender and Family Issues (Department of Gender) has not been implemented.¹²⁰ The deep-rooted harmful gender stereotypes have also rendered otherwise progressive efforts unsuccessful in eliminating discrimination against women. In its 2022 Concluding Observation on Eswatini, the African Commission implored Eswatini to allocate resources to the Department of Gender and to commit to combatting deep-rooted harmful gender stereotypes.¹²¹ However, with specific regard to the allocation of resources, not much progress has been registered, with the current budget, not making provision for gender equality issues.¹²²

Nigeria ratified the Maputo Protocol on 16 December 2004. Despite this, Nigeria has failed to domesticate the Protocol. Nigeria drafted the Gender and Equal Opportunities Bill in 2016.¹²³ The Bill seeks to address discrimination challenges against women and, if passed into law, would enable legislation to domesticate the Maputo Protocol. However, since 2016 the Bill has been rejected several

110 Gender Equality Act, chap 25, 2014.

111 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (2015-2019) and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005-2013), 70th ordinary session of the African Commission on Human and Peoples' Rights 23 February-March 2022 para 62.

112 Concluding Observations and Recommendations Malawi (n 111) para 62.

113 See T Mkali & A Rudman 'Article 9' in this volume.

114 Concluding Observations and Recommendations Malawi (n 111) para 62.

115 The Swaziland National Gender Policy 2010.

116 Sexual Offences and Domestic Violence Act 2018.

117 National Strategy on Women's Participation in Politics and Decision-Making (2014).

118 Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, ACHPR 70th ordinary session: 23 February-9 March 2022 para 48.

119 Concluding Observations and Recommendations Eswatini (n 118) para 48.

120 As above.

121 As above.

122 See Budget Speech 2022, presented by Neal Rijkenberg The Honourable Minister For Finance to the Parliament of the Kingdom of Eswatini, 18th February 2022, <https://parliament.gov.sz/media/speeches/budget/2022.pdf> (accessed 6 April 2023). The budget strategy for 2022/2023 makes no provision for issues of gender, let alone, gender equality.

123 Concluding Observations and Recommendations – Nigeria: 6th Periodic Report, 2015-2016, Adopted by the African Commission on Human and Peoples' Rights at the 65th ordinary session held from 21 October to 10 November 2019 in Banjul, The Gambia.

times by Nigerian lawmakers.¹²⁴ Opposition to the Bill centres around cultural, social and religious barriers that this Bill seeks to challenge.¹²⁵ In its 2019 Concluding Observations on Nigeria, the African Commission commended Nigeria for having in place the Gender and Equal Opportunities Bill.¹²⁶ The African Commission recommended that in its next report, Nigeria should include information on ‘the status of promulgation of the Gender and Equal Opportunities Bill’.¹²⁷ Given the history of rejection of this Bill, coupled with the social, cultural and religious barriers that have previously militated against its passage into law, the recommendations made by the Commission are too open-ended and vague to exert pressure on Nigeria. Requiring Nigeria to provide an update regarding the status in its next report does not necessarily require Nigeria to enact the Bill into law. Instead, the recommendations should have required Nigeria to enact the Bill into law rather than request for a mere update. More succinct recommendations could ensure adherence. Exemplary is the recommendation made by rights and feminist organisations in their Shadow Report to the African Commission. Regarding this Bill, these organisations made the following recommendation:

Ensure the speedy passage and adoption of the Gender and Equal Opportunities (GEO) bill into law by the National Assembly with resources provided for its effective implementation; and support states to adopt similar laws in their jurisdictions.¹²⁸

Cameroon ratified the Protocol on 25 July 2006. Cameroon submitted a report to the African Commission for the period between 2003–2005. Its report did not deal specifically with the implementation of the Maputo Protocol but rather, the African Charter generally. The Concluding Observations that followed the consideration of Cameroon’s report, however, resulted in some recommendations having a bearing on the rights of women. Amongst these, Cameroon was called upon to ‘take special measures to guarantee the protection and implementation of indigenous women’s rights due to their extreme vulnerability and the discrimination to which they are subjected to’.¹²⁹ There is still no specific legislation addressing the unique challenges of indigenous women in Cameroon, and this has undermined their rights, including the right to own and control land.¹³⁰ There were also recommendations regarding reforms to legislation to ensure that violence against women is effectively addressed.¹³¹ Despite showing an intention to review its laws, including the Civil Code, Family Code, and Penal Code, to include provisions related to violence against women, these reforms have not come to fruition.¹³² Thus, a lot still needs to be done to achieve gender equality in Cameroon.¹³³

124 AfricaNews, ‘Nigerian senators reject gender equality bill’ 17 December 2021, <https://www.africanews.com/2021/12/17/nigerian-senators-reject-gender-equality-bill/> (accessed 2 April 2023).

125 AfricaNews (n 124).

126 Concluding Observations and Recommendations Nigeria (n 123) para 77.

127 Concluding Observations and Recommendations Nigeria (n 123) para 111.

128 Shadow Report on Nigeria’s Implementation of the Protocol to the African Charter on Human and Peoples’ Right on the Right of Women in Africa, 21 April 2022, <https://alliancesforafrica.org/shadow-report> (accessed 2 April 2023).

129 Concluding Observations and Recommendations – Cameroon: 2nd Periodic Report, 2003-2005, 47th ordinary session 12-26 May 2010, in Banjul, The Gambia para 13.

130 EE Njieassam ‘Gender inequality and land rights: the situation of indigenous women in Cameroon’ (2019) 22 *Potchefstroom Electronic Law Journal* 18.

131 Concluding Observations and Recommendations – Cameroon (n 129) para 10.

132 Committee on the Elimination of Discrimination Against Women, Concluding Observations: Cameroon, 43rd session (19 January-6 February 2009) para 15.

133 UN Women ‘Cameroon’ <https://data.unwomen.org/country/cameroon> (accessed 2 April 2023).

4.2 Judicial enforcement of the obligation to eliminate discrimination against women

There is evidence of judicial commitment to enforcing the obligation to combat discrimination against women in several African countries. In the context of South Africa, a decision of the Constitutional Court consolidated two cases that dealt with the same issue. In *Bhe*,¹³⁴ the Court dealt with a customary law that deprived women of inheritance rights. The custom in issue had to be applied in accordance with section 23 of the Black Administration Act 38 of 1927, which made provision for an estate to be devolved according to custom. The Constitutional Court of South Africa held, amongst others, that section 23 of the Black Administration Act and the applicable regulations on the customary distribution of property in exclusion of women were unconstitutional as they discriminated against women in inheritance based on sex and gender. The court was of the view that ‘the exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors’.¹³⁵ Another notable decision is *Shilubana*.¹³⁶ In this case, the authority of a traditional community to develop their customs to promote gender equality in the succession to leadership in line with the Constitution was challenged by a male claimant of the chieftainship over a female heir. Emphasising the importance of equality, the Constitutional Court held that the traditional authorities were effecting a valid legal change in line with the Constitution, resulting in the succession of a female heir to the chieftainship.¹³⁷ Although this case did not specifically refer to the Protocol as South Africa ratified the Protocol a year after this judgment, the decision was based on the right to equality and the need to eliminate discrimination against women in terms of South Africa’s domestic laws.

In Uganda, the decision by the Constitutional Court of Uganda in *Uganda Association of Women Lawyers*¹³⁸ dealt with unjustified differential treatment between men and women in cases of divorce. The Divorce Act¹³⁹ permitted men to divorce their wives on the ground of adultery. On the other hand, women who wanted to divorce their husbands on the ground of adultery had to prove other factors, including cruelty, bigamy, and incest. The petitioners challenged these provisions of the Divorce Act on account of their gender-discriminatory nature. The court held that these provisions discriminated against women; thus, they were unconstitutional.¹⁴⁰ This decision came before Uganda ratified the Protocol. However, at the heart of the Court’s decision was the need to eliminate discrimination against women in terms of Uganda’s domestic laws.

In Kenya, several decisions have demonstrated the judiciary’s commitment to the elimination of discrimination against women. In *Rono*,¹⁴¹ Kenya’s Court of Appeal relied on article 18(3) of the African Charter to hold that the customary laws on succession which disinherited women were in violation of the Charter. The court was of the view that the national laws on the subject were insufficient to address the aspect of discrimination that it was confronted with, thus necessitating the reference to the international human rights treaties to which Kenya was a party. The decision in *Rono v Rono* was, in turn, applied by the court in the subsequent case of *Re Andrew Musyoka*.¹⁴² Here the High Court held that the African customary practice of preventing daughters from inheriting from their deceased

134 *Bhe v Magistrate and Shibi v Sithole* 2005 (1) SA 580 (CC).

135 *Bhe* (n 134) para 78.

136 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

137 *Shilubana* (n 136) para 86.

138 *Uganda Association of Women Lawyers v Attorney General* (2004) UGCC 1 (Constitutional Court of Uganda).

139 Divorce Act Chapter 249 of the Laws of Uganda 1904.

140 *Uganda Association of Women Lawyers* (n 138) 59.

141 *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

142 *Re Andrew Musyoka (deceased)* (2005) eKLR.

father's estate was a violation of article 18 of the African Charter. In an earlier decision in *the Matter of the Estate of Mburugu Nkaabu*,¹⁴³ the High Court found in favour of a wife, proceeding to redistribute the property of the deceased to ensure that the deceased's wife and daughters received a fair share. In doing this, the court relied on provisions of Kenya's Constitution on eliminating customs related to property and land that were discriminatory against women.¹⁴⁴

However, it is notable that not all cases relating to eliminating discrimination against women have had a positive outcome. For example, in *Re Estate of CCBH*,¹⁴⁵ a High Court in Kenya took a turn from the progressive strides made in the preceding three decisions. In this case, the court upheld Sharia law, which unjustly discriminates against women from inheriting from the estates of husbands and fathers.¹⁴⁶ The court held that the applicants in this case (who were granddaughters to the deceased) were not entitled to inherit from the deceased's estate in terms of Sharia law. The applicants' reference to various international treaties, including article 18(3) of the African Charter and article 2 of the Maputo Protocol fell on deaf ears. Although the court acknowledged the role of international law in the protection against discrimination as well as the constitutionally entrenched right to freedom from discrimination, it deferred to article 24(4) of the Constitution, which allows the right to equality to be qualified to the extent 'strictly necessary' for the application of Sharia law in proceedings before the Kadhi's court involving practising Muslims who opt to use the Kadhi's court.¹⁴⁷ It is, however, notable that while the effect of article 24(4) is arguably to deny Muslim women's full enjoyment of the right to equality at par with other women, it sets constitutional boundaries on the scope of the application of Muslim personal law, and at least recognises the right of litigants to opt out of the Kadhi's court altogether.

5 Conclusion

There is no doubt that the Maputo Protocol has impacted the national laws of state parties, with the constitutional, legislative and policy reforms at the national level being a testament to this. However, the implementation of these reforms remains a challenge. It is also apparent that these national efforts are being stifled by negative attitudes, practices and stereotypes that are too deeply rooted to be uprooted by legislation, policies or court judgments. Against this backdrop, it is recommended that states and civil society organisations intensify their efforts in raising awareness on issues of gender equality. Education plays an important role in questioning and deconstructing the stereotypes in which discriminatory practices are anchored. A critical look at the state reports and national framework, discussed in section 4.1 suggests that states are generally reporting on the legislative, policy and institutional reforms at the national level. This is commendable. However, these reports should report on the tangible results, if any, arising from the national reforms, as it is becoming increasingly clear that such reforms are not always translating into the actual elimination of all discrimination against women.

143 *Matter of the Estate of Mburugu Nkaabu (deceased)* (2010) eKLR.

144 Article 60(f) Constitution of the Republic of Kenya 2010.

145 *Re Estate of CCBH* (2018) eKLR (High Court, Kenya) 4-7.

146 *Re Estate of CCBH* (n 145) 4-7.

147 Constitution of Kenya, 2010 art 24(4) provides that '[t]he provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance'.