

## Article 20

### Widows' rights

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States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- (a) that widows are not subjected to inhuman, humiliating or degrading treatment;
- (b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- (c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

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## 1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) dedicates its article 20 to widows. This is significant because although African states had ratified several international and regional instruments, none explicitly protected widows' rights. Arguably, protecting women from discrimination on the basis of marital status addresses the situation of widows.<sup>1</sup> However, this generalised prohibition of discrimination has failed to capture the reality of the additional and unique human rights violations that widows suffer, particularly in the African context, exacerbated by the cultural legitimisation of such violations. The Protocol thus took a major step towards addressing the lamentable challenge described by the United Nations (UN) as follows:

Absent in statistics, unnoticed by researchers, neglected by national and local authorities and mostly overlooked by civil society organizations (SCOs) – the situation of widows is, in effect, invisible. Yet abuse of widows and their children constitutes one of the most serious violations of human rights and obstacles to development

1 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art 1.

today. Millions of the world's widows endure extreme poverty, ostracism, violence, homelessness, ill health and discrimination in law and custom.<sup>2</sup>

The explicit inclusion of widows' rights in the Maputo Protocol is therefore worth acknowledging and celebrating. The Protocol offers hope to widows in Africa as they suffer multiple human rights violations.<sup>3</sup> Most bereavement practices that widows must observe constitute a violation of their rights.<sup>4</sup>

While this chapter intends to interpret and analyse article 20 of the Maputo Protocol, it is organised into seven sections. The first being this introduction. The next section considers the drafting history of article 20. Section 3 explores linkages between article 20 and other treaty provisions within the Maputo Protocol and in other human rights treaties. The fourth section discusses concepts and definitions central to understanding the article. Section 5 examines the nature and scope of state obligations concerning widows' rights. The next section takes stock of current measures that states have taken toward implementing article 20, while the concluding section reflects on the state of regional and national jurisprudence around the article and weighs the prospects for its full implementation.

## 2 Drafting history

The distinct sufferings of African widows brought about by the prevalence of widowhood rites necessitated the inclusion of widows' rights in the Protocol. These rights date back to the 1997 Draft Protocol to the African Charter on Women and Peoples' Rights Concerning the Rights of Women (Nouakchott Draft). Article 7 thereof proscribes the subjection of widows to inhuman and degrading treatment. The Nouakchott Draft also condemns traditional harmful practices against females.<sup>5</sup> Eliminating harmful practices was already an objective in some treaties before the Maputo Protocol. These treaties include the Draft Organisation of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention). The Special Rapporteur on the Rights of African Women also flagged the need to eliminate various forms of violence against women, including harmful traditional practices.<sup>6</sup>

The inclusion of widows' rights in the Protocol resulted from the merger of the Draft OAU Convention with the 1999 draft of the Protocol (Kigali Draft). The Draft OAU Convention included widowhood rites as a harmful practice hindering women's rights.<sup>7</sup> In preparing and finalising the Maputo Protocol, several organisations were consulted, among them the Inter-African Committee on Harmful Traditional Practices Affecting the Health and Welfare of Women and Children (IAC). Since the IAC has worked 'on policy programmes and actions to eliminate Harmful Traditional Practices in

2 UN Women 'International Widows' Day, 23 June' <https://unwomenusa.org/international-widows-day-23-june> (accessed 15 May 2023).

3 GD Torvikey & AP Atupare 'Legal pluralism, gender justice, and right to food in agrarian Ghana' in JB Martignoni, C Gironde, C Golay, E Prügl & D Tsikata (eds) *Agricultural commercialization, gender equality and the right to food* (2022) 197; M Makgahlela, T Sodi, S Nkoana & J Mokwena 'Bereavement rituals and their related psychosocial functions in a Northern Sotho community of South Africa' (2019) 45 *Death Studies* 2.

4 EM Baloyi 'Theological reflections on sex as a cleansing ritual for African widows' (2016) 23 *Alternation* 202; NV Pemunta & MF Alubafi 'The social context of widowhood rites and women's human rights in Cameroon' (2016) 2 *Cogent Social Sciences* 12; M Motsoeneng & MA Modise "'Grieving widows" lived experiences in a rural South African setting' (2020) 30 *Journal of Psychology in Africa* 266; FA Doris 'Widowhood rite: an infringement on the rights of widows in Bongo' (2018) 7 *International Journal of Developing Societies* 1.

5 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).

6 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 73.

7 Draft OAU Convention on the Elimination of All Forms of Harmful Practices, subsequently adopted as 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).

the African Region' and internationally,<sup>8</sup> its contribution to the drafting of article 20 must have been significant. The IAC also often refers to degrading widowhood rites when addressing harmful practices. For instance, in an interview on gender and ageing, several widowhood rites were highlighted among the plights of women in Africa.<sup>9</sup>

The Southern African Development Community (SADC) Protocol on Gender and Development (SADC Gender Protocol), developed in 2008, got much of its influence from the Maputo Protocol. This is affirmed by Forere and Stone, who expound that the SADC Gender Protocol is a duplication of the Maputo Protocol.<sup>10</sup> Article 10, dedicated to widows' rights, is among the clauses almost identical to those of the Maputo Protocol. It closely aligns with article 20 of the Maputo Protocol. In addition to the rights entrenched in the Maputo Protocol, the original SADC Protocol included widows' right to have 'access to employment and other opportunities to enable her to make a meaningful contribution to society'.<sup>11</sup> However, this right was omitted in the SADC Protocol amendment, leaving the two protocols virtually identical.<sup>12</sup>

### 3 Linkages with other treaty provisions

Article 20 closely relates to other provisions of the Maputo Protocol, chiefly the prohibition of discrimination against women and safeguarding their right to equality. Article 2 thus charges all state parties to promote women's equality through, among other means, constitutional protection. This means that widows' right to equality and non-discrimination is thereby made a constitutional right.

Article 2(2) of the Protocol closely identifies with articles 2(f) and 5(a) of CEDAW<sup>13</sup> in requiring states to adjust 'social and cultural patterns ... with a view to achieving the elimination of harmful cultural and traditional practices'.<sup>14</sup> Further, article 5 of the Maputo Protocol calls on states to eliminate harmful practices that violate the rights of women. This makes the link between articles 2, 5 and 20 even more pertinent, as widowhood rites account for much of the category of harmful cultural and traditional practices.<sup>15</sup> These include but are not limited to the restriction of widows' movement,

8 Inter-African Committee on Traditional Practices (IAC) <https://iac-ciaf.net/about-iac/> (accessed 23 June 2023).

9 I Hoskins 'Speaking out: an interview with Berhane Ras Work, President, the Inter-African Committee' (1998) 24 *Ageing International* 86.

10 M Forere & L Stone 'The SADC Protocol on Gender and Development: duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *African Human Rights Law Journal* 443.

11 SADC Protocol on Gender and Development (2008), [https://extranet.sadc.int/files/2112/9794/9109/SADC\\_PROTOCOL\\_ON\\_GENDER\\_AND\\_DEVELOPMENT.pdf](https://extranet.sadc.int/files/2112/9794/9109/SADC_PROTOCOL_ON_GENDER_AND_DEVELOPMENT.pdf) (accessed 15 May 2023) art 10(1)(d).

12 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 26.

13 Articles 2(f) & 5(a).

14 Maputo Protocol art 2(2).

15 C Adeyemo 'Widowhood and its harmful practices: causes, effects and the possible way out for widows and women folk' (2016) 3 *World Journal of Educational Research* 385. In a simplified version of the Maputo Protocol, Women in Law and Development in Africa (WiLDAF-West Africa) includes 'widowhood practices that humiliate women' as an example of harmful practices to be eliminated (art 5) [http://www.banfgm.org/IT/IT/La\\_Campagna\\_files/Protocol\\_to\\_the\\_African\\_Charter\\_on\\_Human\\_and\\_People\\_s\\_Rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_Africa\\_simplified\\_pdf%20\(1\).pdf](http://www.banfgm.org/IT/IT/La_Campagna_files/Protocol_to_the_African_Charter_on_Human_and_People_s_Rights_on_the_rights_of_women_in_Africa_simplified_pdf%20(1).pdf) (accessed 15 May 2023).

widow inheritance,<sup>16</sup> compelled wearing of mourning apparel, and sexual cleansing and defacing.<sup>17</sup>

Article 20(a), which proscribes the inhumane and degrading treatment of widows, is also related to articles 3 and 4 on the right to dignity and rights to life, integrity and security of the person, respectively. Article 3 of the Protocol indicates that every woman should be afforded dignity ingrained in other human beings. This entails that widows should enjoy the same dignity as any other human being. Subjecting widows to degrading widowhood rites violates their intrinsic worth. It is in this way that articles 3 and 20 are related. Article 4 opens by safeguarding the integrity of every woman, it then prohibits inhumane and degrading treatment, thereby employing the same prohibition language contained in article 20(a) concerning the proscribed treatment of widows.<sup>18</sup> This makes it clear that eradicating inhuman and degrading treatment is a prerequisite to enjoying women's rights generally and widows' rights specifically.

Article 20(b) safeguards widows' rights regarding the guardianship and custody of children. This clause resonates with article 7(c) of the Maputo Protocol, which gives women the same rights as men with respect to children's custody and guardianship in case of dissolution of marriage through divorce or separation. The right to equality and the abolishment of marital power brought about the same rights to widowers and widows, so that both are recognised as having full capacity to care for children should the other one die. Parties to a marriage bear equal rights and status,<sup>19</sup> therefore, this should be maintained even when a marriage is dissolved through death.

The last part of article 20 of the Maputo Protocol echoes the sentiments contained in article 6(a). It affords widows freedom to remarry. Restricting widows' right to marry or subjecting them to forced levirate marriages runs contrary to the provision that marriage should be based on 'free and full consent of both parties'.<sup>20</sup> This right draws from several other international instruments including CEDAW,<sup>21</sup> the Universal Declaration,<sup>22</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>23</sup> Thus, article 20(c) of the Maputo Protocol, read together with these other provisions, acknowledges that outlawing all forced marriages is necessary to secure widows' rights.

The widows' clause (article 20) further relates to article 17 of the Protocol, which is the right to a positive cultural context. Women have a right to reside in favourable cultural environments and to actively participate in shaping cultural policies.<sup>24</sup> This right has a bearing on the kind of treatment

16 Widow inheritance is an African cultural practice whereby a relative of the deceased husband takes full responsibility or inherits responsibilities towards the widow and her children. Although this practice was originally intended to provide security for widows, some African patriarchs take advantage of this custom thereby leading to widows suffering abuse in the name of being inherited. See B Perry, L Oluoch, K Agot, J Taylor, J Onyango, L Ouma, C Otieno, C Wong & A Corneli 'Widow cleansing and inheritance among the Luo in Kenya: the need for additional women-centred HIV prevention options' (2014) 17 *Journal of the International AIDS Society* <https://onlinelibrary.wiley.com/doi/full/10.7448/IAS.17.1.19010> (accessed 15 May 2023); AO Ezejiolor 'Patriarchy, marriage and the rights of widows in Nigeria' (2011) 12 *Unizik Journal of Arts and Humanities* 54; ELM Gwako 'Widow inheritance among the Maragoli of Western Kenya' (1998) 54 *Journal of Anthropological Research* 175.

17 P Itsweni & R Tshifhumulo 'Coping strategies employed by young Vhavenda widows in Vhembe in dealing with death and bereavement' (2018) 16 *Gender and Behaviour* 11711; Motsoeneng & Modise (n 4) 264; MA Sossou 'Widowhood practices in West Africa: the silent victims' (2002) 11 *International Journal of Social Welfare* 203.

18 The same formulation is found in art 5 of the Universal Declaration of Human Rights (Universal Declaration) art 7 of the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

19 Maputo Protocol art 6.

20 Maputo Protocol art 6(a).

21 CEDAW art 16(1)(b).

22 Universal Declaration art 16(2).

23 ICESCR art 10(1).

24 Maputo Protocol art 17.

that widows would be subjected to. Positive cultural context, as well as allowing women to partake in policymaking, affords them an opportunity to reject harmful practices like degrading widowhood rites. The right to a positive cultural context may be essential in positively shifting the narrative of widows in African communities. As enunciated by Tamale,<sup>25</sup> article 17 appreciates culture's positive influence and potential. This comprehension is important for African communities which place great value on their culture in that the same system which is esteemed by Africans (culture) may still be used in evolving practices into positive ones.

## 4 Concepts and definitions

### 4.1 Widow

Although the term 'widow' is the subject matter of article 20 of the Protocol, it is not defined therein. Other international and regional human rights instruments are of no help either since they do not deal with widows as a category of rights-holders. Looking into African literature, Sossou defines a widow as 'a woman who lost her husband or partner through death'.<sup>26</sup> This definition is affirmed and further clarified by the South African Commission on Gender Equality which defines a widow as 'a woman who has lost her husband by death and has not married again'.<sup>27</sup> Regardless of ethnicity, the majority of African widows are impoverished and vulnerable.<sup>28</sup>

### 4.2 Widowhood

The South African Commission on Gender Equality has described the concept of widowhood as a term whose meaning is inherently social.<sup>29</sup> Its definition, therefore, changes on account of 'geographical situations, culture, race and class'. It thus 'needs to be viewed as both a social and intra-psychic phenomenon.' Widowhood is a socially defined status produced by the often painful transition from married to not being married due to the death of a spouse.<sup>30</sup> The International Council of Women considers it as 'the most neglected of all gender and human rights issues'.<sup>31</sup>

### 4.3 Widowhood rites

'Widowhood rites', just like the terms 'widow' and 'widowhood', is a term whose definition cannot be captured in a legal instrument. Djankpa expounds that widowhood rites are culturally defined as ceremonies that a spouse is expected to undertake in honour of the deceased spouse'.<sup>32</sup> Literature indicates, however, that these rites do not necessarily help widows get through their grief. Instead, they

25 S Tamale 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 58.

26 Sossou (n 17) 202.

27 The Commission on Gender Equality 'Widowhood Rites and Rights Report' Annual Report 2006-07 [http://cge.org.za/wp-content/uploads/2021/01/Widowhood\\_Rites\\_and\\_Rights\\_Research\\_Report.pdf](http://cge.org.za/wp-content/uploads/2021/01/Widowhood_Rites_and_Rights_Research_Report.pdf) (accessed 15 May 2023).

28 UN Women 2000 'Widowhood: invisible women, secluded or excluded' (2001) <https://www.unwomen.org/en/digital-library/publications/2001/12/women2000-widowhood-invisible-women-secluded-or-excluded> (accessed 15 May 2023).

29 Commission on Gender Equality (n 27) 2.

30 Commission on Gender Equality (n 27) 2.

31 International Council of Women – Resolution on Widows (2009) [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fprojects.iq.harvard.edu%2Ffiles%2Fviolenceagainstwomen%2Ffiles%2Ficw\\_resolution\\_on\\_widows\\_sent\\_to\\_un\\_2009.doc&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fprojects.iq.harvard.edu%2Ffiles%2Fviolenceagainstwomen%2Ffiles%2Ficw_resolution_on_widows_sent_to_un_2009.doc&wdOrigin=BROWSELINK) (accessed 15 May 2023).

32 GB Djankpa 'Effects of widowhood rites on the psychological distress and life satisfaction of Konkomba widows in the Saboba District, Northern Ghana' PhD Thesis, University of Cape Coast 2021, 2. On file with the author.

are among the most dehumanising practices in Africa, which demean, degrade and violate widows' rights.<sup>33</sup>

#### 4.4 Harmful practices

The Maputo Protocol defines 'harmful practices' to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.<sup>34</sup> These harmful practices are, according to the joint CEDAW Committee General Recommendation 31 on harmful practices, rooted in social beliefs which view women as inferior to men.<sup>35</sup> Some of these practices include; sexual cleansing,<sup>36</sup> property grabbing<sup>37</sup> and being coerced to drink water used to wash their husbands' corpses.<sup>38</sup> It is important to note that the joint general recommendation mentions widowhood practices among what are considered harmful practices.

### 5 Nature and scope of state obligation

The determination 'to ensure that the rights of women are promoted, realised and protected in order to enable them to fully enjoy all their human rights' demonstrates that states have obligations to assume towards the realisation of the Maputo Protocol. This undertaking resonates with the one in the Preamble to the African Charter on Human and Peoples' Rights (African Charter), which highlights states' duties to 'promote and protect human and peoples' rights'.<sup>39</sup> This means that states are responsible for ensuring all the rights in the African Charter are promoted and respected. Such a mandate seems to be also at the heart of the nature and scope of states' obligations, even towards the Maputo Protocol. The African Commission on Human and Peoples' Rights (African Commission) elaborated on this mandate in the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines on ESCR).<sup>40</sup> These principles and guidelines refer to obligations 'to respect, defend, promote, and fulfill' as a framework for understanding the nature of state obligations.

The obligation to respect is both a positive and negative duty on states. On the one hand, it calls on state parties to refrain from interfering with the enjoyment of the rights, while on the other, it urges states to take measures to ensure human rights are realised. Although widows' rights are not specifically mentioned in this obligation, the generalised and all-encompassing nature of the Principles and Guidelines on ESCR suggests their inclusion. The positive duty to respect human rights is clearly demonstrated in the Maputo Protocol in its appeal through different provisions to enact legislative measures to safeguard Peoples' Rights. Although article 20 does not specifically call upon states to enact legislation to protect widows, the mandate is expressly included in other clauses which relate to

33 Doris (n 4) 2; Adeyemo (n 15) 385.

34 Maputo Protocol art 1(g).

35 Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18 (2014).

36 Baloyi (n 4) 202; HP Khosa-Nkatini 'Liturgical inculturation of Tsonga widows' mourning rituals' PhD thesis, University of Pretoria, 2019, 89. On file with the author.

37 B Magudu & L Mohlakoana-Motopi 'Widowhood and vulnerability: the right to gender equality for widows in South Africa' (2013) *Commission for Gender Equality Policy Brief* 3; M Dube 'The ordeal of "property stripping" from widows in a peri-urban community: the case of a selected ward in Binga district, Zimbabwe' (2017) 53 *Social Work* 342.

38 Adeyemo (n 15) 382; MWG Eche 'Widowhood, justice and the rule of law in Africa: Nigerian – Igbo perspective' (2018) 5 *Tansian University Journal of Arts, Management and Social Sciences* 106.

39 Preamble to the Organization of African Unity (OAU); African Charter.

40 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* (2011).

it. These clauses include articles 2 and 5, which speak against discrimination and harmful practices, respectively.

The Principles and Guidelines on ESCR include an obligation to protect.<sup>41</sup> This entails that states protect the rights of their people from any form of infringement of rights emanating from either public or private spheres. A positive duty is imposed on states to engage in protective measures for the sake of all who live in it. This includes even widows. States are called upon to establish measures to conscientise people of their rights. These may include education and awareness programmes to ensure people have information about the extent to which their rights are protected. Although not specifically included in article 20 of the Maputo Protocol, the obligation to promote widows' rights is essential in the African context where violation of these rights is embedded in cultural practices. General Comment 6 on article 7(d) of the Maputo Protocol clearly highlights states' obligation to raise awareness of widows' rights. It provides that 'states parties should engage in awareness raising, and actively encourage the transformation of discriminatory practices and customs related to marriage, divorce, separation and annulment of marriage, particularly as it relates to discriminatory treatment of women and dispossession from their marital property.'<sup>42</sup> This obligation closely relates to the duty to protect and promote widows' rights, as enunciated in article 20, as both clauses are interested in the rights of women at the end of a marriage. As such, protecting widows' rights through, among others, eliminating discriminatory practices would automatically lead to achieving the realisation of article 7(d) of the Protocol. The need for awareness raising is reaffirmed by Makunya et al, who indicated that 'it may be illusory' to believe that transformation in African communities could be attained by simply adopting legislative and administrative measures.<sup>43</sup>

States also have a duty to fulfil human rights. According to the African Commission, this obligation is for states to realise the rights and freedoms they freely undertake under various human rights regimes.<sup>44</sup> Such a realisation includes the allocation of resources for the actual fulfilment of the rights.<sup>45</sup> In the case of widows' rights, as enunciated in article 20 of the Protocol, states should ensure that necessary arrangements are put in place to ensure widows are protected. This may include budgetary allocations to educate and conduct awareness campaigns on the issue.

The African Commission on Human and Peoples' Rights has produced several recommendations meant to advance rights within the African Charter. One of these is the Resolution on Economic, Social and Cultural Rights in Africa.<sup>46</sup> This resolution endorsed the Pretoria Declaration, which urges African states to 'adopt special measures for women and address the economic, social and cultural rights of vulnerable and marginalised groups'. Although the declaration does not expressly refer to widows, its phraseology echoes the sentiments embodied in article 20 of the Maputo Protocol. Widows fit into the specifics as they are vulnerable and marginalised women. Also, the call to address cultural rights relates to article 20, as culture plays an integral part in protecting widows' rights. While this is an obligation for all state parties, it means states have a duty to establish and implement special measures to safeguard widows.

41 ACHPR (n 40) art 7.

42 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): the Right to Property During Separation, Divorce or Annulment of Marriage (art 7(D)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020 (African Children's Committee General Comment 6) para 58.

43 TM Makunya et al 'Selected developments in human rights and democratisation in Africa during 2020' (2021) 5 *Global Campus Human Rights Journal* 200.

44 *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).

45 *SERAC* (n 44) para 47.

46 Resolution on Economic, Social and Cultural Rights in Africa (2004) ACHPR/Res.73(XXXVI)04.

Compliance with set obligations is monitored through other measures by reporting to the African Human Rights Commission. Article 62 of the African Charter, as well as article 26 of the Maputo Protocol, employs state parties to submit periodic reports documenting their compliance with the Protocol. State parties are called upon to ‘adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised’.<sup>47</sup> This is a strategic way for obliging states to comply with the provisions of the Protocol, including article 20. In this way, states are obligated to ensure that African widows’ rights are protected as provided in the Protocol.

## 6 Implementation

This section is organised in terms of the three specific obligations placed on states by article 20 of the Maputo Protocol: ensuring that widows are protected from inhuman, humiliating or degrading treatment; ensuring that widows are afforded equal rights to custody of their children; and that widows are allowed to remarry based on their full and free consent. The implementation discussion is further subdivided into three themes: legal, policy and institutional implementation.

### 6.1 Proscription against inhuman, humiliating or degrading treatment

#### 6.1.1 *Legal implementation*

Different states have implemented laws which proscribe inhuman, humiliating or degrading treatment. Malawi, Kenya, Rwanda, Togo and Eswatini are among the countries that have undertaken to combat the inhumane and degrading treatment of widows.<sup>48</sup> Malawi has enacted various legislation to protect women from harmful practices. These include the Gender Equality Act, 2013, which proscribes the observance of harmful practices.<sup>49</sup> A harmful practice is defined as ‘a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person’.<sup>50</sup> This definition closely resembles the one given in the Maputo Protocol. It includes the prohibition of degrading widowhood rites. The government of Malawi has also enacted a National Plan of Action against Gender-Based Violence (NPA), which sets out a plan to address violence against women effectively. Among the five priority areas outlined in the tackling of the ‘root causes ... of harmful social norms’.<sup>51</sup> These measures of a Plan of Action against Gender-Based Violence highlight a high level of seriousness in eradicating harmful practices against women, including widows. However, Malawi acknowledges that there is still vast ground to cover to implement the Maputo Protocol fully.<sup>52</sup>

States like Cameroon, Togo, Eswatini and South Africa have legislation criminalising actions against women’s physical and moral integrity. Although not tailored to the plight of widows, Cameroon’s Penal Code Law 2016/7 offers necessary protection to widows. Togo protects widows through its new penal code, which criminalises all widowhood rites which degrade widows’ treatment.<sup>53</sup> Eswatini makes unlawful the act of compelling a woman ‘to undergo or uphold any custom to which she is in

47 Maputo Protocol art 26(2).

48 Republic of Malawi Periodic Report on the African Charter on Human and Peoples’ Rights and the Maputo Protocol May 2015 to March 2019.

49 Gender Equality Act (Malawi) 2013 sec 5.

50 Gender Equality Act (Malawi) 2013 sec 3(a).

51 National Plan of Action to Combat Gender-based Violence in Malawi 2014-2020 <https://files.mutualcdn.com/tfg/assets/files/National-Plan-of-Action-to-Combat-Gender-Based-Violence-in-Malawi-2014-%E2%80%93-2020.pdf> (accessed 17 May 2023).

52 Republic of Malawi Periodic Report (n 48) 72.

53 See Penal Code (Togo) Law 2015-010.



conscience opposed'.<sup>54</sup> This is implemented through the Sexual Offences and Domestic Violence Act, which makes it a crime to subject women to harmful practices.<sup>55</sup> The case of *Jennifer Lindiwe Dupont-Shiba v EBC*<sup>56</sup> is an indication that Eswatini safeguards widows' rights. The court ruled against a chief who unduly influenced people not to vote for the applicant because she was a widow still in mourning attire. Given the country's socio-cultural and patriarchal nature, such a ruling speaks volumes about Eswatini's intention to protect widows' rights.<sup>57</sup> Like other states that have ratified the Maputo Protocol, Nigeria has a mandate to implement its provisions in its national legislation. The greater part of the Protocol, which includes widows' rights, is implemented in the Gender and Equal Opportunities Bill,<sup>58</sup> which has not yet been passed into law. Through this Bill, Nigeria intends to incorporate articles 1 to 24 of the Maputo Protocol.<sup>59</sup> Despite the current status of the Bill, Nigeria has indicated its intention to protect widows' rights through the Violence Against Persons (Prohibition) Act, 2015,<sup>60</sup> which states:

A person who subjects a widow to harmful traditional practices commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N500, 000 or both.<sup>61</sup>

This is a clear indication that harmful widowhood rites are outlawed in Nigeria. Vast literature,<sup>62</sup> however, documents how Nigerian widows still suffer various widowhood rites. Writing on the subject of widows before the Maputo Protocol came into effect, Ewelukwa lamented the lack of laws conferring rights on widows in Nigeria. The article highlighted the need to eradicate degrading rites.<sup>63</sup> Given that the Maputo Protocol bridges the gap in widows' protection, Nigeria has to fully incorporate it into its laws.

In addition to different legislation, some countries have constitutional protection for widows against inhumane and degrading treatment. These include the Constitutions of Kenya, Rwanda, and Eswatini, which proscribe inhuman and degrading treatment against everyone.<sup>64</sup> This provision has been highlighted in the Kenyan 2020 Periodic Report to cover widows as envisaged by article 20 of the Maputo Protocol.<sup>65</sup>

54 Constitution of Eswatini, 2005 sec 28(3).

55 Sexual Offences and Domestic Violence Act (Eswatini) 15 of 2018 sec 77.

56 *Jennifer Lindiwe Dupont-Shiba v EBC* (2013) Case 1342/13.

57 Eswatini-UNICEF (2020) <https://www.unicef.org/eswatini/media/1246/file/World%20children's%20day%20newsletter-2020.pdf> (accessed 15 May 2023).

58 Gender and Equal Opportunities Bill 2016, Nigeria.

59 Nigeria's 6th Periodic Country Report 2015-2016 on the Implementation of the African Charter and the Maputo Protocol in Nigeria (August 2017) 143.

60 The Act is applicable in the federal territory and in a handful of states. The majority of states are yet to adopt it, and the Northern (Muslim) states have indicated that they will not. (C Onyemelukwe 'Legislating on violence against women: a critical analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015' (2016) 5 *DePaul Journal of Women, Gender and Law* 46.

61 Violence Against Persons (Prohibition) Act, 2015 of Nigeria sec 15(1).

62 ON Aihie 'Attaining gender equality for sustainable development in Nigeria through counselling intervention' (2021) 24 *Rivers State University Journal of Education* 96; FC Amadi & AE Gabriel-Whyte 'The Violence against Persons (Prohibition) Act 2015: introduction legislative asset or liability?' (2018) 5 *Unimaid Journal of Public Law* 152.

63 UU Ewelukwa 'Post-colonialism, gender, customary injustice: widows in African societies' (2002) 24 *Human Rights Quarterly* 474, 485.

64 Constitution of Kenya, 2010 art 29(f); Rwanda's Constitution of 2003 (with Amendments through 2015) art 14; Constitution of Eswatini, 2005 sec 12.

65 Combined Report of the 12th & 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2015-2020 69.

Any widowhood rites in Rwanda which are degrading in nature should be rendered unconstitutional, therefore, invalid as envisaged by the supremacy clause.<sup>66</sup> The proscription of harmful practices on women was also implemented in Kenya. The Constitution of Kenya, 2010 states that any customary law that is contrary to the Constitution is invalid.<sup>67</sup> Crafted similar to the Kenyan provision are sections 30<sup>68</sup> and 31<sup>69</sup> of the Constitution of the Republic of South Africa, 1996 (South African Constitution), which prohibit any cultural practice contrary to the Constitution. Section 2 of the South African Constitution invalidates any law or conduct contrary to the Constitution. This includes all harmful practices performed on widows. Moreover, article 16(1) of the Constitution of Zimbabwe, 2013 (as amended) provides as follows: ‘The State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans’. It is apparent that demeaning and degrading widowhood rites are contrary to the Constitution. Hence, any such practices should be outlawed. Kenya has gone further in its protection of widows than most African countries. It outlawed and made it ‘an offence to force a woman to commit a sexual act for a cultural or religious reason’.<sup>70</sup> Such acts are understood to include sexual cleansing and widow inheritance, which are done in compliance with different cultures in Kenya.<sup>71</sup>

Despite all these efforts, it is somewhat disappointing that as of 2014 – eight years since the Sexual Offences Act of 2006 was enacted in Kenya – no arrests or prosecutions had been made under section 29 criminalising sexual acts justified as cultural or religious.<sup>72</sup> This clearly indicates the limitation of law as a tool for social transformation. Lesotho’s constitutional protection from discrimination also falls short on account of an exemption clause that permits discriminatory customary laws in personal law matters such as marriage and inheritance.<sup>73</sup> Since most marriages in Lesotho are governed by customary law, this leaves women in general, and widows in particular, vulnerable.<sup>74</sup> Lesotho’s law allows widows to remarry. This has been the legal position since the Marriage Act 10 of 1974 was promulgated. A widow’s freedom to remarry is, however, qualified by a requirement that she registers any property of the previous marriage for the purposes of safeguarding the children’s interests.<sup>75</sup> Although there is no legal restriction on a widow’s choice of marriage partner, customary law usually prescribes whom she may marry. Due to the constitutional exemption given to customary law, prescriptions on widows’

66 Rwanda’s Constitution of 2003 (with amendments through 2015) art 3.

67 Constitution of Kenya 2010 art 2(4).

68 Section 30 provides:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

69 Section 31 provides:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

70 Sexual Offences Act 3 of 2006 (Kenya) sec 29.

71 Implementing the Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya’s Legal Framework (2014) <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/333065/ml-implementing-protocol-womens-rights-africa-010314-en.pdf;jsessionid=27F4D469EFBAC9A2F3C44E777BAA157D?sequence=1> (accessed 23 June 2023).

72 Oxfam, Dechert LLP & The Circle ‘Implementing the Protocol on the Rights of Women in Africa: analysing the Compliance of Kenya’s Legal Framework’ (2014) 30 <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/333065/ml-implementing-protocol-womens-rights-africa-010314-en.pdf> (accessed 15 May 2023).

73 Constitution of Lesotho, 1993 sec 18(4).

74 N Ansell, F Hajdu, L Blerk & E Robson “‘My happiest time’ or ‘my saddest time’? The spatial and generational construction of marriage among youth in rural Malawi and Lesotho’ (2017) 43 *Transactions of the Institute of British Geographers* 5.

75 Marriage Act 1974 (Lesotho) sec 24.

marriage partners are observed in Lesotho. This entails that widows who were married customarily still do not have the liberty to choose their own spouses in case of remarriage. Such a state of affairs significantly hampers the implementation of article 20 of the Maputo Protocol.

### 6.1.2 Policy implementation

The government of Malawi has also enacted a National Plan of Action against Gender-Based Violence (NPA), which sets out a plan to address violence against women effectively. Among the five priority areas outlined in the tackling of the 'root causes ... of harmful social norms'.<sup>76</sup> These measures of a Plan of Action against Gender-Based Violence highlight a high level of seriousness in eradicating harmful practices against women, including widows. However, Malawi acknowledges that there is still vast ground to cover for fully implementing the Maputo Protocol.<sup>77</sup> Cameroon adopted a National Gender Policy in 2014 to help achieve gender equality in all spheres of government. The policy advances widows' rights, among others. Degrading widowhood rites are also prohibited in Kenya's Vision 2030.<sup>78</sup> The Vision challenges Kenya to be intentional in coining ways to 'prohibit retrogressive cultural practices and social ills ...'.<sup>79</sup> Such a mandate coerces Kenya to outlaw any practices which are demeaning to widows.

### 6.1.3 Institutional implementation

Different institutions implement article 20(a) of the Maputo Protocol. In South Africa, the Commission for Gender and Equality recently conducted a study on the experiences of widows in different cultures.<sup>80</sup> It found that widows often suffer inhuman and degrading rites and are discriminated against. This is despite South Africa's highest law prohibiting discrimination and inhumane and degrading treatment of any human being.<sup>81</sup> Since most of the discriminatory and inhuman treatment of widows takes place through observance of cultural widowhood rites, it, therefore, follows that there is a lack of alignment between the Constitution and cultural practices. This is despite a clear caution of ensuring that customary law aligns with the Bill of Rights and other constitutional provisions.<sup>82</sup> Based on this, it is clear that mere constitutional inclusion of a right does not guarantee desired results unless followed by intentional implementation of the right.

Burkina Faso demonstrates a level of seriousness in its commitment to protecting widows. It has the Association of Widows and Orphans, which aims to protect widows.

In a bid to curb harmful and degrading practices emanating from widowhood rites, Cameroon also set up observatories in specific locations.<sup>83</sup> These are mostly through civil society organisations (CSOs) that advocate for the humanisation of widowhood rites.<sup>84</sup> This entails discarding all the harmful

76 National Plan of Action to Combat Gender-based Violence in Malawi (n 51).

77 Republic of Malawi Periodic Report (n 48) 83.

78 Vision 2030 is Kenya's development blueprint. See The Presidency Kenya Vision 2030 Sector Progress Project Updates June 2018 <http://vision2030.go.ke/wp-content/uploads/2018/09/Kenya-Vision-2030-Sector-Progress-Project-Updates-June-2018.pdf> (accessed 15 May 2023) 36.

79 The Presidency Kenya Vision 2030 (n 78).

80 Commission for Gender Equality 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: monitoring the implementation of the Maputo Protocol 2019/2020' [https://static.pmg.org.za/211130CGE\\_Report\\_SADC\\_Protocol\\_2020.pdf](https://static.pmg.org.za/211130CGE_Report_SADC_Protocol_2020.pdf) at 58 (accessed 15 May 2023).

81 South African Constitution secs 9 & 12(1)(e).

82 South African Constitution sec 39(3).

83 Single Report comprising the 4th, 5th & 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention 2015-2019 (2020).

84 L Bongben 'Widows campaign to humanising rites' *Cameroon Postline* 27 December 2013 <https://cameroonpostline.com/widows-campaign-to-humanising-rites/%E2%80%8B> (accessed 15 May 2023).

practices and consolidating useful ones. Cameroon has also implemented programmes for family protection by raising awareness of harmful socio-cultural practices.<sup>85</sup> All this is an indication that Cameroon condemns degrading widowhood rites and classifies them within the prohibited harmful practices.<sup>86</sup>

In Kenya, different programmes are put in place to advance widows' rights. These include programmes that cater for widows' welfare, like the National Government Affirmative Action Fund and the Women Enterprise Fund.<sup>87</sup> Although these are not specifically for widows, they are for marginalised groups. Kenya also has the Thamini Loan Product for Widows, a loan facility that assists widows.<sup>88</sup>

Rwanda also helps safeguard widows' rights through social security programmes. It has programmes to assist women widowed as a result of the genocide, like, the Rwanda National Association of Genocide Widows-AVEGA AGAHAZO.<sup>89</sup>

Most state parties to the Maputo Protocol condemn the inhuman, humiliating and degrading treatment of widows and acknowledge that culture bears a negative effect on widows' rights. For instance, Angola acknowledged that widows suffer multiple challenges due to culture.<sup>90</sup> However, since most of the challenges identified are related to inheritance, Angola only implemented programmes in that area. The measures did not address other concerns relating to article 20 or how the cultural challenges might be overcome. By contrast, states such as Burkina Faso, Malawi, and Cameroon did not just mention the ill-treatment of widows but indicated in their reports what attempts they had made in dealing with those challenges.<sup>91</sup>

Burkina Faso recognises widows among the selected group of women who should enjoy special protection.<sup>92</sup> It considers widows a highly vulnerable category of women. This is affirmed by Okolo, Reidpath and Allotey, who similarly indicate that widows in Burkina Faso 'are the most vulnerable in the society, and rank amongst the poorest'.<sup>93</sup> Their study on socio-economic inequalities in access to healthcare reveals deplorable statistics on widows.

Although several state parties expressly prohibit harmful practices on widows, as discussed above, there is no record of enforcement of those laws. Practices such as female genital mutilation have seen more action in terms of enforcement.<sup>94</sup> Despite the prevalence of degrading widowhood rites in Africa,

85 Cameroon Periodic Reports 2020 (n 83) 152.

86 RI Danpullo 'The Maputo Protocol and the eradication of the cultural woes of African women: a critical analysis' (2017) 20 *Recht in Afrika – Law in Africa* 10.

87 Kenya Combined Report (n 65) 85.

88 Ministry of Public Service, Gender and Affirmative Action Launch of Thamini Loan Product for Widows <http://www.psyg.go.ke/?p=3971> (accessed 15 May 2023).

89 Republic of Rwanda the Combined 11th, 12th and 13th Periodic reports of the Republic of Rwanda 2009-2016 on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 61st ordinary session (1-15 November 2017).

90 Republic of Angola 6th and 7th Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 at 67.

91 Burkina Faso Periodic Report on the African Charter on Human and Peoples' Rights and the Maputo Protocol May 2015 to March 2019 at 86; Malawi Periodic Report (n 48) 100-101; Cameroon Periodic Reports 2020 (n 83) 152.

92 Combined Periodic Report Burkina Faso (n 91) 86.

93 CO Okolo, DD Reidpath & P Allotey 'Socioeconomic inequalities in access to health care: examining the case of Burkina Faso' (2011) 22 *Journal of Health Care for the Poor and Underserved* 675.

94 J Muthumbi, J Svanemyr, E Scolaro, M Temmerman & L Say 'Female genital mutilation: a literature review of the current status of legislation and policies in 27 African countries and Yemen' (2015) 19 *African Journal of Reproductive Health* 36.

most cases involving widows have to do with inheritance. Given these, the following questions may be asked: Does this suggest that since the adoption of the Maputo Protocol, there have been no violations of widows' rights except with respect to inheritance? Does it perhaps suggest a lack of zeal for standing up to the socio-cultural forces that threaten widows' rights?

## 6.2 Widows' right to guardianship and custody of children

The Maputo Protocol also affords widows the same rights as widowers in guardianship and custody of children.<sup>95</sup> This has brought significant change in African communities where widows used to be disregarded in custody-related issues.<sup>96</sup> Despite this, widows in some cultures are still denied custody of their children.<sup>97</sup> The situation becomes exacerbated for those refusing to follow the inhumane widowhood rites. An example of this is seen in the Luo tribe of Tanzania,<sup>98</sup> where a widow is banished from her marital home and is denied custody of her children if she refuses to undergo cleansing (sexual intercourse with a designated member of her husband's lineage) or resists levirate marriage.<sup>99</sup> Writing on the Zimbabwean situation, Dube and Phethlo-Thekisho highlighted that despite the Protocol's provisions, widows often lose custody over their children as in-laws use these to take control of the deceased's property.<sup>100</sup> In such instances, neither the rights of the widows nor the children are considered. The Talensi widows of Ghana experience a similar fate. They are forced to forfeit not only their husbands' assets but custody and guardianship over their children if they refuse to enter into levirate marriages.<sup>101</sup> Danpullo demonstrates that the payment of the bride price has a bearing on the custody of children.<sup>102</sup>

Notwithstanding the aforementioned, different states are moving towards protecting women, which includes safeguarding their custody rights over their children. The following discussion indicates some measures taken by states to implement article 20(b) of the Protocol.

### 6.2.1 Legal implementation

Lesotho embarked on a review of its Children's Protection and Welfare Act 7 of 2011 to allow women equal custody of their children. This helps advance even Lesotho widows' custody rights. Mauritania also has a law that safeguards women's custody rights. Its Personal Status Code accords priority to mothers in matters of child custody.<sup>103</sup> It, therefore, means that widows' right of custody is covered through the Personal Status Code in Mauritania, as mothers include even those who are widowed. This provision supports article 20(b) of the Maputo Protocol, which indicates that widows automatically

95 Maputo Protocol art 20(b).

96 NH Msuya 'Challenges surrounding the adjudication of women's rights in relation to customary law and practices in Tanzania' (2019) 22 *Potchefstroom Electronic Law Journal* 2.

97 RIC Ehumadu 'Depriving widows inheritance rights by husbands' relatives in Nigeria' (2022) 16 *Bichi Journal of Education* 65; MT Ba-an, L Bedzra, JA Adjuri & SK Segbefia 'Assessing the infringement of widows rights during widowhood rites practices in Talensi And Nabdam in the upper East Region of Ghana' (2022) 1 *CITYA WISESA: Journal of Multidisciplinary Research* 34.

98 Although the Luo tribe is predominantly in Kenya, they are also found in Tanzania. See JB Shetler 'Historical memory as a foundation for peace: network formation and ethnic identity in North Mara, Tanzania' (2010) 47 *Journal of Peace Research* 640.

99 NH Msuya 'Harmful cultural and traditional practices: a roadblock in the implementation of the convention on the elimination of discrimination against women and the Maputo Protocol on women's rights in Tanzania' PhD thesis, University of KwaZulu Natal, 2017 at 121. On file with the author.

100 M Dube & N Phethlo-Thekisho 'The psychosocial plight of widows in the Binga District, Zimbabwe' (2019) 31 *Southern African Journal of Social Work and Social Development* 11.

101 Ba-an et al (n 97) 34.

102 Danpullo (n 86) 100.

103 Personal Status Code 2001 (Mauritania) arts 123, 126.

have the right to the custody of their children. Although the Personal Status Code came into force before the Protocol, Mauritania can still use it to buttress widows' rights.

### **6.3 Widows' right to remarry**

The Protocol grants widows a right to remarry and marry a person of their choice, should they decide to do so. It was essential for the Protocol to expressly expound on the subject due to its prevalence and relevance in Africa. It emanated from an understanding that restrictions were placed on widows' marital freedom. African widows are often coerced into levirate marriages.<sup>104</sup> The rationale behind this is usually to proscribe them from leaving the family with any inheritance. The practice not only tramples on widows' freedom of expression but also on several other rights, such as human dignity and bodily integrity. It also infringes on women's freedom from exposure to sexually transmitted diseases, including HIV.<sup>105</sup> It is on account of this context that the Maputo Protocol safeguards the right to remarry. This right aligns with article 6(a) of the Protocol on full and free consent as the basis for a valid marriage.

A study conducted in South Africa by the Commission for Gender Equality confirmed that widows are usually coerced into marrying one of their deceased spouse's relatives.<sup>106</sup> It is further indicated that widows suffer discrimination as they are subjected to demeaning practices which widowers do not experience.<sup>107</sup> Following is an indication of how different states implement legal measures to protect widows' right to remarry.

#### **6.3.1 Legal implementation**

The South Africa Constitution, 1996, expressly proscribes discrimination on the grounds of marital status.<sup>108</sup> This means the country had already committed, before the Maputo Protocol, to do away with laws and practices that unfairly discriminate against widows. Since equality is not only a right contained in the South African Constitution but also a foundational value, legislation had to be enacted to give effect to it, namely the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). It is, therefore, not surprising that South Africa did not enact specific legislation to deal with discrimination against widows as the Maputo Protocol envisages. The Constitution and PEPUDA, among other legal frameworks, still maintain their relevance in ensuring that widows enjoy their rights and are not unfairly discriminated against. Owing to these realities and more, the Commission for Gender Equality pronounced itself as follows:

South Africa has adopted sophisticated rights-based legislation with explicit reference to gender equality. An important challenge remains in making these rights accessible to all women by the provision of information and the development of the knowledge and skills that women require to avail themselves of the mechanisms inherent in the legal remedies.<sup>109</sup>

The above is true for the implementation of article 20 of the Maputo Protocol. South Africa has sufficient legislation and policy frameworks to safeguard widows' rights as enunciated in the Protocol. For instance, PEPUDA also outlaws 'any practice including traditional, customary, or religious

104 Doris (n 4) 5; Ezejiolor (n 16) 151; ME Baloyi 'Critical reflections on polygamy in the African context' (2013) 40 *Missionalia* 173.

105 Maputo Protocol art 14(d).

106 Commission for Gender Equality (n 80) 59.

107 Commission for Gender Equality (n 80) 58.

108 South African Constitution sec 9(3).

109 Commission for Gender Equality (n 80) 53.

practice which impairs the dignity of women and undermines equality between women and men'.<sup>110</sup> The Commission on Gender Equality Act 39 of 1996 (Gender Equality Act) further places a mandate on the Commission to monitor and report on compliance with different international and regional instruments relating to it.<sup>111</sup> This includes monitoring and ensuring compliance with the Maputo Protocol. Despite all these, widows in South Africa still suffer multiple human rights violations. According to research, the main cause of the infringement of widows' rights is the prevalence and observance of cultural practices.<sup>112</sup> The imposed cultural practices necessitate strict observance of widowhood rites, even where these are degrading and inhuman. South Africa, thus, needs an alignment of traditional practices with the legal framework.

Since the issues the Maputo Protocol addresses are not new, some states may find that although they have not yet domesticated the Protocol, its contents may be traceable in the country's legislation. To add to this, countries that follow a monist approach do not need to domesticate the Protocol for it to be effective in their jurisdictions. For instance, since Namibia follows a monist approach,<sup>113</sup> all provisions of the Maputo Protocol find application within the country. This includes provisions on widows' rights. Although Namibia has no independent legislation dedicated to widows,<sup>114</sup> article 20 of the Maputo Protocol is directly applicable to Namibia. The right to remarry safeguarded in the Protocol also finds its applicability in Eswatini through the Constitution, which gives room for free and consensual marriages between spouses.<sup>115</sup> This means forced levirate marriages are against the law in Eswatini. Cameroon also has similar laws on the protection of widows' rights. Its Penal Code prohibits forced marriages.<sup>116</sup> Burkina Faso also joins the list of those which shun forced marriages. Its Criminal Code criminalises levirate marriages imposed on widows by family members.<sup>117</sup> All these align with article 20(c) of the Maputo Protocol, which affords widows freedom to remarry. Widowhood rites which force widows to be married by particular individuals infringe the Maputo Protocol.

Despite the express provision of widows' rights to remarry a person of their choice, research indicates that several states overlook these rights. Some cultures in Ghana require widows to marry their deceased husbands' brothers or relatives.<sup>118</sup> This is done without any regard to their wishes because her family is considered bound by the bride wealth paid to the widow's family at the time of marriage to the deceased. This resonates with Danpullo's argument that achieving the realisation of widows' rights necessitates an eradication of the negative effects of marriage payments.<sup>119</sup> The fact that marriage payments were made at the commencement of marriage is taken to mean that the widow may be treated as part of the deceased's property to be inherited upon his death or as giving his lineage absolute say over her life even after he has died.<sup>120</sup> In some cultures, the only way to avoid

110 PEPUDA sec 8(d).

111 Gender Equality Act sec 11(1)(h).

112 GT Baloyi 'When culture clashes with individual human rights: a practical theological reflection on the dignity of widows' (2017) 38 *Verbum et Ecclesia* 4; M Manala 'African traditional widowhood rites and their benefits and/or detrimental effects on widows in a context of African christianity' (2015) 71 *Theological Studies* 1; L Phillips 'Culture vs the Constitution: the suffering of Zulu widows' (2019) *Farmer's Weekly* 6.

113 SK Witting & MP Angula 'Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia' (2020) 53 *Comparative and International Law Journal of Southern Africa* 5; N Ndeunyema 'The Namibian Constitution, international law and the courts: a critique' (2020) 9 *Global Journal of Comparative Law* 272.

114 The Republic of Namibia 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the Second Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 126.

115 Constitution of Eswatini sec 27(2).

116 Penal Code Law 2016/7 (Cameroon) sec 356.

117 Burkina Faso Criminal Code art 234; Burkina Faso Periodic Report (n 91).

118 Ba-an et al (n 97) 34; Doris (n 4) 5.

119 Danpullo (n 86) 108.

120 Danpullo (n 86) 109.

forced levirate marriages is to refund the bride price. The Ugandan case of *Mifumi v Attorney General and Kenneth Kakuru*,<sup>121</sup> which outlawed the mandatory refund of the bride price, is a step in the right direction, although it did not make explicit reference to widows' rights under the Maputo Protocol. Bride price aggravates the plight of widows. Court cases pronouncing on widows' rights are needed in order to safeguard their interests, as stated in article 20 of the Protocol.

#### 6.4 Jurisprudence relating to article 20

Very few cases dealing with widows' rights have been reported in Africa despite the prevalence of violations of widows' rights. Addadzi-Koom confirms this by stating that despite the Protocol having existed for over a decade, very few cases have been reported on it.<sup>122</sup> Those that have been reported mainly relate to inheritance rights, which are dealt with in article 21 of the Maputo Protocol. Furthermore, the few cases available on widows' rights were not influenced by the Maputo Protocol as they were decided before the coming into effect of the Protocol. An example of this is the Ugandan case of *Maliyam Adekur v James Opaja and Attorney General*.<sup>123</sup> The petitioner averred that the wife's inheritance violated the rights of the widow as it infringed some provisions of the 1995 Constitution of Uganda. Sadly, the Constitutional Court did not have the opportunity to pronounce substantively on the matter as the case was dismissed on a preliminary objection of wrongfully joining the second respondent in the matter. Without trivialising court procedures, the case may be symbolic of the regard paid to widows' rights as formalities take up attention, leaving the crucial matter unresolved. The *Okonkwo v Okagbus* case from Nigeria is one of many cases that, despite coming before the Maputo Protocol, denounced some cultural customs that were unfavourable to widows and their children. The case challenged the marrying of a woman for a deceased man and expounded that such a practice was contrary to public policy and also failed the repugnance test. It is through such decisions that the Maputo Protocol included a clause on the protection of widows.

### 7 Conclusion

After carefully evaluating widows' rights as protected in article 20 of the Maputo Protocol, it is clear that the provision came as a much-needed remedy for the challenges facing widows in Africa. Although some states already had legislation and policies catering for widows directly or indirectly, these were mostly generalised. Article 20 of the Protocol deals in detail with the specific challenges faced by widows in Africa, emphasising the state's obligation to do away with harmful widowhood rites. Various states have implemented article 20 of the Protocol into their domestic laws. However, there is still much to be done to ensure the law is implemented. The low incidence of reported cases of violation of widows' rights is far from comforting. Rather, it testifies to the work that still needs to be done to make rights real for widows in Africa.

In an endeavour to address the identified gap, states may mandate CSOs to identify, advise and report on degrading widowhood rites in various locations. These would be effective as CSOs – especially community-based ones – would be aware of different cultural practices taking place in different societies and aware of laws regulating those practices. In this way, more detailed reporting on article 20 may be considered. Such reporting may have an additional section specifically indicating efforts by different CSO in the promotion of widows' rights. The African Commission will need to be intentional and specific on the need for state reports to indicate specific measures undertaken to promote widows' rights as well as cases heard relating to the advancement of these rights. Also, since it is clear from the discussion advanced in this chapter that violation of widows' rights mainly emanates

121 *Mifumi v Attorney General and Kenneth Kakuru* (2010) UGCC 2 (26 March 2010).

122 ME Addadzi-Koom 'Of the women's rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard' (2020) 28 *Feminist Legal Studies* 155.

123 *Maliyam Adekur v Joshua Opaja and the Attorney General* (Constitutional Petition 1 of 1997) (1997) UGCC 4 (13 June 1997).



from practices justified as cultural, educational programmes may be initiated to encourage individual and collective critical reflection on those practices in relation to human rights generally, and widows' rights specifically. States could facilitate the creation of safe platforms for such reflection. Those platforms must be inclusive, participatory, and accessible to widows. The platforms could function as a filtering mechanism so that only those practices that are truly about appropriately honouring the deceased while safeguarding the widow's dignity are retained, in accordance with articles 17 and 20 of the Maputo Protocol, the latter being about guaranteeing women the right to a positive cultural context.