

## Article 8

### Access to justice and equal protection before the law

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Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- (a) effective access by women to judicial and legal services, including legal aid;
- (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- (c) the establishment of adequate educational and other appropriate structures with particular

attention to women and to sensitise everyone to the rights of women;

- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- (e) that women are represented equally in the judiciary and law enforcement organs;
- (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

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## 1 Introduction

Women's access to justice, their equal standing before the law and their right to equal protection of the law are critical parts of safeguarding any and all of their human rights.<sup>1</sup> When judicial institutions and the law they apply are gender responsive, they encourage women to claim their economic, social, cultural, civil and political rights.<sup>2</sup> However, when they are not gender responsive, they may further

1 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice, 23 July 2015, CEDAW/C/GC/33 (CEDAW Committee General Recommendation 33) para 1.

2 UN Women Fact Sheet on the importance of women's access to justice and family law, <https://www.unssc.org/sites/default/files/UNWomenFactSheet.pdf> (accessed 23 June 2023).

marginalise those already vulnerable.<sup>3</sup> As is highlighted throughout this chapter, although laws are essential in setting normative standards, such reform in isolation is often not enough to bring about social change. To be able to rely on the law, women need access to justice institutions which they often lack due to cost, location, and stigma.<sup>4</sup> Moreover, justice actors, such as the police, prosecutors, and judges, more often than not reflect the gender stereotypes and biases of their societies at large.

Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) combines three interrelated rights: 'equality before the law', 'equal protection and benefit of the law' and 'women's access to justice'. These rights underpin the entire Protocol and form an essential part of the principle of the rule of law and good governance.<sup>5</sup>

Article 8 reinforces the obligation of each member state to guarantee that a suitable system is in place to ensure every woman all their rights. It equally reinforces the obligation to guarantee that an appropriate system is in place to enable each woman to challenge violations of their rights.<sup>6</sup> Article 8 furthermore refers to the many elements that make up an enabling environment that is the *sine qua non* condition for women to access justice and effectively experience equal protection of the law. In this regard, article 8 features inter-linked, distinct, and diverse issues such as aspects of fair trial rights, educational and sensitisation measures, equal representation, and obligations to reform the law.

The aim of this chapter is to provide a holistic analysis of article 8. To attend to the many facets of this article this chapter is divided into six sections. After this introduction, the chapter explores the rich drafting history of article 8. Section 3 then proceeds to analyse the different legal concepts brought together under article 8 and highlights the linkages between article 8 and other treaty provisions in the Protocol and in other human rights instruments. Section 4 examines the nature and scope of the obligations imposed on states under article 8, after which the discussion shifts to the measures that states have employed to varying degrees to implement the article. In the conclusion, the discussion assesses the challenges to implementing article 8, the development of regional jurisprudence related to article 8 and provides some recommendations to state and non-state actors.

## 2 Drafting history

The origin of article 8 is found in the Nouakchott Draft, which drew from article 7 of the African Charter on Human and Peoples' Rights (African Charter).<sup>7</sup> Article 9 of the Nouakchott Draft stipulates that state parties must 'take all appropriate measures to facilitate the access of women to judicial services' and 'put in place adequate structures to inform women and make them aware of their rights'.

In the following draft, the Kigali Draft, a reference to article 25 of the African Charter was inserted alongside the reference to article 7.<sup>8</sup> A heading was also introduced, referring to 'Information and Legal Aid'. In terms of the 'access' right, the reference to 'judicial' was dropped, and a right to legal aid was inserted. The latter reference is arguably related to the adoption of the Beijing Platform for Action

3 UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, para 35.

4 UN Women 'Families in a changing world' Progress of the World's Women 2019-2020 <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women> (accessed 23 June 2023) 80.

5 CEDAW Committee General Recommendation 33 (n 1) para 1.

6 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 84.

7 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).

8 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). The numbering of the art changed from 9 to 10.

(Beijing Platform), four years prior, stipulating that states must '[e]nsure access to free or low-cost legal services, including legal literacy, especially designed to reach women living in poverty'.<sup>9</sup>

In the process that followed, the African Commission on Human and Peoples' Rights (African Commission) was tasked to consider a parallel development that was underway, the drafting of the Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls.<sup>10</sup> The OAU Convention on Harmful Practices was later incorporated into the Maputo Protocol. In the merger, it made an important contribution to the 'educational and sensitisation' aspects of article 8 by specifically referring to education campaigns involving those who administer and enforce the law.<sup>11</sup>

The Final Draft formed the basis for the further development of the Maputo Protocol.<sup>12</sup> It received input from the Meeting of Experts in 2001, comments by the Office of the Legal Counsel in 2002 and the NGO Forum in 2003. In the Final Draft, the title was kept, while a first paragraph was added, closely resembling the right set out in article 7(1) of the African Charter, which refers to the right of women to 'have their cause heard'. Sub-section (a) was revised to refer to 'legal aid services' while a new sub-section (b) was inserted to support 'local, national, regional and continental initiatives directed at providing women access to legal aid'.

At the Meeting of Experts in 2001, the reference to 'women having their cause heard' and the new sub-section (b) were adopted without changes.<sup>13</sup> Sub-section (a) was amended to include 'equal access' to legal aid and sub-section (c) was amended to widen the scope of the structures involved in sensitisation.<sup>14</sup> The most important change, however, was the addition of a new sub-section (d) as a direct result of the alignment of the Maputo Protocol with the OAU Convention on Harmful Practices, as mentioned above. This section set out that states must 'ensure that law enforcement organs at all levels are aware of gender equality and women's human rights and shall enforce the law in a gender responsive manner'.<sup>15</sup> Although this addition did not elaborate on the different law enforcement organs, it did, as a first step, acknowledge the essential principle of the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women.<sup>16</sup> It stipulates that '[t]here is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws'.<sup>17</sup>

9 Article 61(a).

10 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). See also R Murray 'Women's rights and the organisation of African Unity and African Union: the Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law modern feminist approaches* (2005) 262.

11 Article 2(4). Art 3 furthermore referred to 'all necessary measures to create public awareness regarding harmful practices'.

12 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.

13 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts). 13.

14 Report of the Meeting of Experts (n 13) 13.

15 As above.

16 1994 (Victoria Falls Declaration), reprinted in C Heyns & M van der Linde 'Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women' in C Heyns (ed) *Human rights law in Africa 1999* (2002) 387-388.

17 Victoria Falls Declaration para 15.

In 2003, the NGO Forum provided further feedback on the Final Draft.<sup>18</sup> Importantly, substantial revisions were proposed in the Comments by the NGO Forum to ensure that article 8 fulfilled existing human rights standards. A new heading was suggested, referring to '[a]ccess to justice and equal protection of the law'.<sup>19</sup> This change shaped the scope of article 8 going forward as the focus shifted away from 'information and education' towards the broader 'access to justice and equality before the law'. It was furthermore suggested that the main provision be enlarged to encapsulate three interrelated concepts: 'equality under the law', 'the right of women to have their cause heard', and 'equal protection of the law'.<sup>20</sup>

In light of the suggested revisions to the opening paragraph, the language of sub-sections (a) to (d) was revised.<sup>21</sup> In addition, two new sub-sections were proposed. First, sub-section (e) containing a requirement that women be equally represented with men in 'judicial and law enforcement institutions'. Second, with reference to article 2(f) and (g) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), an obligation on states to 'reform ... existing discriminatory customary law to ensure respect for fundamental women's rights particularly the right to equality'.<sup>22</sup>

The final version of the Protocol was adopted by the Ministerial meeting in March 2003.<sup>23</sup> In the Addis Ababa Draft the right of women to have their cause heard was removed; and a vital change was made to sub-section (f) replacing the reference to 'customary laws' with 'existing discriminatory laws and practices' substantially enlarging states' obligation to reform all domestic laws.

In summary, the various rights that eventually found their way into article 8 substantially differ from the point of origin in the Nouakchott Draft. What started out as a right to access judicial services and the right to be informed about relevant rights, transformed into a complex web of access, equality, representation, and educational rights. Importantly, this provision lost its general reference to the 'right to information' but gained a strong stance on access to judicial and legal services, including legal aid. It was, as highlighted, significantly influenced by convergence with the OAU process of developing the OAU Convention on Harmful Practices, which resulted in the comprehensive reference to the reform of discriminatory laws and practices.

### 3 Concepts and definitions

Article 8 consists of a main paragraph that sets out the equality standard and six sub-paragraphs referring to access to justice, the support of initiatives providing women's access to legal services, education about the law, enforcement of the law, reform of the law and representation in organs enforcing the law. The following conceptual analysis takes place under two separate headings referring to the main concepts involved under article 8, namely: 'equality before the law and equal protection

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

19 Comments by the NGO Forum (n 18) 9.

20 As above.

21 Comments by the NGO Forum (n 18) 10. Most importantly sub-sec (a) was rephrased to include 'effective access to judicial and legal services, including legal information and legal aid services'.

22 Comments by the NGO Forum (n 18) 10.

23 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).

and benefit of the law' and 'access to justice'. The six sub-paragraphs (a) to (f) are then discussed under section 5 in relation to the state obligations expressed under each provision.

### 3.1 Equality before the law and equal protection and benefit of the law

#### 3.1.1 Formal versus transformative substantive equality

In its generic form, equality has been referred to by Holtmaat as a 'treacherously simple concept'.<sup>24</sup> Found in articles 7 and 8 of the Universal Declaration of Human Rights (Universal Declaration), equality, together with the attendant concept of non-discrimination, found in article 2 of the Universal Declaration, forms a progressive, universal, moral, and legal principle.<sup>25</sup> However, although referred to as a progressive principle, equality in its formalistic form, arguably does very little to change the position of women in an overwhelmingly patriarchal context.

At a glance, the wording of the main paragraph of article 8 may create the impression that it protects formal, rather than substantial equality as 'equality before the law' implies an absence of special privileges that favour, in this context, men over women; while the expression 'equal protection of the law' suggests that there should be equality of treatment of women and men in the application of the law. On the face of it, both concepts draw on the 'sameness and difference' approach used to establish formal equality.<sup>26</sup> This impression is further supported by the definition provided by the African Commission under article 3 of the African Charter.<sup>27</sup> In this regard, the Commission has defined the principle of 'equality before the law' as 'the right by all to equal treatment under similar conditions' and 'equal protection of the law' as 'no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances'.<sup>28</sup> As suggested by Chekera, the jurisprudence of the African Commission has predominantly 'favoured the formal approach to equality', where several communications have consistently referred to equality as requiring sameness in treatment.<sup>29</sup>

24 R Holtmaat 'The Concept of Discrimination' Academy of European Law Conference Paper, 2004 [http://www.era-comm.eu/oldoku/Adiskri/02\\_Key\\_concepts/2004\\_Holtmaat\\_EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/02_Key_concepts/2004_Holtmaat_EN.pdf) (accessed 23 June 2023).

25 CEDAW Committee General Recommendation 33 (n 1) para 6. See also arts 5 UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 2 and 14 International Covenant on Civil and Political Rights (ICCPR), 2(2) and 3 International Covenant on Economic, Social and Cultural Rights (ICESCR), 14 European Convention on Human Rights (ECHR), Protocol 12 ECHR and art 24 American Convention on Human Rights.

26 For a further discussion on the 'sameness and difference' approach see C MacKinnon 'Difference and dominance: on sex discrimination' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 276-287. See also C Littleton 'Reconstruction sexual equality' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 248-263; and J Capps 'Pragmatism, feminism, and the sameness-difference' (1996) 32 *Transactions of the Charles S. Peirce Society* 1 65-105.

27 The main provision of art 8 of the Maputo Protocol is almost a verbatim recount of the contents in art 3 of the African Charter.

28 *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) paras 96 & 99.

29 YT Chekera-Radu 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) 1 *African Human Rights Yearbook* 57. In *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v the Republic of Cameroon*, Communication 290/04, African Commission on Human and Peoples' Rights 25th Annual Activity Report (2019) para 187 the African Commission, with reference to *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016) the African Commission reaffirmed the basis upon which a successful claim may be made in respect of allegations of discrimination. In *Equality Now*, para 147, the Commission stated that '[t]he complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable' which is indicative of a formal approach to equality. The African Commission did recognise, in both cases, that difficulties may be encountered in the identification of comparators, and that therefore, there can be exceptions to the use of comparators. However, the exceptions to the use of comparators is arguably not analogous with a substantive approach to equality.

Reaching equality by treating like alike is, however, a contentious logic.<sup>30</sup> As questioned by Fredman, ‘when can we say that one person is so “like” another that they should be treated alike?’<sup>31</sup> Moreover, although we might be able to agree on whether ‘two individuals are relevantly alike, we may still have doubts as to whether they should always be treated alike’.<sup>32</sup> With regard to the rights of women, practice implies that equal treatment of men and women may, in reality, preserve inequalities.<sup>33</sup> Thus, as a contrast, the substantive call for equality is predicated on and illustrated by, the lived inequalities of women.<sup>34</sup> This refers to the formulation of norms themselves (promulgating and reforming the law), their application by judicial institutions and the context within which laws are formulated and applied.<sup>35</sup>

As was highlighted above, the African Charter seemingly focuses on formal equality. Thus, as article 8 borrows from, and builds on, the approach of article 3, it is not too far fetched to conclude that it views equality in the same light. However, when considering the Maputo Protocol as a whole, together with the specific provisions in for example article 8, it is clear that both provision and treaty breaks away from a formalistic notion of equality. The Maputo Protocol neither treats women as if they are all in the same position in society to then proceed to outlaw all sex- and gender-based differentiation; nor does it translate existing interests into rights, risking the entrenchment of an unequal *status quo*.<sup>36</sup> Instead, the Maputo Protocol, including article 8, expressly seeks to address and overcome structural, social and economic, public and private inequalities of gender inherited from our patriarchal past. By dismantling the public and private divide in articles 1(j) and 4, by prescribing economic and welfare rights in article 13 and by applying an intersectional lens, throughout, recognising the implication of, for example, refugee status, age and disability, the Maputo Protocol consistently refers to a substantive approach to equality, not a formalist approach.

The African Commission, in General Comment 6, furthermore defines substantive equality, within the context of the Maputo Protocol as a form of equality that

requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law.<sup>37</sup>

Although this definition was provided in relation to article 7(d) of the Maputo Protocol it is clear that this aptly describes the overall approach of the Maputo Protocol to achieve a transformed society for all.

Moreover, as can be deduced from the definition provided by the African Commission, the objective of the Maputo Protocol is arguably to transform women’s position in society; making transformation

30 S Fredman *Discrimination law* (2011) 1.

31 Fredman (n 30) 1.

32 Fredman (n 30) 2.

33 Fredman (n 30) 2.

34 C MacKinnon ‘Substantive equality revisited: a reply to Sandra Fredman’ (2016) 14 *International Journal of Constitutional Law* 739.

35 T Loenen ‘Towards a common standard of achievement? Developments in international equality law’ (2001) *Acta Juridica* 197.

36 C Albertyn ‘Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice’ (2018) 34 *South African Journal on Human Rights* 442.

37 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples’ Right 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 extra ordinary session of the African Commission held in Banjul, The Gambia 4 March 2020, para 14.

an inherent part of the strive towards substantive equality. Goldblatt and Albertyn refer to the concept of ‘transformative, substantive equality’, which, although developed in the context of the South African Constitution, well describes the drive of the Maputo Protocol to change women’s lived realities. They understand ‘transformative, substantive equality’ to mean,

a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities [that] allow people to realise their full human potential within positive social relationships.<sup>38</sup>

Transformative substantive equality thus requires a concern with ‘recognition, redistribution and redress, and an eradication of actual, “real-life” inequalities’.<sup>39</sup> By referring to, for example, ‘effective’ access to justice – contemplating the eradication of gendered stereotypes, resource allocation towards legal aid assistance and the sensitisation of ‘everyone’ to the rights of women article 8, in line with the approach of the Protocol at large, evidently addresses inequality in a transformative, substantive manner to target systemic forms of discrimination.

### 3.1.2 ‘Equality before the law’ and ‘equal protection and benefit of the law’

As alluded to above, various international human rights instruments incorporate and combine the terminology of ‘equality before the law’ and ‘equal protection of the law’.<sup>40</sup> Although distinct in their application, these two phrases have been combined over time to define the legal guarantees of equality in domestic and international law.<sup>41</sup> These phrases are arguably closely related, yet different in their application.

‘Equality before the law’ signifies that every person must be subject to one system of laws, have equal access to the same adjudicatory bodies and have the right to non-discriminatory administration of justice.<sup>42</sup> As alluded to above, this concept is intimately connected to the principle of non-discrimination which in the context of article 8 especially refers to the judiciary and all related law enforcement organs. To capture the meaning of ‘equality before the law’, it is important, as Goonesekere notes, to understand this concept in the context of its evolving meaning.<sup>43</sup> In the context of article 8, this refers to the state’s obligation to achieve substantive equality by equipping law enforcement officials with skills to efficiently interpret and enforce women’s rights.<sup>44</sup>

The ‘equal protection of the law’ is arguably a further expansion of the concept of ‘equality before the law’ as the scope of the former terminology is wider. ‘Equal protection of the law’ views the substantive content of law from the perspectives of the principles of equality and non-discrimination. It is the obligation of all member states, as is further discussed under section 5 below, to guarantee that all laws abide by the principles of equality, non-discrimination, and non-arbitrariness; thus, affording equal protection to everyone through the relevant legal system.

38 C Albertyn & B Goldblatt ‘Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 *South African Journal on Human Rights* 249.

39 Albertyn & Goldblatt (n 38) 442.

40 See also arts 5 CERD, 2 and 14 ICCPR, 2(2) and 3 ICESCR, 14 ECHR, Protocol 12 ECHR and art 24 ACHR.

41 For a discussion on the constitutional protection of these rights see 5.1.

42 S Goonesekere ‘Article 15’ in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 388.

43 S Goonesekere ‘Article 15’ in Freeman et al (n 42) 388.

44 See 5.3.

Furthermore, the addition of ‘equal benefit of the law’ in article 8 closely resembles the construction of the equality clauses in the South African and Canadian Constitutions.<sup>45</sup> The outcome of this addition is not only that law which prohibits, protects, or regulates activities must be equal in their application, those that confer benefits must do so equally.

### 3.1.3 ‘Women’ and ‘men’

The reference to ‘women’ and ‘men’, in the main provision of article 8 identifies the position and treatment of men and women as the relative points of comparison in determining equal treatment. With reference to article 3 of the African Charter, the Commission has determined that the ‘principle of “equal protection” ... places all men and women on an equal footing before the law’, and that ‘all men and women are entitled to equal protection against any discrimination and against any incitement to such discrimination’.<sup>46</sup> However, the reference to ‘women’ and ‘men’ gives little guidance regarding the far more complex aspects of determining maleness and femaleness. The reference to ‘persons of the female gender’ not ‘persons of the female sex’ in article 1(k) of the Maputo Protocol further highlights these complexities. Considering the fact that not all persons of the female gender carry biological female sex markers and the fact that the term ‘men’ is left undefined in the Maputo Protocol makes the comparison between the position of ‘women’ and ‘men’ complex.<sup>47</sup>

Furthermore, article 8 does not account for intersectional discrimination based on, for example, sexuality, gender identity, race, or class. In this regard, it is helpful to scrutinise the equality continuum: ‘women’ and ‘men’ with reference to for example, the prohibited grounds in the African Charter, the ICCPR and the intersecting grounds that are pointed out in the Maputo Protocol itself such as age, refugee status, disability, widowhood, pregnancy, being a nursing mother, among others.

## 3.2 Access to justice

Article 8 of the Maputo Protocol refers to ‘access to justice’ in its title and in sub-sections (a) and (b). It refers to ‘effective access’ to ‘judicial and legal services, including legal aid’ as well as to support any local, regional, or continental initiatives that provide women with access to such services. In this regard, it is closely related to article 25 of the Maputo Protocol which provides for the right to a remedy.<sup>48</sup>

The UNDP defines ‘access to justice’ as, [t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’.<sup>49</sup> As a legal concept, access to justice comprises legal protection, legal awareness, legal aid and counsel, appropriate adjudication, enforcement of the law and relevant judgments, reparation and oversight

45 Section 9(1) of the Constitution of the Republic of South Africa, 1996; sec 15(1) of the Constitution of Canada, 1867 with amendment through 2011.

46 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* Communication 323/06 African Commission on Human and Peoples’ Rights, Combined 32nd and 33rd Annual Activity Report (2013) para 176.

47 T Snyman & A Rudman ‘Protecting transgender women within the African human rights system’ (2022) *Special Edition Stellenbosch Law Review* 67.

48 Art 25 covers both the aspects of a procedural and substantial remedy alongside the right to access information about the remedies guaranteed. Access to justice can be viewed as a procedural aspect of the right to an effective remedy, see United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, Resolution adopted by the General Assembly on 16 December 2005, UN Doc A/RES/60/14, principle 12.

49 United Nations Development Programme (UNDP), Programming for Justice: Access for All – A Practitioner’s Guide to Human Rights-Based Approach to Access to Justice, <https://www.undp.org/asia-pacific/publications/programming-justice-access-all> (accessed 23 June 2023). The reference to ‘remedy’ in this definition also assists in relating this aspect of art 8 to art 25 of the Maputo Protocol proscribing the right to a remedy both as a procedural and material right.



by civil society organisations (CSOs).<sup>50</sup> As is further addressed in relation to the state obligations regarding access to justice, there is no such access when women fear the system; or where the system is far removed from women's lived realities, costly, weak, or corrupt.

A cornerstone of international human rights law, access to justice is one of the main components of the rule of law, a target of SDG 16<sup>51</sup> and a principle set to guide all functions and processes of the African Union (AU).<sup>52</sup> Women's access to justice is consequently promoted in the AU Agenda 2063: The Africa we want.<sup>53</sup> It moreover forms part of customary international law and can be characterised as a *jus cogens* norm.<sup>54</sup> As noted by Lawson et al, what distinguishes access to justice from any other human right is its 'transversal and interdependent character in relation to other rights, especially socio-economic rights, linked to the reduction and alleviation of poverty, gender inequality and other deprivations'.<sup>55</sup>

As expressed by the CEDAW Committee, access to justice is 'indispensable to the realisation of [all] women's rights'.<sup>56</sup> As further stated by the CEDAW Committee in General Recommendation 21, 'when countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependants'.<sup>57</sup>

Women's access to justice is furthermore specifically mentioned in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,<sup>58</sup> where the African Commission establishes that the equality of access by women and men to judicial institutions and equality before the law in any legal proceedings is a vital part of a fair hearing.<sup>59</sup>

#### 4 Nature and scope of state obligations

While the core concepts included under article 8 are set out in the main provision, as discussed in detail under section 3, the subsequent paragraphs (a) to (f) emphasise the many obligations resting on states in effecting access to justice, equality before the law and equal protection and benefit of the law. For ease of reference, the following sub-sections discuss these obligations together with references to related provisions in the Maputo Protocol and other international treaties under the headings of 'equality before the law and equal protection and benefit of the law', 'access to justice', 'education and sensitisation' and 'representation'. The discussion on state obligations related to 'access to justice'

50 UNDP Programming for Justice (n 49) 115.

51 Target 16.3: 'Promote the rule of law at the national and international levels and ensure equal access to justice for all'.

52 Article 4(m) of the Constitutive Act of the African Union.

53 Aspirations 3 and 6, see further the AU Strategy for Gender Equality and Women's Empowerment 2018-2028. For further discussion see N Ntlama-Makhanya & N Lubisi-Bizani 'The "Africa we want" in the African Union's Agenda 2063 on the realisation of women's human rights to access to justice' (2021) 21 *African Human Rights Law Journal* 292-293.

54 D Lawson, A Dubin, L Mwambene & B Woldemichael 'Engendering access to justice for the poorest and most vulnerable in Sub-Saharan Africa' in D Lawson, A Dubin, & L Mwambene (eds) *Gender, poverty and access to justice: policy implementation for sub-Saharan Africa* (2019) 5; F Francioni 'The rights to access to justice under customary international law' in F Francioni (ed) *Access to justice as a human right* (2007).

55 Lawson et al (n 54) 3. See also *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Communication 155/96 African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report (2001) para 61.

56 CEDAW Committee General Recommendation 33 (n 1) para 1.

57 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21 on Equality in marriage and family relations, 1994, A/49/38.

58 African Commission DOC/OS(XXX)247 (Principles and Guidelines on the Right to a Fair Trial).

59 Principles and Guidelines on the Right to a Fair Trial (n 58) para 2(c). As further supported by African Commission Resolution 283 on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283(LV)2014 (Resolution 283).

specifically highlights the impact of judicial stereotyping on access to justice and presents some specific state obligations that refer to access to justice in cases of sexual and gender-based violence (SGBV), an aspect of the right to access to justice that has been repeatedly singled out by the international community as key to women's equality.

#### 4.1 Equality before the law and equal protection and benefit of the law

In terms of state obligations article 8 bears strong resemblance to articles 3 of the African Charter, 15(1) of CEDAW, 26 of the ICCPR and the main provision of article 7 of the SADC Protocol on Gender and Development.<sup>60</sup> As noted by the African Court on Human and Peoples' Rights (African Court) in *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*,<sup>61</sup> article 26 of the ICCPR contains the same obligations as those stipulated in article 3 of the Charter, but it is 'much more detailed'.<sup>62</sup> In contrast to articles 3 of the Charter, 15(1) of CEDAW and 8 of the Maputo Protocol, article 26 of the ICCPR adds the obligation that, 'the law [must] prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. In this regard, article 26 much resembles the language used in the Maputo Protocol, which routinely refers to the obligation to ensure 'effective' protection against discrimination.<sup>63</sup> Read in this context, article 8 requires all domestic law, including customary and religious law, to be applied equally and have an equal outcome in relation to men and women, supporting substantive equality, as addressed above.<sup>64</sup>

An important aspect of the 'equal protection and benefit of the law' provision is the obligation to reform or repeal laws that are discriminatory against women. As an example, the African Commission has called on all state parties to reform legislation to ensure that 'histories of abuse are considered as a mitigating factor, including by codifying gender specific defences and mitigating factors' with regard to women facing the death penalty.<sup>65</sup>

Article 8(f) of the Maputo Protocol specifically refers to the obligation to 'reform ... existing discriminatory laws and practices'. The reference to 'existing' is redundant, but the reference to 'reform' [a change to improve] both discriminatory law and practices is of interest. On the one hand, it supports the obligation to 'modify' harmful social and cultural patterns.<sup>66</sup> On the other, it does not go as far as the obligation under article 5 to 'prohibit' and 'condemn' harmful practices and to 'take all necessary legislative and other measures to eliminate such practices'.<sup>67</sup> In this regard, it is of interest to note, in comparison, the language of article 2(f) of CEDAW, which arguably fulfils the combined obligations to 'modify', 'prohibit' and 'condemn', as equally part of the obligations under CEDAW.

60 For a comparison between arts 7 of the SADC Protocol on Gender and Development and 8 of the Maputo Protocol see further 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* 26-27.

61 (merits) 2016, 1 AfCLR 668.

62 Para 145.

63 See eg arts 2(1)(b), 8 (a) & (d) (2). It could also be said that its practical application has the same effects as combining arts 2 & 3 of the African Charter.

64 See sec 3 I 1.

65 African Commission Resolution 483 on the need for better protection of women sentenced to death in Africa, ACHPR/Res.483 (EXT.OS/XXXIII) 2021 (Resolution 483).

66 Article 2(2) of the Maputo Protocol.

67 See also arts 21 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) and 5(a) of CEDAW.

In *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali (APDF)*<sup>68</sup> the African Court provided further insights into women's right to equal protection of the law. The litigants, in this case, approached the African Court, claiming that sections of Mali's revised Family Code violated the Maputo Protocol and CEDAW.<sup>69</sup> Article 8 was not specifically referenced in *APDF*. However, the Court presented three conclusions relevant to the analysis of the obligations in article 8. First, the African Court was prepared to analyse the Code from an equality perspective even in the absence of a specific complainant injured by specific application of the code. The applicants, in this case, did not bring the case on behalf of a specific victim or victims; but rather put forward an argument based on the content of the law and the probable discriminatory outcomes. Second, the African Court, with respect to the law, found that the provisions on age, consent and inheritance were discriminatory as the law maintained 'discriminatory practices which undermine the rights of women'.<sup>70</sup> Finally, the Court prescribed re-socialisation through education as a remedy to the violations it found, similar to the obligation in article 8(c).<sup>71</sup>

## 4.2 Access to justice

As mentioned above, the Principles and Guidelines on the Rights to a Fair Trial indicate that states are required to take special measures to guarantee that women have access to judicial facilities.<sup>72</sup> The Commentary to the Bangalore Principles of Judicial Conduct in addition points out the role of the judge in ensuring that all courts offer equal access to men and women by avoiding the use of judicial stereotypes.<sup>73</sup> In formulating its views on the definition of women's access to justice, the CEDAW Committee refers to articles 2(c), 3, 5(a) and 15 of CEDAW, with a further reference to the obligation to guarantee that women have access to information about their rights and the available remedies.<sup>74</sup> It also includes access to 'competent, gender sensitive dispute resolution systems' together with 'equal access to effective and timely remedies'.<sup>75</sup> As spelt out by the African Commission, in relation to SGBV,

fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.<sup>76</sup>

It is clear from the statements by the CEDAW Committee and the African Commission that the concept of women's access to justice is a complex, multidimensional legal concept that not only guarantees all other rights of women, but also places unique and comprehensive obligations on state parties. As concisely described by the CEDAW Committee, the right to access to justice consists of the obligation to ensure 'justiciability', 'availability', 'accessibility', 'good quality', 'the provision of remedies for victims' and the 'accountability of justice systems'.<sup>77</sup> Access to justice is furthermore dependent on 'the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and

68 (merits) (2018) 2 AfCLR 380.

69 *APDF* (n 68) para 9.

70 *APDF* (n 68) para 124. See also *E.S. and S.C. v United Republic of Tanzania*, CEDAW Committee, Communication No 48/2013, CEDAW/C/60/D/48/2013, paras 3.5 and 7.9.

71 See further sec 3.3.

72 Principles and Guidelines on the Rights to a Fair Trial (n 58) para K(b).

73 United Nations Office on Drugs and Crime, 'Commentary on the Bangalore Principles of Judicial Conduct' (Bangalore Commentary) (2007) para 185. See also 4.2.1.

74 CEDAW Committee General Recommendation 33 (n 1) para 11.

75 CEDAW Committee General Recommendation 33 (n 1) para 11.

76 Principles and Guidelines on the Right to a Fair Trial (n 58) para P: Victims of Crime and Abuse of Power I; in terms of SGBV during conflict see Resolution 283 (n 59) para 1.

77 CEDAW Committee General Recommendation 33 (n 1) para 14.

corruption, and the equal participation of women in the judiciary'.<sup>78</sup> The latter is specifically referred to in sub-paragraph 8(e).<sup>79</sup>

Moreover, resources are key to accessing justice. As concluded by the CEDAW Committee, '[a] crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law'.<sup>80</sup> Thus, legal aid and initiatives directed at supporting the provision of legal aid as stipulated in sub-sections (a) and (b) are critical to the overall access of women to justice.<sup>81</sup>

Moreover, access to justice also includes what the CEDAW Committee refers to as the '[g]ood quality of justice systems', which requires that 'all components of the system adhere to international standards of competence, efficiency, independence and impartiality'.<sup>82</sup> It also, arguably, requires that women and men be equal before courts and tribunals, a provision which is not specifically provided for in the Maputo Protocol but which can be understood as part and parcel of the concept of 'equality before the law'.<sup>83</sup>

Finally, the obligation to guarantee the right to access to justice extends to plural legal systems.<sup>84</sup> As plural legal systems include compounded sources of law, women are sometimes met with contradictory laws and procedures as they try to access justice.<sup>85</sup> As pointed out in *APDF*, one of the obstacles to women's equality before the law was that the Family Code enshrined religious and customary law as the applicable regime, by default, in matters of inheritance.<sup>86</sup> The Family Code stipulated that its provisions would only apply when

religion or custom ha[d] not been established in writing, by testimony, experience or by common knowledge or where the deceased, in his life time, ha[d] not manifested in writing or before witnesses his wish that his inheritance should be distributed otherwise.<sup>87</sup>

Thus, in order for the Family Code to apply, a will must be drawn up in writing confirming the deviation from religious or customary rules on inheritance. Such a document would then have to be authenticated by a notary. However, as argued by the applicants, the majority of women in Mali lacked the capacity to use the services of a notary, and in addition there were only 40 notaries countrywide servicing a population of 15 million people.<sup>88</sup> Thus, as suggested by the applicants, a suitable remedy in this situation would be the obligation to develop a programme that would ensure that women in rural areas have access to a notary as a means to access justice.<sup>89</sup>

78 CEDAW Committee General Recommendation 33 (n 1) para 1.

79 See further sec 4.4.

80 CEDAW Committee General Recommendation 33 (n 1) para 36.

81 See also art 7(1)(c) of the Charter, 14(3)(d) ICCPR and 17(2)(iii) of the African Children's Charter.

82 CEDAW Committee General Recommendation 33 (n 1) para 14(d).

83 See art 14(1) of the ICCPR. See also sec 3.1.2.

84 CEDAW Committee General Recommendation 33 (n 1) para 5.

85 As above.

86 *APDF* (n 68) para 96.

87 As above.

88 *APDF* (n 68) para 97.

89 *APDF* (n 68) para 16xii.

#### 4.2.1 *Judicial stereotyping*

Patriarchal socio-legal contexts influence all societal systems, including the judiciary. As expressed by Pillay, notwithstanding the continuous struggle for women's right to equality, 'judicial processes worldwide are often shot through with harmful gender stereotypes', which results in the denial of access to justice for many women.<sup>90</sup> The effect of such judicial stereotyping is especially acute in cases of SGBV. As further stated by Pillay, '[j]udicial stereotyping is a common and pernicious barrier to [access to] justice, particularly for women victims and survivors of violence'.<sup>91</sup>

These stereotypes appear inside our courts, where gender biases by judges towards lawyers, as an example, include demeaning speech and gestures. For example, addressing woman lawyers as 'sweetie', 'honey', 'little girl', 'little sister' or point out their physical appearance or dress, which constitutes sexual harassment.<sup>92</sup> Belittling conduct by a judge, with statements such as 'this pleading must have been prepared by a woman' undercuts the credibility of women as lawyers.<sup>93</sup> As further noted in the Bangalore Commentary, insensitive treatment of a woman litigant referring to her, for instance, as a 'stupid woman' affects her access to justice as well as all her other rights.

Similar to the Maputo Protocol, CEDAW contains state obligations to modify harmful social practices and stereotypes.<sup>94</sup> According to the CEDAW Committee, these obligations apply to all arms of government, including the judicial branch.<sup>95</sup> Cusack considers that the effect of this obligation is that judges must, 'refrain from stereotyping (obligation to respect)', 'ensure stereotyping does not infringe human rights (obligation to protect)' and 'ensure women can exercise and enjoy the right to be free from wrongful gender stereotyping (obligation to fulfil)'.<sup>96</sup> Moreover, in combatting judicial stereotypes, the CEDAW Committee has acknowledged that there is a tacit obligation in every substantive provision of CEDAW, including article 15(1), to address gender stereotyping.<sup>97</sup> Considering the close resemblance between the provisions in article 2(c), 5 and 15 of CEDAW and 2(2) and 8 of the Maputo Protocol, the same obligation would arguably rest on the state parties to the Maputo Protocol.

#### 4.2.2 *Lack of access to justice in sexual and gender-based violence cases*

As acknowledged by Pillay, women subjected to SGBV face unique challenges in accessing justice.<sup>98</sup> As expressed by the Commission in its concluding observation on The Gambia, '[t]he huge under-reporting of gender-based violence cases including rape, trafficking and Female Genital Mutilation despite numerous sensitisation activities conducted', in combination with 'snail pace of prosecution and completion of the few reported cases due to insufficient evidence or non-cooperation by the victim and her family' is a cause of concern.<sup>99</sup> Moreover, as mentioned by Makunya, in the DRC, before

90 N Pillay 'Equality and justice in the courtroom', *Huffington Post*, 3 March 2014, [https://www.huffpost.com/entry/equality-and-justice-in-t\\_b\\_4892624](https://www.huffpost.com/entry/equality-and-justice-in-t_b_4892624) (accessed 26 June 2023).

91 Pillay (n 90) as referenced in S Cusack 'Eliminating judicial stereotyping: equal access to justice for women in gender-based violence cases' OHCHR, 9 June 2014, <https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc> (accessed 26 June 2023) Preface ii.

92 Bangalore Commentary (n 73) para 185.

93 As above.

94 See arts 2(2), 4(d), 5 & 12(b) of the Maputo Protocol and 5(a) and 10(c) of CEDAW.

95 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 39.

96 Cusack (n 91) 6.

97 CEDAW Committee General Recommendation 28 (n 95) para 7.

98 Pillay (n 90).

99 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on

any court can enforce a judgment, including judgments related to SGBV cases, victims are required to pay 10 per cent of the total amount of compensation they have been awarded.<sup>100</sup> Therefore, laws that protect women against SGBV, appropriate and swift investigations, access to an appropriate, non-biased remedy, and the actual payment of fair compensation are key to achieving justice and reducing trauma in SGBV cases.<sup>101</sup>

On the regional level, the Economic Community of West African States Community Court of Justice (ECOWAS Court) has led the way in defining women's access to justice in matters relating to SGBV, detailing the relevant state obligations. Some of these obligations are arguably unique to the SGBV context. Others, however, are essential with regard to the general right of access to justice for women. In *Mary Sunday v The Federal Government of Nigeria*,<sup>102</sup> the applicant specifically referenced article 8 of the Maputo Protocol, claiming that her right to an effective remedy had been violated because the state did not order an independent investigation into the acts of domestic violence she had suffered.<sup>103</sup> In its judgment, the ECOWAS Court held that there were major flaws in the investigation, as the suspect was never confronted nor questioned. The ECOWAS Court also stressed that the negligence experienced by Ms Sunday, where her docket was 'misplaced' on several occasions, impacted her rights under article 8. The court concluded that, on the part of the state, this was a gross misunderstanding of the right of access to a judge and thus a breach of the Maputo Protocol.<sup>104</sup>

In *EI v The Federal Government of Nigeria*,<sup>105</sup> the Applicant had been raped. When the ECOWAS Court received the application in 2019, eight years after the assault, the accused was still in custody, but the trial had not been concluded.<sup>106</sup> The Applicant in this case, relied on articles 7 of the African Charter and 25 of the Maputo Protocol to argue her right to have her matter tried in a domestic court without delay. The state defended the long delay by arguing that 'court[s] are sometimes affected by either the transfer, retirement, elevation, removal or death of a trial judge of the particular case involved, with the attendant consequences of commencing the case afresh'.<sup>107</sup> In response to this defence, the ECOWAS Court concluded that the 'practice of delaying dispensation of justice for many years by national courts of member states on flimsy excuses fall short of acceptable international standards in the dispensation of justice'. The court went on to state that, 'to hold a case in perpetuity before a competent court of law without recourse to giving the victim a quick closure poses unnecessary anxiety on the victim as to whether they will get a fair trial and just remedy at the lengthy end of the trial'.<sup>108</sup>

the Implementation of the African Charter on Human and Peoples' Rights (1994-2018) 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) (2005-2014) African Commission on Human and Peoples' Rights, adopted at its 31st extraordinary session held virtually 9-25 February 2021 (Concluding Observations The Gambia (2021).

100 TM Makunya 'Beyond legal measures: a review of the Democratic Republic of Congo's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(2) *Journal of African Law* 232.

101 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, 26 July 2017, CEDAW/C/GC/35 (CEDAW Committee General Recommendation 35) paras 26(b) & 34(f).

102 *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (17 May 2018).

103 Para 1. See also *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018) for a reference to art 8 and the conclusion that the litigant had been denied access to justice, paras 37-45. Access to justice for women were further discussed by the ECOWAS Court in *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017).

104 *Mary Sunday* (n 102) para IV.

105 *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022) (*EI*).

106 *EI* (n 105) paras 17 & 76.

107 *EI* (n 105) para 26.

108 *EI* (n 105) para 89.

The regional jurisprudence contributes to the understanding, meaning, nature and scope of article 8 by providing insight into some of the major challenges women face in seeking justice; such as the loss or misplacement of critical evidence and undue and prolonged delays in the administration of justice.

### 4.3 Education and sensitisation

Closely related to articles 2(2) and 5 of the Maputo Protocol, 25 of the African Charter, 7(e) of the SADC Protocol on Gender and Development and 2(f) and 5(a) of CEDAW, article 8(c) and (d) embrace the legal concept of re-socialisation. In *APDF*, the African Court referred to this concept as a measure to teach, educate and sensitise a population to ensure that society understands that the rights and freedoms in the Maputo Protocol and the corresponding obligations are not to be trumped by cultural or traditional practices that contradict the protection.<sup>109</sup> In *APDF*, the African Court specifically referred to article 25 of the African Charter, to set out this obligation. However, this obligation is clearly spelt out under article 8(c), concerning ‘everyone’ indicating the broader society, a populace, or a large group, and in sub-section (d) with regard to key actors, such as the police, judges and prosecutors. The latter provision goes beyond mere sensitisation and resocialisations to ‘equipping’ relevant actors to effectively interpret and enforce gender equality rights.

In Resolution 483, the African Commission explains that states must reform legislation, referring to sub-section (f), but also ‘train judicial actors to ensure histories of abuse are considered as a mitigating factor in relevant cases, including by codifying gender specific defences and mitigating factors’.<sup>110</sup> In the same vein, the Principles and Guidelines on the Right to a Fair Trial elaborates that states must ‘ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women’.<sup>111</sup>

Access to justice in situations of conflict or in the aftermath of conflict is furthermore particularly precarious for women. In this regard, the Commission, in Resolution 283, interprets access to justice to embrace the provision of adequate training on ‘investigating and prosecuting crimes of sexual and gender-based violence to personnel in the criminal justice system’.<sup>112</sup> The Commission specifically details that this refers to the police, forensic examiners, prosecutors, lawyers, and judges.<sup>113</sup> Moreover, different transitional justice mechanisms such as war crime tribunals, truth commissions and commissions of inquiries have been applied across Africa in the last 30 years.<sup>114</sup> For women, these mechanisms present two main obstacles to accessing justice: the application of blanket amnesty provisions; and the disregard of gender-related concerns during the formulation and implementation of transitional justice mechanisms.<sup>115</sup> In terms of the application of blanket amnesty provisions both the African Commission and the African Court have concluded that such amnesty laws violate the general right of the victim to access to justice under article 7 of the African Charter.<sup>116</sup> In addition, the UN Security Council Resolution 1325 stipulates that it is the responsibility of all states to ‘prosecute those responsible for ... war crimes including those relating to sexual and other violence against women and

109 *APDF* (n 68) paras 131 & 135(xii).

110 Resolution 483 (n 65) para 3.

111 Principles and Guidelines on the Rights to a Fair Trial (n 58) para K: Access to Judicial Services (b).

112 Resolution 283 (n 59) para 1.

113 Resolution 283 (n 59) para 1.

114 Since 1992, such mechanisms have been created in Rwanda, Burundi, South Africa, Nigeria, Sierra Leone, Ghana and Liberia among others.

115 See also art 10(2)(b) of the Maputo Protocol as discussed in A Budoo-Scholtz ‘Article 10’ in this volume.

116 *Thomas Kwoyelo v Uganda* Communication 431/12 African Commission on Human and Peoples’ Rights, 44th Annual Activity Report (2018); *Ajavon v Benin* (merits) (2019) 3 AfCLR 130 para 239.

girls', in this regard, the UN Security Council stresses the need to exclude these crimes, 'where feasible' from amnesty provisions'.<sup>117</sup>

Moreover, the Special Rapporteur on Rights of Women in Africa insists that states undertake training of law enforcement agents on identifying and prosecuting cases of violence against women and specifically online violence against women.<sup>118</sup> This, she further indicates, 'includes sensitisation on the gravity of the cases' and '[a]wareness raising and information dissemination [as] the majority of cases are not reported because women are unaware that online violence is as much a serious issue as offline violence'.<sup>119</sup> In Resolution 522 the African Commission goes even further to indicate that states have an obligation to 'undertake awareness-raising programmes which target boys and men, as well as campaigns involving all relevant stakeholders'. These programmes must, the Commission explains,

address the root causes of digital violence against women within the general context of gender-based violence in order to bring about changes in social and cultural attitudes and remove gender norms and stereotypes, while promoting the respect of fundamental rights in the online space, with special regard to social media platforms.<sup>120</sup>

The Commission has further identified other areas where sensitisation is necessary. In Resolution 336, it specifically points to the importance of 'training the judiciary and public security and other relevant authorities on the specific risks and protections for human rights defenders and in particular women human rights defenders'.<sup>121</sup>

#### 4.4 Equal representation in the judiciary and in law enforcement

As earlier discussed, the close relationship between women's access to justice and the rule of law as a core principle of a democratic government puts emphasis on the empowerment of women to advance gender equality.<sup>122</sup> Women's representation in all aspects of the domestic legal system is therefore essential.<sup>123</sup> However, equal levels of women's representation are far from achieved.<sup>124</sup> As

117 United Nations Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000) adopted by the Security Council at its 43th meeting, on 31 October 2000 (UN Security Council Resolution 1325).

118 Intersession Activity Report by Janet Ramatoulie Sallah-Njie Special Rapporteur on Rights of Women in Africa, 71st ordinary session of the African Commission on Human and Peoples' Rights (21 April-13 May 2022) p 15.

119 Intersession Activity Report (n 118) p 15.

120 522 Resolution on the Protection of Women Against Digital Violence in Africa - ACHPR/Res. 522 (LXXII) 2022 para 3.

121 African Commission Resolution 336 on Measures to Protect and Promote the Work of Women Human Rights Defenders - ACHPR/Res.336(EXT.OS/XIX)2016.

122 N Ntlama-Makhanya & N Lubisi-Bizani 'The "Africa we want" in the African Union's Agenda 2063 on the realisation of women's human rights to access to justice' (2021) 21 *African Human Rights Law Journal* 300.

123 Ntlama-Makhanya & Lubisi-Bizani (n 122) 300.

124 See eg Republic of Seychelles Country Report 2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, para 8.2, Table 1 'Proportion of women in legal offices'; Concluding Observations and Recommendations on the Periodic and Combined Report of the Islamic Republic of Mauritania on the Implementation of the African Charter on Human and Peoples' Rights (2006-2014) and the Initial Report on the Maputo Protocol African Commission on Human and Peoples' Rights, adopted at its 23rd ordinary session 12-22 February 2018 Banjul, Gambia paras 38(iv), and 49(iv); Democratic Republic of Congo Report to the African Commission on Human And Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (initial report and 1st, 2nd and 3rd Periodic Reports) para 129; Eswatini Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights Of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports), Table 5 'Number of Men and Women in the Judiciary'; see also in contrast the Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights (1994 -2018) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the



noted in the Concluding Observations on Mauritania the ‘low rate of training and integration of women judges in the judicial system’, is concerning; and the state should ‘[d]evelop a training and integration policy for women in the justice system’.<sup>125</sup> Closely related to articles 2(1)(d) and 9(2) of the Maputo Protocol, article 8(e) stipulates the obligation on state parties to ensure that ‘women are represented equally [with men] in the judiciary and law enforcement organs’. The CEDAW Committee furthermore interprets justiciability to guarantee ‘the unhindered access by women to justice’ which includes confronting and removing ‘barriers to women’s participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers in justice related services’.<sup>126</sup> It further includes applying temporary special measures under article 4(1) of CEDAW, to ensure that women are ‘equally represented in the judiciary and other law implementation mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal’.<sup>127</sup> The SADC Protocol on Gender and Development adds the aspect of the nature of courts in a plural legal system by referring to women’s equal representation in ‘all courts’ which importantly includes traditional courts, alternative dispute resolution mechanisms and local community courts.<sup>128</sup>

## 5 Implementation

Initial or periodic reports detailing states’ approaches to implementing the bundle of rights under article 8 can largely be divided into two groups.<sup>129</sup> The first group of states refers to a general right of access to justice and equality before the law;<sup>130</sup> while the second group of states presents their findings with specific reference to the relevant sub-articles of article 8.<sup>131</sup> In their initial or periodic reports, states have largely focused on the provision of ‘access to justice’ and ‘legal aid’ under article 8(a) and providing

Rights of Women in Africa (the Maputo Protocol) (2005-2014), African Commission on Human and Peoples’ Rights, adopted at its 31st extraordinary session held virtually, 9-25 February 2021, para 28(viii), indicating the ‘[a]ppointment of 50% of female Judges in the Superior Courts and 52% of female Magistrates in the Lower Courts’.

125 African Commission Concluding Observations Mauritania (2018) n 124, paras 38(iv) & 49(iv).

126 CEDAW Committee General Recommendation 33 (n 1) para 15(f).

127 CEDAW Committee General Recommendation 33 (n 1) paras 14(a) and 15(f).

128 Article 7(f).

129 What most of these state reports have in common is that they depart from a provision, in the relevant constitution, which refers to the right of ‘everyone’ to equality before the law.

130 Periodic Report of Burkina Faso within the framework of the implementation of art 62 of the African Charter on Human and Peoples’ Rights, January 2015; Cameroon Single Report comprising the 4th, 5th and 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, 2019; The Gambia Combined Report on the African Charter on Human and Peoples’ Rights for the period 1994 And 2018 and Initial Report Under the Protocol to the African Charter on the Rights of Women In Africa, August 2018; Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on human and Peoples’ Rights and Initial Report on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, April 2020.

131 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, January 2017; Combined Report of the DRC 2015 (n 124); Combined Report of Eswatini 2015 (n 124); Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, April 2018; Malawi Periodic Report on the African Charter on Human and Peoples’ Rights and the Maputo Protocol May 2015 to March 2019, 2020; 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, 2020; 10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the implementation of the provisions of the African Charter on Human and Peoples’ Rights, July 2016; the 11th, 12th and 13th Periodic Reports of Rwanda on the Implementation Status of the African Charter on Human and Peoples’ Rights & 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 2009-2016, 2017; Seychelles Country Report 2019 (n 124); Togo 6th, 7th and 8th Periodic Reports of Togo on the Implementation of the African Charter on Human and Peoples’ Rights, August 2017; Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human And Peoples’ Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women; South Africa Combined Second Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa August 2015.

‘education and sensitisation’ campaigns under 8(c). Therefore, the following discussion proceeds under these headings. As a prelude to this discussion, a brief engagement with the constitutional protection of rights related to article 8 and the reform of discriminatory laws are provided as background.

### 5.1 The gender responsiveness of domestic laws

Article 8 requires all law, including constitutional, statutory, and customary law to be gender responsive. When analysing the gender responsiveness of any constitution, UN Women suggests the consideration of a number of related constitutional provisions or indicators, two of which are equality and non-discrimination clauses and clauses referring to custom and religion.<sup>132</sup> Equality before the law and equal protection by the law, in its broader sense, are common core constitutional concepts, especially important in African post-colonial contexts.<sup>133</sup> From the perspectives of women’s equality before the law and equal protection and benefit of the law, such rights are guaranteed by states by including specific constitutional provisions creating a hierarchy of rights and values, where ‘equal protection’ prevails over, for example, discriminatory customary laws.<sup>134</sup> However, customary and religious laws have been left constitutionally unchallenged in some state parties to the Maputo Protocol, such as Comoros, Mauritius, and Tanzania.<sup>135</sup>

From the perspective of article 8, another approach that raises concern is the creation of constitutional caveats where customary law, in one way or another, trumps the right to equality. Even though much-needed reform in this area has taken place, in, for example, Zambia<sup>136</sup> and Zimbabwe,<sup>137</sup> these caveats still exist in, for example, Lesotho and Mauritius. In this regard, it is interesting to note the almost identical language and provisions in these clauses. Section 16 of the 1968 Constitution of Mauritius and section 18 of the 1993 Constitution of Lesotho specifically outlaw discrimination based on sex.<sup>138</sup> However, sections 16(4) and 18(4) in these respective constitutions indicate that the principle of non-discrimination does not apply to any law (including customary and religious law) so far as such laws make provision with respect to ‘adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law’. In Mauritius, without a reference that stipulates constitutional

132 UN-Women, Policy Brief No. 8: Why and how constitutions matter for advancing gender equality: gains, gaps and policy implications (2017) [www.unwomen.org/en/digital-library/publications/2017/2/why-and-how-constitutions-matter-for-advancing-gender-equality](http://www.unwomen.org/en/digital-library/publications/2017/2/why-and-how-constitutions-matter-for-advancing-gender-equality) (accessed 23 June 2023). The other indicators mentioned are: specific protection from violence, access to education, access to other social services, affirmative action, standalone provisions on women’s rights, national level quotas, local level quotas, national gender machineries (political) and the reference to unpaid care work.

133 See eg the Constitution of the Democratic Republic of the Congo (DRC) 2005 art 12; the Constitution of the Republic of South Africa, 1996 sec 9; the Constitution of Kenya, 2010 sec 27; the Constitution of Lesotho, 1993 sec 19; the Constitution of Malawi 1994, secs 4, 12(v) & 20; the Constitution of Namibia, 1990 art 10.

134 See eg the Constitution of Angola 2010 secs 223-224; the Constitution of Zambia 2016 sec 1(1); the Constitution of the DRC 2005 arts 153 & 207; the Constitution of Eswatini 2005 sec 252(2); the Constitution of Lesotho 1993 sec 2; the Constitution of Malawi 1994 sec 10(2); the Constitution of Mozambique 2004 sec 2(4) the Constitution of Namibia 1990 art 66; the Constitution of Seychelles 1993 sec 39(1); the Constitution of the Republic of South Africa 1996 secs 39(3) & 211(3); Constitution of Zimbabwe 2013 secs 46(2) & 176. For further reference see also C Heyns & W Kaguongo ‘Constitutional human rights law in Africa: current developments’ (2006) 22 *South African Journal on Human Rights* 676.

135 In the case of Tanzania, customary and Islamic law are in effect only when they do not conflict with statutory law as is established under sec 9 of the Judicature and Application of Laws Act.

136 The Constitution (Amendment) Act 2 of 2016, art 1, provides for the affirmation of the principle of constitutional supremacy and invalidates law or conduct that is inconsistent with the Constitution to the extent of the inconsistency. This provides that no law shall make any provision that is discriminatory either in itself or in its application to members of a particular race, tribe or system of customary law.

137 The Constitution of Zimbabwe 2013 provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. Under the previous constitution, the Constitution of Zimbabwe 1980, matters of personal law and the application of African customary law fell outside the purview of the discrimination clause, see sec 23(1)-(3).

138 Section 16 of the Constitution of Mauritius was amended in 1995, before it became a state party to the Maputo Protocol. In this regard ‘sex’ was added to the list of grounds based upon which an act can be deemed discriminatory.

supremacy of the non-discrimination clause, this caveat clause may contradict women's equality before the law and the equal protection and benefit of the law. In contrast, the 1993 Constitution of Lesotho spells out the general idea that the Constitution is the supreme law of Lesotho.<sup>139</sup> However, this is then contradicted by withdrawing customary law from the purview of the non-discrimination clause.

Related to the constitutional protection, putting in place domestic legislation, and specifically referring to sub-article (f), reforming discriminatory legislation also plays an important role in protecting, promoting, and fulfilling the rights set out in article 8. In terms of the former providing for specific legislation such as, for example, legislation concerned with domestic violence<sup>140</sup> and human trafficking<sup>141</sup> are examples of states' attempts to implement article 8. In terms of the latter, reforming the law, for example, to specifically prohibit marital rape, promotes and protects the rights of women.<sup>142</sup>

## 5.2 Access to justice

It is common cause that effective implementation is key to the protection of women's rights; but as expressed by Burkina Faso, the 'persistence of certain phenomena like illiteracy and inadequacy of information on judicial procedures' hamper the implementation of rights relevant to achieving gender equality.<sup>143</sup> As pointed out by the DRC, in its initial report, the main challenges to women's access to justice include the 'non-popularization of laws and mechanisms established to promote access by women to justice'.<sup>144</sup> They also include inadequate legal representation for indigent persons including women.<sup>145</sup> The same difficulties were revealed in *APDF* where Mali, after facing religious mobilisation against a new Family Code<sup>146</sup> that sought to align national laws with Mali's obligations under the Maputo Protocol, pleaded with the African Court to view a revised version, limiting women's rights, as 'adapting [its] obligations to social realities'.<sup>147</sup> However, such 'social realities', as indicated in the Periodic Report by Lesotho, will not realise women's access to justice, because '[c]ustomary law does not embrace equality between men and women and therefore does not guarantee women the right of equality before the law'.<sup>148</sup> These statements point to the continued existence and reinforcement of negative stereotypes about women and women's relationship with the law as referred to in articles 2(2) and 5 of the Maputo Protocol and 5(a) of CEDAW, severely limiting women's access to justice.<sup>149</sup>

## 5.3 Legal aid

The centrality of legal aid to women's access to justice is well captured in the Periodic Report by Togo, indicating that, '[i]n terms of access to justice, there is no discrimination between men and women ... [b]ut the real problem lies in the acquisition of the means to be able to have access to it easily'.<sup>150</sup> As captured in Togo's report, the feminisation of poverty makes it difficult for women to benefit adequately

139 Section 2.

140 See eg Malawi the Prevention of Domestic Violence Act 5 of 2006; Zimbabwe Domestic Violence Act 14 of 2006; South Africa Domestic Violence Act 116 of 1998.

141 See eg Zimbabwe Trafficking in Persons Act 4 of 2014; South Africa Prevention and Combating of Trafficking in Persons Act 7 of 2013; Lesotho Anti-Trafficking in Persons Act 1 of 2011.

142 See eg South Africa's Criminal Law (Sexual Offences and Other Related Matters) Act of 2007, secs 3 and 56(1).

143 Burkina Faso (n 130) para 31.

144 DRC (n 124) para 126.

145 Makunya (n 100) 232-233.

146 Adopted 2 December 2011, promulgated 30 December 2011.

147 *APDF* (n 68) para 67.

148 Lesotho (n 131) para 382.

149 See also arts 4(2)(d) & 12(1)(b) of the Maputo Protocol.

150 Togo (n 131) para 508.

from judicial services.<sup>151</sup> In this regard, many state reports decry the lack of funds and the expertise needed and are therefore by necessity relying on civil society and university initiatives.<sup>152</sup>

Most states approach the provision of legal aid in terms of making it available to the ‘disadvantaged’ or ‘indigent’, which is presumed to include women, but not specifically earmarking a portion for women or making specific reference to women.<sup>153</sup> As noted by the Commission in its Concluding Observations on Eswatini, ‘the Legal Aid Bill, which provides for the establishment of an office of the Registrar ... may strengthen access to justice and protection before the law for vulnerable women’.<sup>154</sup>

There are, however, some important exceptions to this general approach that can serve as good practice. In The Gambia, for example, the Women’s Act 12 of 2010 provides that ‘every woman is entitled to equality and justice before the law and to equal protection of the law’.<sup>155</sup> In the implementation of this right, the Act provides for legal aid to safeguard the protection and promotion of women’s rights.<sup>156</sup> Further, with specific reference to the provision of legal aid in cases of SGBV, Togo has launched a partnership initiative between national authorities, civil society and the private sector for a pilot project for legal assistance to victims of SGBV.<sup>157</sup> In the same vein, in the DRC, access to justice by SGBV survivors is, according to the state, free, and victims enjoy legal assistance.<sup>158</sup> Its Ministry of Justice and Human Rights has implemented an exemption from legal fees for female rape victims.<sup>159</sup> However, if the historical marginalisation of women and the unequal distribution of resources and power between men and women in the DRC is considered, as suggested by Makunya, it becomes clear that the absence of a constitutional guarantee on legal assistance and its discretionary nature in the DRC will likely deprive women of an effective right of access to justice more than men.<sup>160</sup> In addition, in Eswatini a legal aid clinic was set up through support from the UN Joint Gender Programme, the Ministry of Justice and the Faculty of Law at the University of Eswatini to provide legal aid services predominantly to women.<sup>161</sup>

#### 5.4 Education and sensitisation

As detailed above, a multi-sectoral approach to awareness raising, training and sensitisation is critical.<sup>162</sup> Under article 8, state parties have approached this both from the aspect of article 8(c) in terms of mass

151 Togo (n 131) para 508. To overcome this difficulty, Togo adopted Law No 2013-010 of 27 May 2013 on legal assistance, which offers vulnerable groups, most of whom are women, the opportunity to assert their rights in court.

152 Burkina Faso (n 130) para 30; Cameroon (n 130) para 731; DRC (n 124) para 119; Togo (n 131) para 509; Zimbabwe (n 131) para 3.3; Eswatini (n 124) paras 442 & 444.

153 Burkina Faso (n 130) para 23; Cameroon (n 130) para 729, Eswatini (n 124) [Draft bill], Lesotho (n 131) para 381; Namibia 6th Periodic Report on the African Charter on Human and Peoples’ Rights, 2015 para 10.1; Mauritania (n 131) para 2; Rwanda (n 131) para 47, Seychelles (n 124) para 8.1; Zimbabwe (n 131) para 3.0; South Africa (n 131) para 235.

154 Para 51. My emphasis.

155 Section 7, domesticating arts 8 of the Maputo Protocol and 15 of CEDAW.

156 Section 7(4)(a).

157 Togo (n 131) para 509.

158 DRC (n 124) para 118.

159 DRC (n 124) para 119.

160 Makunya (n 100) 232.

161 Eswatini (n 124) para 442.

162 For domestic incorporation of this principle see the Constitution of the DRC 2005 art 45(6); Constitution of Benin 1990 art 40).

educational campaigns<sup>163</sup> and under article 8(d) the targeting and training specifically of members of law enforcement organs.<sup>164</sup>

In this regard, it is important to acknowledge the central role of civil society and universities in awareness raising on different levels. For instance, the Faculty of Law at the University of Namibia has an arrangement with national radio in which the Faculty has a slot where they give lectures and provide advice on women's rights.<sup>165</sup> In Eswatini the police service, state lawyers, private practitioners, and the judiciary received university-level training on legal instruments promoting gender equality. Moreover, workshops were convened in partnership with the country's development partners. In terms of these interventions, it is clear that civil society at large has played a central role in mass education and in training staff in law-related sectors.<sup>166</sup>

## 6 Conclusion

Worldwide, the level of protection offered by the law and a person's ability to access justice are influenced by, amongst other factors, a person's sex and gender.<sup>167</sup> Thus, realising substantially equal outcomes in access to justice and in the application of the law for women requires considerable efforts and reforms in all societal arenas.

With its origins in articles 2, 3, 7 and 25 of the African Charter, article 8 specifically focuses on the law and related justice systems as mechanisms to accomplish equality between women and men. It offers a common standard of equality that requires member states to acknowledge gender-biased and discriminatory assumptions ingrained in their legal systems, in the law, and through judicial stereotypes. It also requires member states to address the manner in which these systems, laws and stereotypes restrict women's equal protection of the law and access to justice.

As highlighted in the discussion about its drafting history, what started out as a right of access to judicial services and the right to be informed about relevant rights, transformed into a complex web of access, equality, representation, and educational rights. As detailed throughout this chapter, article 8 is therefore key to the operation of the Maputo Protocol as a whole, and essential in guaranteeing both the socio-economic and civil and political rights stipulated.

Similar to article 15 of CEDAW, article 8 does not specify precise legal reforms since the details of implementation will vary within each domestic system. The multifaceted approach by state parties in this regard was highlighted in the analysis of state practice under 6. Here it was pointed out that some of the greatest threats to the rights in article 8 exist on the constitutional level either as an unchecked application of customary law that is, without the creation of a hierarchy of sources, or as constitutional caveats that shield matters of personal law from the purview of the non-discrimination clause.

Moreover, although gender-discriminatory legislation has been repealed and revised in most member states, the impact of customary and religious laws, especially in some aspects of the law, still persist.<sup>168</sup> In this regard CEDAW<sup>169</sup> and the SADC Protocol on Gender and Development<sup>170</sup>

163 Burkina Faso (n 130) para 31, Cameroon (n 130) para 731; DRC (n 124) para 121; Namibia (n 153) para 10.2; Zimbabwe (n 131) para 3.6, Table 8 'The number of sensitization programmes undertaken from 2008 to 2019'.

164 Eswatini (n 124) para 446; Togo (n 131) para 510.

165 Namibia (n 153) para 10.2.

166 Cameroon (n 130) para 731; DRC (n 124) paras 121-122; Kenya (n 130) para 12.

167 CEDAW Committee General Recommendation 33 (n 1) paras 8-9 & 14(c).

168 See eg S Nabaneh 'Article 5'; C Musembi 'Article 6' and 'Article 7'; and C Mokoena 'Article 20' in this volume.

169 Article 15(2) & (3).

170 Article 7(b).

point out the importance of specifying state obligations. In relation to this, it is important to note that although women's equal capacity in civil matters is not covered in detail in article 8, articles 6, 7, and 21 specifically set out such obligations in relation to marriage, divorce, and inheritance. Therefore, as a recommendation, article 8 must be read in conjunction with these articles.<sup>171</sup> The empowerment aspects of article 8(e) must moreover be understood from the perspective of article 9, which is detailed in the following chapter.

The jurisprudence of the African and ECOWAS Courts, discussed in this chapter, points, on the one hand, to the importance of scrutinising matters relating to legal capacity, inheritance, and marriage against the provisions of article 8. On the other hand, it highlights the fact that lack of access to justice for women, especially in cases of SGBV, calls for further effort from the state parties to the Maputo Protocol. However, the limited reference to article 8 by litigants and courts is a cause of concern. This could partially be explained by reliance on other articles in the Maputo Protocol that deal with specific aspects of the law, such as equality in inheritance in article 21, as referred to in *APDF*; or reliance on the provisions of the African Charter referring to a fair trial and sensitisation efforts. However, the non-reliance on article 8 concerning issues that directly refer to access to justice, equality before the law and equal protection and benefit of the law amounts to a missed opportunity to trigger a deeper analysis of the multifaceted obligations stipulated in article 8. In this regard, there is much scope for litigants and courts alike to use the detailed provisions in article 8, apply it in combination with other rights, and take judicial notice of the resolutions and guidelines issued by the Commission in this regard.

In conclusion, a systematic review of State Reports and Concluding Observations has shown that although the primary responsibility of fulfilling, promoting, and protecting the rights in article 8 rests on the state parties, some of the key obligations, such as the running of educational and sensitisation programmes and providing legal aid are regularly fulfilled by CSOs. Other actors, such as the African Commission, also play a vital role, as indicated above, in providing interpretations of the key elements of article 8. In this regard, the Commission has provided essential input in contextualising the rights with reference to specific circumstances, such as in situations of armed conflict, in relation to domestic violence or in relation to technology assisted violence against women.<sup>172</sup> Thus, to fully guarantee the rights set out in article 8, state parties must support CSOs as they take on critical roles in the fulfilment of article 8. They should also take note of the specific instructions issued by the Commission providing much-needed detail on the state obligations involved.

171 See arts 15(2)-(4) of CEDAW and 7(b) of the SADC Protocol on Gender and Development.

172 See n 59, n 65 & n 120.