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Abstract

The African Union (AU) celebrated 2016 as the year of human rights with a particular focus on women, amplifying the call to respect, promote, protect and fulfil women's rights. On this premise, it is timely to assess progress made in implementing the key continental instrument for the promotion and protection of women's rights in Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Parties to the Maputo Protocol have adopted measures to realise the women's rights enshrined in the Protocol geared towards gender equality and women empowerment in their various jurisdictions. It is envisaged that these measures, when implemented, will transform women's lives and elevate their status, which has been perpetually inferior. However, despite the adoption of the Maputo Protocol, Africa continues to experience negative indicators in women's rights as the adopted legal and policy measures are hardly implemented. This chapter argues that, legislative and police changes will only have impact in the lived realities of African women if accompanied by competent institutions and budgetary allocation to programmes and services that affect women's rights.

1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa (Maputo Protocol) was adopted on 11 July 2003 by the Assembly of the AU in Maputo, Mozambique and entered into force on 25 November 2005. It has so far been ratified by 37 States. Among other expectations, it was envisaged to protect women's rights in all contexts (in peacetime and in armed conflict). It was also envisioned to guarantee gender equality, promote access to justice, ensure non-discrimination based on sex, provide equal rights in marriage, separation and divorce, safeguard the right to education for women and girls, eradicate harmful cultural practices and child marriage, ensure women's participation in decision-making especially in the public and family spheres, and also protect vulnerable women such as widows, the

elderly women and those with disability.¹ It mandates State Parties to eliminate discrimination against women through appropriate legislative, institutional and other measures.² The legal authority of the Maputo Protocol emanates from the AU Constitutive Act that contains gender equality as part of its principles.³

The call for intensified promotion and protection of women's rights saw the 2016 Africa Human Rights Day commemorated under the theme 'Women Rights – Our Collective Responsibility' in line with the declaration by the AU that 2016 be designated the *African Year of Human Rights with Particular Focus on the Rights of Women*. This specific focus on women's rights was in view of the challenges still faced by African women and worsened by the patriarchal nature of African societies. The inadequate support for women's rights from States Parties associated with lack of political will, inadequate allocation of resources in favour of women's rights, as well as general reluctance to domesticate regional and international human rights instruments. These, coupled with incapacitated and poorly resourced human rights institutions and the negative attitude towards human rights monitoring bodies are some of the challenges that prevent full implementation of women's rights treaties in Africa. Although there have been tremendous human rights gains over the years, generally, the women's rights movement faces hurdles in the endeavour to promote and protect women's rights.

Nevertheless, regarding the implementation of the Maputo Protocol, there is evidence of determination in creating an enabling environment for gender equality and championing women's rights through pro-active compliance and implementation efforts by way of legislation, policies, and institutions support implementation. States have adopted legislative, policy and institutional measures to ensure the realisation of women's rights and these measures have had a significant impact in many areas affecting women's rights as will be elaborated below. However, a lot still needs to be done before African women can celebrate the fruits of this Protocol.

- 1 FJ Mohamed '11 years of the Maputo Protocol: Women's progress and challenges' (2014) 57 *Development* 71.
- 2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 2(1).
- 3 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 11 *Washington & Lee Journal of Civil Rights and Social Justice* 12.

2 The Maputo Protocol and women's rights in Africa: A cursory appraisal

Article 26 of the Maputo Protocol, requires State Parties to ensure implementation of the Protocol at the national level and indicate in their periodic reports all legislative and other measures undertaken for the full realisation of the rights recognised in the Protocol.⁴ The record of states reporting to the African Commission on the implementation of the Protocol has not been very encouraging. Only South Africa, Malawi, Namibia, Burkina Faso, Senegal, and Nigeria have reported on progress made under the Protocol, in their State Reports.⁵

Regarding institutional and policy reforms, many countries now have constitutionally mandated institutions such as national human rights institutions and gender commissions to monitor women's rights. They monitor the adherence to gender equality, investigate cases of gender discrimination and inequality, undertake studies, make recommendations on how to enhance gender equality, advise public and private institutions on gender equality, and recommend prosecution on gender related human rights violations. Countries such as Zimbabwe,⁶ South Africa⁷ and Kenya⁸ have recently established national gender commissions. In Kenya, the National Gender and Equality Commission Act of 2011 gave birth to the National Gender and Equality Commission. The National Gender and Equality Commission is obligated to observe and respect 'impartiality, gender equality and gender equity, inclusiveness, non-discrimination and protection of the marginalised groups.'⁹

Where there are no gender commissions, National Human Rights Institutions have tried to mainstream gender in their mandates. For example, the Malawi Human Rights Commission has provided a platform for the government to fight against domestic violence and the Nigerian National Human Rights Commission has a Gender Desk responsible for women's rights issues.¹⁰

Most countries have ministries of 'women's affairs' or 'gender' to formulate policy on women's rights. In Côte d'Ivoire for example, the Equality and Gender Directorate in the Ministry of the Family, Women and Social Affairs is 'responsible for coordinating government activities in

4 Maputo Protocol, art 2.

5 More information on state periodic reports available on www.achpr.org (accessed 31 October 2016).

6 Zimbabwe Gender Commission Act (chapter 10:31).

7 The Constitution of the Republic of South Africa 1996, sec 187.

8 Kenyan National Gender and Equality Commission Act 2011.

9 Lawyers Circle, Dechert LLP & Oxfam 'Implementing the Protocol on the Rights of Women in Africa: Analysing the compliance of Kenya's legal framework' (2014).

10 Nigeria and Zambia State Periodic Reports www.achpr.org (accessed 6 June 2017).

the fight against gender discrimination, the adoption of the National Policy on Equal Opportunities, Equity and Gender, promotes the consideration of gender in the public and private sectors'.¹¹ The country also benefits from the National Equity and Gender Observatory (ONEG) that 'monitors, assess and formulates proposals for the promotion of gender equality in the political, economic and social spheres of life, punishing excision practitioners'.¹² In Kenya, the Monitoring and Evaluation Framework for Gender Mainstreaming plays an influential role in gender policy and enactment of gender related legislation.¹³

In terms of non-discrimination and gender equality, discrimination is a serious challenge that exacerbates the plight of women in Africa. Women and girls suffer various forms of discrimination despite widespread advocacy against it. In some societies the male child is held with high esteem and the girl child largely discriminated against. As a result of this discrimination, girls experience gruesome challenges such as early and forced marriage, female genital mutilation (FGM) and other harmful cultural practices, sex slavery and child sex, as well as other forms of exploitation that compromise their dignity and undermine any efforts made for their personal development. Non-discrimination is an important feature of the Maputo Protocol.¹⁴ State Parties are obligated to combat all forms of discrimination through legislative, institutional and other measures.

In order to deal with this challenge, the non-discrimination clause is now a common characteristic in most constitutions. In Zambia, article 11 of the Constitution guarantees protection against gender discrimination.¹⁵ The Swaziland and Lesotho constitutions also guarantee equality.¹⁶ The new constitutions of Kenya and Zimbabwe have non-discrimination and equality clauses as well. Under the Constitution of Kenya, everyone has the right to live in a society free from discrimination. Article 27 states that 'every person is equal before the law and has the right to equal protection and equal benefit of the law .Equality includes the full and equal enjoyment of all rights and fundamental freedoms'.¹⁷ Additionally, part 3 of the Bill of Rights in the Kenyan constitution highlights affirmative action requirements with regards to vulnerable sections of society which include women.¹⁸ The Namibian constitution similarly guarantees

11 Côte d'Ivoire State Periodic Report 2012-2015.

12 Côte d'Ivoire State Periodic Report (n 11 above).

13 n 9 above.

14 Maputo Protocol, art 2.

15 The World Bank 'Zambia strategic country gender assessment' 2004.

16 Equality Now 'Maputo Protocol a journey to equality'.

17 Constitution of Kenya 2010.

18 As above.

equality and freedom from discrimination based on their sex and other grounds.¹⁹

While African states are embracing gender equality and non-discrimination, retrogressive discriminatory tendencies are still evident in some instances. For example, although the Nigerian Constitution (section 42) has an explicit non-discrimination clause that includes discrimination on the basis of sex, sections 26(2) and 29(4)(b) of the same Constitution invalidates the non-discrimination guarantee established in section 42. According to section 26(2), a Nigerian woman cannot transmit nationality to her non-Nigerian spouse. Another controversial provision is section 29(4)(b), which provides that a woman is assumed to have attained majority upon marriage. This is not the case for men. This provision enables and arguably emboldens the practice of child marriage since girls below the age of 18 are automatically considered adults once they get married. This makes it almost impossible to prosecute perpetrators of child marriage, which has many dire consequences for the girl child. Again, there are some provisions of legislative instruments like the Police Act that are discriminatory to women. For example, section 121 of the Police Regulations provides that women police officers shall, as a general rule, be employed on duties which are concerned with women and children. Section 126 of the Police Regulations also provides that

a married woman police officer who is pregnant *may* be granted maternity leave in accordance with the provisions of general order (a federal government instruction that regulate the condition of public officials) and an unmarried woman police officer who is pregnant shall be discharged from the force and can only be re-enlisted with the approval of the Inspector General of Police.²⁰

This provision clearly discriminates against unmarried women, contrary to the provisions of the Maputo Protocol.

Most Embassies and High Commissions demand that a woman can obtain a visa and other documents only when there is proof of her spouse's consent while men are not subjected to such requirements.²¹ These are just a few illustrations of the discrimination that women are subjected to both in law and practice.

19 Namibia State Periodic Report 2011-2014 http://www.achpr.org/files/sessions/58th/state-reports/6th-2011-2014/namibia_state_6th_periodic_report.pdf (accessed 31 October 2016).

20 Nigerian Police Regulations 1968 (No 53) (chapter 359).

21 'The rights of women' *Blueprint 2* September 2015 <http://www.blueprint.ng/the-rights-of-women/> (accessed 31 October 2016).

Attempts to adopt a Gender and Equal Opportunities Bill that was designed to domesticate the Maputo Protocol and CEDAW was shot down by the Nigerian Senate.²² The Bill also intended to eradicate gender discrimination in all areas and advocate for equality in marriage, divorce, widowhood, property ownership, inheritance, and other rights.²³ Critics rejected the Bill on the basis of its exclusion of the Sharia laws that are recognised in the Constitution.²⁴

For many decades decision-making and public participation, and public positions were either male dominated or entirely exclude women. With the progressive developments such as the adoption of the Maputo Protocol, that obligates State Parties to ‘take specific positive action to promote participative governance and equal participation of women in the political life of their countries through affirmative action and other measures ,such attitudes have begun to change’. Women have now begun to occupy spaces and positions previously male dominated. The introduction of quotas systems has increased women’s participation. Rwanda is a shining example.²⁵

The Kenyan Constitution sets the agenda for gender equality in decision-making by empowering the Parliament to enact laws that promote the representation of women in Parliament.²⁶ It established quotas for women in any elected body such as Parliament and Senate.²⁷ Each gender should not constitute more than two thirds of any elected body.²⁸ This means that in the National Assembly there shall be at least 47 women and 16 in the Senate.²⁹ Further, the Political Parties Act 2011 of Kenya provides opportunities for women to enter into politics.³⁰ According to this act, membership of a political party must reflect gender balance and this is envisaged to increase the number of women in politics in Kenya.³¹ The Political Parties Act Code of Conduct requires political parties to ‘respect, uphold and promote human dignity, equity, social justice, inclusiveness and non-discrimination and protection of the marginalised and respect, uphold and promote human rights and the rule of law’.³² Such a framework creates a conducive environment for women

22 ‘Nigerian Senate votes down gender equality bill due to “religious beliefs”’ *Independent* 17 March 2016 <http://www.independent.co.uk/news/world/africa/nigerian-senate-votes-down-gender-equality-bill-due-to-religious-beliefs-a6936021.html> (accessed 31 October 2016).

23 ‘Nigerian Senate rejects bill seeking gender equality in marriage’ *Premium Times* 15 March 2016 <http://www.premiumtimesng.com/news/top-news/200202-nigerian-senate-rejects-bill-seeking-gender-equality-marriage.html> (accessed 31 October 2016).

24 n 24 above.

25 Mohamed (n 1 above).

26 Constitution of Kenya (n 17 above).

27 n 9 above.

28 Constitution of Kenya (n 17 above).

29 As above.

30 n 9 above.

31 n 9 above.

32 n 9 above.

to participate in politics. However, this Act has faced a number of challenges in implementation, which still need to be resolved.

In Rwanda, at least thirty per cent of decision-making positions should be occupied by women.³³ The implementation of such legislative framework has resulted in an increase in women's representation in influential decision-making positions, especially in the legislature. Senegal has also progressed in this area. Under the Senegalese Parity law of 2010, all political parties and coalitions must have equal numbers of male and female candidates.³⁴ Similarly, Burkina Faso has experienced an increase in the participation of women in politics as a result of the legislative measures that were taken. In 2014, there were 20 women, out of 127 seats, in Parliament (15.7 per cent).³⁵ In 2009, a law on quotas for legislative and local elections that requires parties to have a minimum of thirty per cent women candidates on their party lists was adopted.³⁶ Parties that fail to adhere to the law are subject to a fifty per cent cut in their electoral campaign funding.³⁷ Consequently, representation of women at national and local levels of government has steadily increased.

The Malawi Gender Equality Act also introduces quotas in the public service. Section 11 states that

Notwithstanding anything contained in the Public Service Act and subject to subsection (2), an appointing or recruiting authority in the public service shall appoint no less than forty per cent and no more than sixty per cent of either sex in any department in the public service.³⁸

Important milestones in the continent include the appointment of a female Chief Justice of Nigeria,³⁹ two consecutive female Chief Justices in Ghana,⁴⁰ a female president in Liberia (Ellen Johnson Sirleaf) and a female president in Malawi (Joyce Banda). Countries such as Rwanda, Senegal, Mozambique, Seychelles, Angola, Tanzania and Uganda have a high number of women in parliament.⁴¹

33 Equality Now (n 16 above).

34 Inter Press Service 'Breakthrough for women in Senegal's Lower House' 2 August 2012 <http://www.ipsnews.net/2012/08/breakthrough-for-women-in-senegals-lower-house/> (accessed 30 October 2016).

35 Burkina Faso State Periodic Report 2011-2015 <http://www.achpr.org/states/burkina-faso/reports/3-2011-2015/> (accessed 30 October 2016).

36 As above.

37 As above.

38 Malawi State Periodic Report available on http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi_state_report_eng.pdf (accessed 30 October 2016).

39 Nigeria State Periodic Report

40 *Africanews* 'Ghana to have second successive female Chief Justice' <http://www.africanews.com/2017/05/12/ghana-to-have-second-successive-female-chief-justice/> (accessed 6 June 2017).

41 K Ighobor 'A celebratory rise in Women's political participation' <http://www.un.org/africarenewal/magazine/april-2015/celebratory-rise-women%E2%80%99spolitical-participation-April-2015> (accessed 6 June 2017).

Traditional leadership positions such as chieftaincy are male dominated because they are regulated by customary law that is largely patriarchal. In South Africa this has been challenged through the courts. In *Bhe v Magistrate, Khayelitsha* the Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture which only allows an oldest male descendant or relative to succeed the estate of a deceased man.⁴² In Sierra Leone where chieftaincy is also male dominated and regulated by traditional norms and values, the newly adopted Chieftaincy Act encourages women to contest for Paramount Chieftaincy positions.⁴³ In Zimbabwe more women have been appointed in traditional leadership positions.⁴⁴

Despite these commendable accomplishments, a lot still needs to be done as there exists a contradiction between legislation and reality in some jurisdictions. For example, although the Namibian Constitution contains affirmative action clauses and laws such as the Local Authorities Act, Act No. 6 of 1992, encourages women's participation in the public sphere, there is still gender imbalance in decision-making positions in the public sphere. Women constitute 27 per cent in Parliament, 12 per cent in the Regional Councils and 42 per cent in the Local Authority Councils.⁴⁵ In Gambia, out of 58 parliamentary seats, only six are women.⁴⁶

3 The Maputo Protocol and sexual and reproductive rights in Africa

One of the most contentious themes in the discourse of women's rights is the area of sexual and reproductive rights. Women in Africa find themselves in unfortunate circumstances where they are 'policed, investigated and penalised for engaging in sex work, sex outside of marriage, obtaining abortions, HIV exposure and transmission and same-sex intimacy'.⁴⁷ Article 14 of the Maputo Protocol guarantees women's right to health, including sexual and reproductive health. The African Commission on Human and Peoples' Rights has developed General Comment 2 that articulates the nature and content of sexual and

42 South Africa State Periodic Report http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2_southafrica_2003_2014_eng.pdf (accessed 30 October 2016).

43 African Development Bank Group 'Sierra Leone country gender profile' 16.

44 T Chigwata 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20 *Law Democracy and Development* 69.

45 Namibia Periodic Report (n 19 above).

46 Gambia National Assembly Elections Available on <http://makeeverywomancount.org/index.php/tools/political-participation-a-election-monitoring/2017-elections-monitoring/10495-the-gambia-national-assembly-elections?platform=hootsuite> (accessed 6 June 2017).

47 J Todd-Gher 'Policing bodies, punishing lives: The African Women's Protocol as a tool for resistance of illegitimate criminalisation of women's sexualities and reproduction' (2014) 14 *African Human Rights Law Journal* 775.

reproductive rights as espoused in article 14 of the Maputo Protocol.⁴⁸ The General Comment provides interpretive guidance on the obligations of State Parties towards promoting the effective implementation of article 14 of the Maputo Protocol.⁴⁹ In reality, indicators in the area of sexual and reproductive rights are still poor and there is slow pace of implementation of the Protocol in this area.

Under article 14(2)(c) of the Protocol, State Parties shall protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the foetus. Despite the progressive provisions in the Maputo Protocol, accessing safe abortion remains either difficult or not even a possibility in most parts of Africa. Safe and legal abortion is still not viewed as woman's human right. It is significant to mention that 14 countries prohibit abortion under any circumstances even when it is essential to save the life of the mother.⁵⁰ This has increased unsafe abortion procedures. Of the estimated 5.6 million abortions carried out in the region every year, only an estimated 100,000 are performed under safe conditions.⁵¹ Statistics from the negative consequences on unsafe abortion are appalling. Many women either die (26,000) or suffer from serious health complications (1.7 million).⁵² Nigeria for instance, has a high prevalence of unsafe underground abortions.⁵³ About 760,000 illegal and unsafe abortions are estimated to take place in Nigeria every year and out of these abortions, between 3,000 to 34,000 women die.⁵⁴ Unsafe abortion remains a major contributor to maternal morbidity and mortality.⁵⁵

In Ghana, although the Reproductive Health Policy and Strategic Plan for Abortion Care has resulted in many improvements to women's access to health services, unsafe abortion continues to be a serious problem.⁵⁶ Abortion is acceptable if it is performed by a doctor, in a health facility in cases of incest, rape, foetal deformity and also in situations where the life

48 General Comment 2 on art 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

49 General Comment 2 (as above).

50 'To save women's lives in Africa, bring abortion out of the shadows' *The Guardian* 12 November 2010 <https://www.theguardian.com/global-development/poverty-matters/2010/nov/12/abortion-africa-health> accessed (30 August 2016).

51 n 51 above.

52 n 51 above.

53 A Bankole *et al* 'The incidence of abortion in Nigeria' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 170.

54 E A Ayoola 'Nigeria: Abortion in Nigeria – the silent taboo' <http://allafrica.com/stories/201508130954.html> (accessed 13 November 2016).

55 A Bankole *et al* (n 53 above).

56 P Aniteye & SH Mayhew 'Shaping legal abortion provision in Ghana: Using policy theory to understand provider-related obstacles to policy implementation' (2013) 11 *Health Research Policy & Systems* 1 <https://health-policy-systems.biomedcentral.com/articles/10.1186/1478-4505-11-23> (accessed 20 November 2016).

of the mother is in danger.⁵⁷ This legal provision is unknown to most Ghanaians hence the high prevalence of unsafe abortions.

In Zimbabwe, although women can abort in circumstances where they have been raped, the process is cumbersome and most women end up not accessing such services. The case of Mildred Mapingure is an example of how a woman who had been raped failed to procure an abortion due to hindrances in the legal system.⁵⁸ Mapingure was raped in 2006 but failed to get emergency contraception within the prescribed 72 hours to prevent pregnancy because she could not get a police officer to accompany her to the doctor, as required by the law. Upon confirmation of her pregnancy, she failed to terminate the pregnancy because she was only able to get the magisterial certificate when it was too late to terminate. She was erroneously told that the magisterial certificate was a requirement for her to terminate the pregnancy under the Termination of Pregnancy Act.⁵⁹ In its judgment, the Supreme Court ruled that section 5(4) of the Zimbabwean Termination of Pregnancy Act (1978) is incompetently framed and lacks adequate clarity as to what exactly a victim of rape or other unlawful intercourse is required to do when confronted with an unwanted pregnancy, and therefore should be amended.⁶⁰

Only three countries (Cape Verde, South Africa, and Tunisia) have laws that allow induced abortion for any reason – laws that have had a hugely positive public health impact. In view of the suffering that women go through in illegal and unsafe abortion, there is need to liberalise laws that restrict abortion. The fundamental thing that governments can do is to invest in the provision of safe abortion services. In this way, women's sexual and reproductive rights will be guaranteed and more importantly lives will be saved.⁶¹ The benefits of relaxing abortion laws can be seen in the South African experience where abortion-related deaths dropped by 91 per cent from 1994 to 2001, during which period abortion was legalised and made available on request.⁶²

Furthermore, the inadequate budgetary allocation to sexual and reproductive health sectors negatively impacts the realisation of these rights. In its General Comment 2, the African Commission states that

57 Aniteye & Mayhew, as above.

58 *Mapingure v Min of Home Affairs & Others*, S-22-14.

59 Judgment in *Mapingure v the State*: A step forward for women's rights, <http://www.southernafricalitigationcentre.org/2014/04/08/judgment-in-mapingure-v-the-state-a-step-forward-for-women-rights-or-a-token-gesture/> 8 April 2014 (accessed 6 June 2017).

60 n 60 above.

61 Center for Reproductive Rights 'A global view of abortion rights' <http://worldabortionlaws.com/about.html> (accessed 20 November 2016).

62 S Griffin 'Literature review on sexual and reproductive health rights: Universal access to services, focussing on East and Southern Africa and South Asia' <https://assets.publishing.service.gov.uk/media/57a08c2940f0b64974001036/LitReview.pdf> (accessed 26 November 2017).

pursuant to article 26.2 of the Protocol, paragraph 26 of the Abuja Declaration and paragraph 7 of the Maputo Plan of Action, State parties should allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care in family planning/contraception and safe abortion. This includes making specific budget allocations under the health budget at national and local levels, as well as tracking expenditures on these budget lines. Information on health expenditures should be available to facilitate monitoring, control and accountability.⁶³

In addition, there are infrastructural hindrances, because of low budget allocations to health in general and to the reproductive health sector in particular. Existing infrastructures, including facilities and equipment, are unable to cope with the rising sexual and reproductive health demands, especially in remote and rural areas where the majority of the population lives.

This specialised kind of budgeting (gender budgeting) is yet to be embraced by African States except in the area of HIV/AIDS. Security and defence in most countries dominate budget allocations. In 2007, the defence budget in Ethiopia and Eritrea was an estimated 80 per cent of the national budget. With such a budget allocation, areas such as the health sector that provides sexual and reproductive services are neglected.⁶⁴ While it is true that national governments face competing priorities for resources, absence of financial commitment for sexual and reproductive issues has generally been attributed to lack of political will by governments. Poor funding of this sector leads to weakened health systems with obsolete or no infrastructure to ensure access to reproductive services. Again, in situations where there is increased privatisation of health services, the poor are denied access to services that become unaffordable, which leads to loss of lives or other complications, which could be avoided, leading to for example, and increase in maternal mortality.

The picture is, however, not all bleak as some African states have made modest legislative progress on the issue of sexual and reproductive rights. For example, the Gender Equality Act of Malawi specifically provides for the right to adequate sexual and reproductive health under law covering issues such as access to sexual and reproductive health care services, access to family planning services, protection from sexually transmitted infections, self-protection from STIs, choice of whether and when to have a child, fertility control, and choice of contraceptive method.⁶⁵ Similarly, in Senegal, the 2005 Law in Relation to Reproductive Health recognises reproductive health as a 'fundamental and universal right guaranteed to all individuals without discrimination based on age,

63 General Comment No 2 (n 48 above), para 62.

64 BJ Omotosho 'African Union and gender equality in the last ten years: Some issues and prospects for consideration' (2015) 5 *Journal of Integrated Social Sciences* 98.

65 Malawi State Periodic Report (n 38 above).

sex, wealth, religion, race, ethnicity, matrimonial situation or any other situation'.⁶⁶ Under this law there is access to contraceptives and other basic services, such as pregnancy and sexually transmitted illnesses testing for those who are 15 years or older and abortion is only available in cases where the life of the mother is in danger.⁶⁷

Despite these few positive measures that have been cited, there is still limited access to sexual and reproductive health services by women and girls such as family planning and safe abortion. Prominent barriers include poverty, gender based violence, poor management of health systems, lack of information and inadequate resources. The notion of sexual and reproductive health rights is also characterised by gross misconception with some labelling it a western construct. In most parts of Africa, sex and sexuality are largely shunned subjects and considered taboo.⁶⁸ This attitude comes with unwillingness to discuss issues related to sexual health and stigmatisation of those who do not conform to socially accepted sexual norms and behaviours such as sexual minorities and adolescents who have sex before marriage. As a result, there is blatant opposition for the promotion of sexual rights.

Regarding marriage, article 6 of the Maputo Protocol provides that States Parties shall ensure equality between men and women in marriage and shall enact appropriate legislation to this end.⁶⁹ The Protocol provides for women's rights on issues relating to minimum age of marriage, consent, marriage registration, nationality, retaining a maiden name and property acquisition. Some State Parties to the Maputo Protocol have aligned their laws to the Protocol to improve the status of women in the institution of marriage that has, in some cases, continued to be characterised by unfair relations between men and women largely favouring men. Women who suffer most are those married under customary laws that are based on patriarchal beliefs and attitudes. In Sierra Leone, the Registration of Customary Marriage and Divorce Act protect persons entering into customary marriage from forced marriages.⁷⁰ In Kenya, equal rights for men and women are guaranteed during a marriage and at its dissolution and equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage.⁷¹

66 'Guttmacher Institute 'Sexual and reproductive health of young women in Senegal' <https://www.guttmacher.org/fact-sheet/sexual-and-reproductive-health-young-women-senegal> (accessed 21 November 2016).

67 n 67 above.

68 Griffin (n 64 above).

69 Maputo Protocol, art 6.

70 Sierra Leone State Periodic Report http://www.achpr.org/files/sessions/57th/state-reports/1st-1983-2013/sierra_leone_state_report_eng.pdf (accessed 30 October 2016).

71 n 9 above.

Although the minimum age of marriage is still contested, there seems to be acceptance of 18 years as the minimum age as stipulated in the Maputo Protocol. However, the problem of child marriage continues to be prevalent in Africa. In Sub-Saharan Africa, at least 40 per cent of girls marry before their 18th birthday. Some of the highest prevalence rates are in Niger (77 per cent), Central African Republic (60 per cent) and Chad.⁷² In some jurisdictions there are contradictions in the legislative framework. For instance, in Eritrea, according to the Logo Chwa Code of Customary Law, girls can marry at 15 while the Eritrean Civil Code stipulates 18 years.⁷³ In Namibia, while the Marriage Act sets 18 years as the minimum age, in terms of the Combating of Immoral Practices Act, it is an offence for someone to impregnate or marry someone younger than sixteen years old.⁷⁴ Further, in Namibia various ethnic groups do not set a minimum age for marriage, as readiness for marriage is generally determined by one's attainment of puberty, 'an acceptable level of social maturity' or family consent.⁷⁵ These benchmarks ('attainment of puberty, family consent and an acceptable level of social maturity') leave underage girls susceptible to child marriage. In Malawi, under article 22 of the Constitution, a person who is 18 years of age may enter into marriage without parental consent, while persons between 15 and 18 must obtain parental consent before entering into marriage.⁷⁶ The Constitution does not explicitly prohibit marriage of children below 15, but provides that the state is obliged merely to 'discourage' marriages where either party is under age 15. In Ghana although the legal age of marriage is 18, marriage can take place at 16 with parental consent.

There, however, has been some progress in eradicating child marriage in Africa. Fifteen countries (Burkina Faso, Chad, the Democratic Republic of Congo, Ethiopia, Eritrea, Ghana, Madagascar, Mali, Niger, Sierra Leone, Senegal, Sudan, The Gambia, Uganda, and Zimbabwe) have launched the African Union campaign to end child marriage and its harmful effects.⁷⁷ The campaign was launched in 2014.

72 Human Rights Watch 'Ending child marriage in Africa: Opening the door for girls' education, health, and freedom from violence' <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (accessed 25 November 2016).

73 Girls not Brides 'How important is minimum age of marriage legislation to end child marriage in Africa?' <http://www.girlsnotbrides.org/how-important-is-minimum-age-of-marriage-legislation-to-end-child-marriage-in-africa/> (accessed 25 November 2016).

74 Namibia Periodic Report (n 19 above).

75 As above.

76 Malawi Periodic Report (n 38 above).

77 'Girls not Brides' 'Senegal launches African Union campaign to end child marriage' <http://www.girlsnotbrides.org/senegal-launches-african-union-campaign-to-end-child-marriage/> (accessed 25 November 2016).

Many States have also introduced measures to curb child marriage. In The Gambia, amendment to the Children's Act of 2016 abolished child marriage.⁷⁸ In Tanzania, the High Court ruled that Tanzania's laws on marriage were unconstitutional and discriminatory as they allow girls to marry at the age of 14.⁷⁹ The Court imposed a punishment of thirty years jail term for perpetrators.⁸⁰ In Ethiopia, perpetrators of child marriage face a hefty sentence of up to seven years in prison.⁸¹ The new Zimbabwean Constitution sets the minimum age of marriage at 18.⁸² One of the major challenges in eradicating child marriage is its acceptance by families and society as a culturally legitimate practice.⁸³

In conformity with the provisions of the Maputo Protocol, States Parties are moving towards legislation that encourages tolerance and non-discrimination. Laws tackling either domestic or sexual violence have been enacted or reformed. Liberia passed the Rape Amendment Act and amended the Liberian Penal Code, which expanded the definition of what constitutes 'rape', to include

intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female) with his penis, without the victim's consent or intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of his body ... without the victim's consent or if the victim is less than 18 years old.⁸⁴

In Liberia again, the Gender and Sexually Based Violence Act provides for the creation of a specialised court to try cases of sexual violence. In the same vein, sexual violence against women is a criminal offence under the Penal Code and Domestic Violence Act in Malawi.⁸⁵ The reviewed Penal Code of Malawi came into law in 2010. It has, among other things, extended the definition of sexual activity and revised the age under which a girl may consent to sexual intercourse.⁸⁶ The Gender Equality Act of Malawi criminalises sexual harassment which is defined in section 6 as:

A person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in

78 Opening Statement by Her Excellency Vice President of the Gambia Madam Isatou Njie Saidy delivered by Hon Mama Fatima Singhateh, Attorney General and Minister of Justice at the 59th Ordinary Session of the African Commission on Human and Peoples' Rights.

79 Girls not Brides' 'High Court judgment in Tanzania rules age of marriage laws discriminatory and unconstitutional' <http://www.girlsnotbrides.org/high-court-tanzania-child-marriage/> (accessed 25 November 2016).

80 n 80 above.

81 Human Rights Watch (n 72 above).

82 Girls not Brides' 'Zimbabwe: Former child brides win case to make child marriage illegal' <http://www.girlsnotbrides.org/zimbabwe-former-child-brides-win-case-to-make-child-marriage-illegal/> (accessed 25 November 2016).

83 Human Rights Watch (n 73 above).

84 Committee on African Affairs' 'Gender-based violence laws in sub-Saharan Africa' 19.

85 Malawi Periodic Report (n 38 above).

86 As above.

circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.⁸⁷

In Kenya, the Constitution; the Sexual Offences Act; the HIV Prevention and Control Act; the Children's Act; the Prohibition of Female Genital Mutilation Act; the Counter-Trafficking in Persons Act; the International Crimes Act; the Truth, Justice and Reconciliation Act; the Witness Protection Act; and the Witness Protection Amendment Act are some of the pieces of legislation that have been enacted to respond to violence against women.⁸⁸ As a case in point, under the Sexual Offences Act, a woman cannot be coerced to have sexual intercourse for the purposes of widow cleansing rituals.⁸⁹

In Namibia, the Combating of Domestic Violence Act, Act No. 4 of 2003, contains an extensive definition of domestic violence to include physical, sexual, economic, verbal, emotional and psychological violence, intimidation and harassment.⁹⁰ It further provides for the issuing of protection orders and police warnings in domestic violence matters. It also has provisions, which gives added protection to complainants that lay criminal charges against their abusers. The Act gives police specific duties in domestic violence incidents, including the duty to help complainants get access to medical treatment and collect their personal belongings.⁹¹

Despite the above measures that have been taken by some States, violence against women is still widespread in Africa. Generally, there are no reliable statistics on domestic violence to ascertain the extent of this problem. In Nigeria, there are neither specific laws nor policies prohibiting domestic violence or otherwise protecting victims. On the contrary, section 55 of the Penal Code permits wife beating as a form of chastisement as long as it does not inflict grievous bodily harm.⁹² According to the 2014 Kenya Demographic and Health Survey, 45 per cent of Kenyan women aged between 15 to 49 years have experienced physical violence, with 14 per cent of these having been sexually abused.⁹³ The same survey showed that in Kenya there is high prevalence and acceptance of wife beating.⁹⁴ As a result, severe and repeated domestic violence goes unpunished.

As Africa moves towards revolutionising the status of women's rights, the continued existence of harmful cultural practices is a reality that stakeholders in the women's rights movement continue to grapple with.

87 As above.

88 n 9 above.

89 n 9 above.

90 Namibia Periodic Report (n 19 above).

91 As above.

92 Nigeria Periodic Report (n 36 above).

93 2014 Kenya Demographic and Health Survey <https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf>.

94 As above.

Article 5 of the Maputo Protocol specifically focuses on harmful cultural practices. It states that State Parties shall eliminate all harmful cultural practices that negatively affect women's rights and contrary to international human rights norms and standards.⁹⁵ Practices such as bride kidnapping (ukuthwala), widowhood practices including wife inheritance, sex initiation, mandatory virginity testing and female genital mutilation (FGM) continue to be practised. The perceived sacredness of culture often results in some sensitivity to cultural practices and therefore in the denial of some human rights violations which occur within a cultural milieu.

In Malawi, shocking revelations of a sexual rite of passage were reported recently where young girls were sent to sex initiation camps to have their virginity broken by men known as hyenas.⁹⁶ The ritual exposes young girls to sexual and reproductive problems and increases the risk of contracting HIV and other STIs. This is despite the presence of the Gender Equality Act that prohibits harmful practices.⁹⁷ A progressive stance was taken in Malawi where the President ordered the arrest of one of these sexual predators and investigation into the practice.⁹⁸

Female Genital Mutilation (FGM) is another cause for concern. Its prevalence varies, ranging from 10 per cent in the Democratic Republic of Congo to 89 per cent in Eritrea. In Nigeria, an estimated 19.9million (27 per cent) of girls and women had undergone FGM in 2013.⁹⁹ Article 5 of the Maputo Protocol mandates States Parties to prohibit 'all forms of FGM' through enactment of legislative measures and supportive sanctions.¹⁰⁰ There have been campaigns to eradicate this obsolete tradition: for example, the 2003 Afro-Arab Expert Consultation for the Prevention of Female Genital Mutilation, resulted in the adoption of the Cairo Declaration on Legal Tools to Prevent FGM.¹⁰¹ So far, across the continent, twenty out of twenty-nine countries that traditionally practiced FGM have specific laws against the procedure.¹⁰² For instance, the Burkina Faso Criminal code and the law on the fight against excision

95 Maputo Protocol, art 5.

96 'The sex initiation camps of Malawi where ten-year-old girls are sent by their families to lose their virginites' *Daily Mail* 5 February 2014.

97 Malawi Periodic Report (n 39 above).

98 'Malawi arrests "hyena" man who bragged about sex with children' *CNN* 27 July 2016.

99 UNICEF 'Female genital mutilation/cutting: A statistical overview and exploration of the dynamics of change' (2013).

100 Maputo Protocol, art 5.

101 The Afro-Arab Expert Consultation on Legal Tools for the Prevention of Female Genital Mutilation <http://www.npwj.org/FGM/Afro-Arab-Expert-Consultation-Legal-Tools-PREVENTION-FEMALE-GENITAL-MUTILATION.html> 21-23 June 2003 (accessed 20 October 2016).

102 Mohamed (n 1 above).

criminalised FGM.¹⁰³ Côte d'Ivoire, has since 1998, criminalised FGM.¹⁰⁴ Recently, the Gambia passed a law prohibiting FGM.¹⁰⁵

Another harmful cultural practice that violates women's rights is the 'cleansing' of widows through rituals. Some of the rituals involve a situation where a widow is forced to have unprotected sexual intercourse with a social outcast such as a person with mental disability for example.¹⁰⁶ This exposes the widow to HIV/AIDS and other STIs.

In some parts of South Africa, bride kidnapping (*ukuthwala*), a general culturally acceptable practice, which involves the abduction of a woman or girl by the family or friends of the husband-to-be for the purposes of marriage, is still practiced.¹⁰⁷ Recent cases of '*ukuthwala*' involve intergenerational relationships where young girls get married to older men exposing them to HIV/AIDS, STIs and violating their rights including the right to education.¹⁰⁸ The South African government has been using legislative and other measures to address the issue. A recent court judgment saw a man being sentenced to 22 years in prison.¹⁰⁹

4 Women's labour rights

Women's labour rights have for a long time been a struggle for women in African and many parts of the world. The Maputo Protocol provides that State Parties shall ensure equality in issues to do with employment.¹¹⁰ Remarkable progress has been made in the area of maternity leave where, in most countries, women are guaranteed paid maternity leave. Such measures are evident in the Sierra Leone case where women are sent on paid leave or leave with social security benefits and guarantees against dismissal for working mothers, irrespective of their marital status, during a reasonable period before and after childbirth.¹¹¹ This is equally true of Ghana.¹¹² The Namibian Labour Act, Act No. 11 of 2007, makes explicit provision for maternity benefits and outlaws discrimination in workplaces on the basis of pregnancy and HIV and AIDS status, and prohibits sexual

103 Burkina Faso Periodic Report (n 35 above).

104 Côte d'Ivoire Periodic Report (n 11 above).

105 n 78 above.

106 Human Rights Watch 'Women's property rights in sub-Saharan Africa' <https://www.hrw.org/legacy/campaigns/women/property/qna.htm> (accessed 21 November 2016).

107 T W Bennet as cited by N Soucie *Child Marriage: Ukuthwala in South Africa. A series in Culture and human rights: Challenging cultural excuses for gender based violence* www.genderacrossborders.com (accessed 30 October 2016).

108 L Mwambene & J Sloth-Nielsen 'Benign accommodation? Ukuthwala, "forced marriage" and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 1.

109 *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

110 Maputo Protocol art 13.

111 Sierra Leone State Periodic Report (n 71 above).

112 Sec 57 of the Labour Act 2003 (Act 651).

harassment.¹¹³ While such progress is being celebrated, gender based discriminatory trends still exist. A case in point is that of the Nigerian Labour Act that prohibits women from undertaking underground work in mines and working in the night except for nurses and women in management.¹¹⁴ Under the same law, women cannot be accompanied by their spouses to their place of deployment whilst men enjoy such privileges to the extent that they can be accompanied by more than one wife.¹¹⁵

5 Conclusion

Although 2016 was declared the year of human rights with special focus on women's rights, only two thirds (40 out of 55) of the AU Member States have ratified the Maputo Protocol, 14 years after its adoption and very few have domesticated it. It is imperative for the remaining States to ratify the Protocol as it provides the basis upon which reforms on women's rights can be realised and can enable citizens to hold governments accountable for women's rights. Ratifying the Maputo Protocol would 'have a momentous effect on the rights of women on a continent that has historically seen women bear the multiple brunt of poverty, exclusion and experience wars and civil unrests'.¹¹⁶

This chapter has highlighted that there has been notable progress concerning the realisation of women's rights since the adoption of the Maputo Protocol. While one cannot wholly attribute this progress to the Maputo Protocol it is arguably, untenable to suggest that the Maputo Protocol has had no influence in the many positive changes that have been seen in legislation and policy on women's rights since 2003. The Maputo Protocol has thus contributed to the improvement of legislative and policy provisions on women's rights and consequently an improvement on women's human rights in Africa. While this contribution is noteworthy, it also important to highlight that patriarchy, harmful customary practices and conservative religious beliefs remains some of the major obstacle hindering the successful implementation of gender sensitive reforms.

The chapter also highlights that many states have failed to adopt gender budgeting which require allocation of specific funds towards the realisation of women's rights. While legislative and policy changes are steps in the right direction, these would only lead to change in the live realities of African women if accompanied by relevant institutional and funding allocations to ensure the effective realisation of women's rights. Consequently, African governments must in addition to legislative and policy reform, provide the necessary funding and competent institutions to

113 Namibia Periodic Report (n 19 above).

114 Nigeria Labour Act, secs 56(1) and 55(7).

115 Nigeria Labour Act, sec 34(1).

116 Mohamed (n 1 above).

implement programmes and services that advance women's rights. The Maputo Protocol holds great promise for the realisation of women's rights in Africa if effectively implemented.