

# THE IMPACT OF THE MAPUTO PROTOCOL IN THE GAMBIA



*Basiru Bah\**

## 1 Introduction

The Gambia is the smallest country in mainland Africa and remains one of the poorest in the world. In 2019, the United Nations Development Programme (UNDP) ranked The Gambia 174 out of 189 on the Human Development Index countries and territories,<sup>1</sup> falling two positions since 2016. The country's standing improved in 2020 to 172.<sup>2</sup> The country is predominantly Muslim with over 95 per cent of the population professing the Islamic faith while the other 5 per cent compose of Christians and traditional African religions. The country attained independence on 18 February 1965 and has since witnessed various constitutional and legislative reforms.

The Gambia currently operates a tripartite legal system which allows for a simultaneous application of the common law, Sharia law and customary law. The basic law of the country remains the 1997 Constitution which is the supreme law of the land.<sup>3</sup> This Constitution was born after the coming into power of former President Yaya Jammeh through a *coup d'etat* in 1994 and abrogating the 1970 Constitution. An attempt to promulgate a new constitution following the fall of former president Jammeh in 2016 failed when National Assembly members rejected the Draft Constitution in Parliament. The 1997 Constitution provides for the protection of human rights in general under Chapter IV and enjoins horizontal and vertical application of the provisions of the bill of rights.<sup>4</sup> The rights of women to full and equal dignity, equal opportunities in politics, economic and social activities and equal treatment to men are also protected.<sup>5</sup> The Gambia has also enacted a series of legislation protecting the rights of women in addition to international and regional treaties ratified by The Gambia. The country has ratified and domesticated

\* LLB (University of The Gambia), LLM(HRDA)(UP); Senior Legal Officer, The Gambia National Human Rights Commission.

1 UNDP Human Development Report 'Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (2019) 302.

2 UNDP Human Development Report (2020) 'the next frontier: human development and the Anthropocene' 363 available at <http://hdr.undp.org/en/2020-report> (accessed 3 December 2021).

3 The Constitution of the Republic of The Gambia 1997 sec 4.

4 The Constitution of the Gambia (n 3) sec 17.

5 The Constitution of the Gambia (n 3) sec 28.

the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).

However, women and girls continue to suffer discrimination and gender inequalities. These inequalities and discriminatory practices continue to be aggravated by patriarchy, religious and traditional practices. Gender inequality in The Gambia remains steep as the country is ranked 148 out of 189 in the Human Development Report.<sup>6</sup> This is reflected in all sectors of the country as women continue to occupy the smallest percentage in decision making offices and lower positions in both public and private sectors. In the National Assembly, which is the law-making organ of the state, only 10.3 per cent of parliamentary seats are held by women even though more than half of the population of The Gambia are women.<sup>7</sup> This is significantly below the 30 per cent affirmative action target.<sup>8</sup> Political participation in the National Assembly and local government remains significantly poor. The 2017 legislative elections saw only three female candidates being elected to the National Assembly constituting a mere 5.66 per cent of the elected National Assembly members. A slightly higher number and percentage of 8 and 6.67 respectively was recorded in the 2018 local government elections. These numbers were a decrease from the 2008 and 2013 local councillors election when 14 and 10 women councillors respectively, representing 12.28 per cent in 2008 and 8.77 per cent in 2013 were elected.<sup>9</sup>

On the education aspect, only 30.7 per cent of adult women have reached at least a secondary level of education compared to 43.6 per cent of their male counterparts while female participation in the labour market is 51.7 per cent compared to 67.7 per cent for men.<sup>10</sup> This chapter analyses the impact of the Maputo Protocol in The Gambia.

## 2 Ratification of the Maputo Protocol

The President of the Republic has the power to negotiate and conclude international treaties on behalf of The Gambia.<sup>11</sup> This power is exercisable by the President or through his cabinet ministers. However, ratification remains under the jurisdiction of the National Assembly.<sup>12</sup> The procedure for transmitting the ratification of treaties involves the Ministry of Justice receiving the resolution of ratification from the National Assembly, which is then prepared for signature by the president and then deposited to the relevant treaty body through the Ministry of Foreign Affairs.

Through this procedure, The Gambia ratified the Maputo Protocol on 25 May 2005 with initial reservations on its articles 5 (elimination of harmful practices), 6 (marriage), 7 (separation, divorce and annulment of marriage) and 14 (health and reproductive rights).<sup>13</sup> Even though no reason was advanced for these reservations, it is believed that the decision was informed by the country's very conservative religious and cultural background. However, these

6 Human Development Report (n 1) 147.

7 UNDP Human Development Report 'briefing notes for countries: Gambia' 6.

8 The Republic of The Gambia 'National Gender Policy 2010-2020' 11. This is part of the objectives of the Gender Policy.

9 The Republic of The Gambia (n 8) 6.

10 Human Development Report (n 1).

11 The Constitution of the Gambia (n 3) sec 79(1)(c).

12 As above.

13 F Viljoen *International human rights law in Africa* (2012) 256.

reservations were lifted in 2006 by The Gambia just before the country hosted the African Union Summit.<sup>14</sup> Despite lifting the reservations, these rights continue to be either violated or legitimately curtailed by personal laws that serve as valid justifications for their limitation despite domestication into national legislation.

### **3 Government focal point**

The Ministry of Justice of The Gambia is the government focal point for all human rights issues. The Ministry has a special Civil Litigation and International Law Department responsible for providing legal services to government departments, vetting of Gambia's international agreements, preparing instruments for ratification, ensuring adherence to Gambia's treaty obligations and responding to communications against The Gambia at international and African human rights treaty bodies.<sup>15</sup> The Ministry is responsible for preparing state reports to the African Commission on Human and Peoples' Rights (African Commission) and other international treaty bodies. The Ministry is also responsible for prosecuting violations of laws including those domesticating international human rights treaties. This is done through State Counsel under the Director of Public Prosecutions within the Attorney General's Chambers in the Ministry of Justice.<sup>16</sup>

The Ministry of Women, Children and Social Welfare is responsible for women affairs policy formulation,

resource mobilisation and serves as general overseer of the affairs of women in The Gambia. The creation of this ministry in 2019 represents a fundamental change in the institutional structure of the protection of the rights of women as the ministry is removed from the Office of the Vice-President. In collaboration with the Ministry of Justice and other stakeholders, the Ministry of Women, Children and Social Welfare continue to advance women's rights in The Gambia.

Other important government institutions in the implementation and enforcement of the Maputo Protocol, the Women's Act, 2010 and other related legislation include the National Women's Council and the National Women's Bureau. The National Women's Council which is established under section 57 of the Women's Act, is a body corporate responsible for the integration, implementation of gender and women's rights in all sectors of government, reviewing proposals on gender equality from ministries and government departments, ensuring gender equality in budget appropriation and cooperation with NGOs towards the achievement of gender equality among other things.<sup>17</sup> The Council also advises government on women related matters and is responsible for the preparation of periodic reports on the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The Women's Bureau is the administrative body of the Women's Council and runs the day-to-day activities of the Council.<sup>18</sup>

14 As above.

15 Attorney General's Chambers and Ministry of Justice <https://www.moj.gm/civil-litigation-international-law-department> (accessed 18 October 2020).

16 The Constitution of the Gambia (n 3) sec 85.

17 The Women's Act 2010 sec 66.

18 The Women's Act (n 17) sec 70.

## 4 Domestication

The Gambia is a dualist common law state which requires the domestication of international law before it can be enforced by domestic courts. Though there is no specific legal provision to this effect, the practice is that international treaties are negotiated on behalf of The Gambia by the executive and subject to ratification by the National Assembly.<sup>19</sup> It only receives domestic judicial enforcement when it is domesticated into domestic law.<sup>20</sup> The body of laws created under section 7 of the 1997 Constitution does not include international law as part of the laws of The Gambia. As a result, many treaties that are ratified but not domesticated by the country remain largely unenforced at the domestic level.

The Gambia domesticated the Maputo Protocol by enacting the Women's Act, 2010. This legislation also implements the provisions of the National Policy for the advancement of Gambian Women and Girls and incorporates and enforces the provisions of CEDAW.<sup>21</sup> The Act encompasses a majority of the fundamental principles and rights provided by the Maputo Protocol. The Women's Act 2010 also expands on the rights of women in Chapter IV of the 1997 Constitution. These constitutional provisions recognise women's rights to non-discrimination, protection from deprivation of property, right to education in The Gambia and right to political participation. These rights are reflected in and expanded by the Act.

Even though The Gambia currently has no formal reservations to the provisions of the Maputo Protocol, there remain several impediments that continue to hinder effective protection and fulfilment of women's rights in The Gambia. The Gambia operates a tripartite legal framework which sees a simultaneous application of common law and principles of equity, Sharia law and customary law in the legal system. This has seen a significant increase in claw back clauses in the laws allowing important human rights provisions to be subjected to the personal laws of individuals. This means that despite the progressive provisions of the Women's Act 2010, women and girls find their rights curtailed by provisions in Sharia and customary law regarding marriage, divorce, and inheritance.<sup>22</sup>

Section 10 of the Women's Act provides that any existing law, regulation or practice that constitutes discrimination against women is null and void and not enforceable. However, the recognition of Sharia and customary law under section 7 of the 1997 Constitution allows for the application of principles and personal laws that are not compatible with the rights protected in the Maputo Protocol and the Women's Act. This conundrum is not cured by the anti-discrimination clause under section 33 of the Constitution. Instead, the clause subjects non-discrimination to the application of personal laws on marriage, divorce, burial and devolution of property on death and customary laws in respect of tribes to which they bind.<sup>23</sup> The implication of this limitation is that regardless of how good the domestic laws are, they can be curtailed

19 The Constitution of the Gambia (n 3) sec 79.

20 For example, the Children's Act 2005, the Women's Act 2010 all domesticate international treaties ratified by The Gambia.

21 Long Title Women's Act 2010.

22 See The Constitution of the Gambia (n 3) sec 7 which outlines the laws of The Gambia.

23 See The Constitution of the Gambia (n 3) sec 33(5)(c) and (d).

by provisions of Sharia and customary law as personal laws of individuals. Victims of these limitations will not have the constitutional basis to challenge the laws since section 33(5) subjects non-discrimination clauses to personal laws.

The High Court of The Gambia which has branches throughout the country has the jurisdiction to enforce the rights protected in the Act just like other rights protected in the 1997 Constitution. Section 12 of the Women's Act allows for any person acting on behalf of another person, any member of an interest group and anyone acting in the public interest to bring action for the enforcement of these rights before the High Court. The National Women's Bureau can also initiate proceedings on behalf of the National Women's Council in the High Court to enforce these rights or seek any other redress. Thus, unlike under section 37 of the Constitution which only recognises *locus standi* of the person who alleges that his or her rights has been, is being, or likely to be violated, or by someone acting on behalf of a detained person, the Women's Act opens up various avenues through which women can seek enforcement of the provisions of the Act.

A notable absence from the Women's Act 2010 is the lack of recognition and provision for the absolute right to abortion for women. This is despite The Gambia's obligation under the Maputo Protocol and the African Commission's General Comment on article 14 of the Maputo Protocol which buttressed the significance of legalising abortion to protect the physical and mental health of women who may find themselves entangled between the legitimate limits of the law and protecting

their right to reproductive health. The Act only provides for the right to medical abortion where a pregnancy endangers the life of the mother or the fetus. This is limited in scope contrary to article 14(2)(c) of the Maputo Protocol which provides for medical abortion in cases of assault, rape, and incest. The Criminal Code continues to criminalise abortion related acts<sup>24</sup> and child destruction<sup>25</sup> providing lawful instances of the latter only where said child destruction is meant for preserving the life of the mother. Consequently, the provisions fall short of the requirements of article 14 of the Maputo Protocol and may in turn trigger illegal and unsafe abortions which can lead to eventual complications or even death of the mother. This is in contravention of The Gambia's obligation to protect women's sexual and reproductive rights.<sup>26</sup> In any event, states are required to put in place enactments that allow for access to medical abortion when the pregnancy poses a threat to the physical and mental health of the pregnant mother.<sup>27</sup>

The Act initially did not ban the practice of female genital mutilation (FGM) and the practice remained widespread in The Gambia until 2015. A 2015 declaration on ban of FGM by the then President Yahya Jammeh resulted in a swift legislative action. An amendment to the Act<sup>28</sup> criminalised female circumcision and placed a three-year imprisonment and a fine of fifty thousand Dalasis (approximately 955 USD)

24 Act 25 of 1933 (as amended) secs 140-143.

25 The Constitution of the Gambia (n 3) sec 198.

26 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) and art 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa para 20.

27 African Commission General Comment (n 26) para 38.

28 Women's (Amendment) Act, 2015.

or both the fine and imprisonment on both the principal offender and accomplices.<sup>29</sup> Even though this was a welcome development, women's rights advocates raised concerns on both the language of the amendment for failing to categorically criminalise FGM in all forms and also for the lenient punishment imposed on perpetrators. The Act and the amendment also failed to criminalise cross-border cutting and as a result, there have been various reports that persons from The Gambia travel to neighbouring Senegal to procure the performance of FGM on Gambian women and girls.

Even though prosecution of perpetrators has not been very common, *The State v Sunkaru Darboe and Saffiatou Darboe* at the Mansakonko High Court some 135 kilometres from Banjul served as a warning for persons involved in the practice. In this case, a woman who had subjected her child to FGM was arrested and arraigned before a court. However, the matter was withdrawn before judgment was entered largely due to insufficient evidence for the prosecution and social pressure. There has been very little arrest or prosecution based on the amendment since then.

Even though the Act provides for the implementation of policies that will ensure equality between men and women,<sup>30</sup> it remains too remote a possibility to achieve as women participation in politics and public offices remains far below the 30 per cent quota system that is targeted. Other enactments that incorporate provisions of the Maputo Protocol into domestic law include the Sexual Offences Act, 2013, the Tourism Offences Act 2003, the Domestic

Violence Act, Trafficking in Persons Act, 2007 and Children's Act, 2005. The Sexual Offences Act amends the law and procedure relating to the trial of rape and other sexual offences and for connected matters. In line with article 4 of the Maputo Protocol, the Sexual Offences Act punishes rape and related offences in a bid to protect women and girls from sexual violence and punish perpetrators.

Furthermore, the Tourism Offences Act prohibits unlawful sexual advances to children,<sup>31</sup> child sexual abuse<sup>32</sup> and procurement of a child for sex.<sup>33</sup> All these provisions provide domestic legal enforcement for some provisions of the Maputo Protocol. Similarly, the Domestic Violence Act provides protection for women and girls victims of domestic violence.<sup>34</sup> The Act criminalises domestic violence under part IV in accordance with the Maputo Protocol and establishes an Advisory Committee that is mandated to advise government on gender-based violence (GBV) related matters and promote strategies to eliminate GBV among other things.<sup>35</sup> The Trafficking in Persons Act 2007 provides a legal framework to prevent, suppress and punish those engaged in trafficking in persons. Women and girls being the primary victims of trafficking, the Act domesticates article 4 of the Maputo Protocol which requires state parties to ensure the protection of women's right to security of the person and for states to prevent and punish trafficking of women and girls.

The Children's Act, 2005 also provides detailed protection for children

29 As above.

30 Women's Act 12 of 2010 sec 15.

31 Women's Act (n 17) sec 5.

32 Women's Act (n 17) sec 6.

33 Women's Act (n 17) sec 7.

34 See the Long Title of the Act.

35 Sec 5 of the Women's Act.

generally. The Act prohibits child trafficking, exploitation, marriage, betrothal, and other harmful practices. Even though this Act does not specifically indicate that it domesticates provisions of the Maputo Protocol, these provisions provide for domestic enforcement of the prohibition of harmful social practices on women and girls enshrined in its article 5, the right to dignity in article 3, non-discrimination under article 2 and prohibition of child marriage under article 6.

An opportunity to make some improvements in the country's legal system was blown when the National Assembly rejected the Draft Constitution 2020. This Draft had undergone wide consultations and incorporated progressive provisions on the protection of women's rights. Section 55 thereof, for example, provided for women's rights to equal treatment with men, equal opportunities, protection from abuse and all forms of violence. Section 63 also protected the rights of elderly women to dignity and participation in public affairs. The Draft was meant to domesticate these important provisions of the Maputo Protocol, CEDAW and other international treaties that The Gambia is a party to.

## 5 Institutional reform

An important structural change in the cabinet setup which recently took place in The Gambia is the creation of a separate Ministry of Women, Children, and Social Welfare which consists of a workforce of more than 60 per cent women. The ministry used to be under the Office of the Vice President, but the recent changes put women affairs in a separate ministry. This development is hailed by many as a positive measure considering the fact that the Office of the Vice-Presi-

dent has too many responsibilities and may not be able to give enough attention to women affairs.<sup>36</sup> This ministry was 'part of the president's women empowerment drive to give prominence to the matters of women, children, and the vulnerable in society'.<sup>37</sup> It was further 'in line with the government's institutional reforms policy of realigning key sectors under the relevant institutions'.<sup>38</sup>

However, women's rights advocates are of the view that the congregation of women affairs, children and social welfare under one ministry may relegate women affairs to secondary position as these other mandates are also of great importance in The Gambia, thus the chance that the ministry may not give sufficient attention to women. The argument is that given the importance of the proper protection, promotion and fulfilment of women's rights, a ministry should be created that is solely responsible for women's matters.

In the 2021 Budget Appropriation, the Ministry of Women, Children and Social Welfare is allocated 92,878,464 Gambian Dalasis (approximately USD 1,808,733), representing a low 0.42 per cent of the entire budget.<sup>39</sup> This is significantly a lower amount compared to, for example, the sums allocated to the Office of the President (USD 12,218,963) or the Ministry of Transport, Works and Infrastructure (USD 38,452,191). As a result of this minimal resource allocation, the ministry is faced

36 This appreciation was shared by all interviewees.

37 'Fatou Kinteh appointed minister for women affairs' *Foroyaa* 27 February 2019 <https://foroyaa.net/fatou-kinteh-appointed-minister-for-women-affairs/> (accessed 10 October 2020).

38 As above.

39 Government of The Gambia Budget Appropriation Report 2021, 1.

with budget constraints as the resources must be distributed to women affairs, children, and social welfare related issues. In fact, the 2021 Budget is an improvement on the 2019, and 2020 ones which allocated a meagre 30,447,000 Gambian Dalasis (USD 592,930) and 73,568,000 Gambian Dalasis (USD 1,432,677) respectively.

Despite the financial challenges faced by the Ministry of Women, Children and Social Welfare, due to the spike in domestic violence cases, the ministry has undertaken positive initiatives in the protection of the rights of women and girls. For example, it opened a hotline for the reporting and handling of domestic and GBV cases. The '1313' hotline remains active and able to provide prompt response to victims of GBV. This ministry also works in collaboration with other stakeholders such as the Paradise Foundation (which provides shelter for victims of GBV) and the United Nations Population Fund (UNFPA) which has turned one of its libraries into shelter for victims.

The Women's Bureau which was created in 1980 and established under the Office of the Vice President remains in place with a minor change in terms of oversight. Since the creation of a separate Ministry of Women, Children and Social Welfare, the Bureau is now under this ministry with a similar role of being the executive arm of the National Women's Council created under section 56 of the Women's Act 2010 to protect the rights of women and children. The Bureau receives complaints of abuse and other human rights violations from women across the country, provides training for CSOs, women, police and security forces and other stakeholders on the rights of women and girls. Over

the years, the Bureau has received many complaints, though quite fewer than expected considering the number of legal issues that women face every year. On receipt of complaints of human rights abuses, the Bureau may refer some of the complaints to its partner Female Lawyers Association of The Gambia (FLAG), which can and does with support from the UNFPA, take legal action where necessary.

The Gambia Police Force (GPF) is one of the institutions that is directly involved in the protection of the rights of women and operates a welfare unit under the police force. As such, the Bureau works with the GPF's welfare unit through training and capacity building programmes. The GPF Academy which is responsible for recruiting officers into the Force, now uses a training manual prepared by the Bureau on sexual and GBV for police prosecutors.<sup>40</sup> As it is later discussed in this chapter, the creation of an independent National Human Rights Commission is also an important institutional addition as the body is mandated to promote human rights generally and receive complaints and provide recommendations accordingly.

## 6 Legislative reform

Since the ratification of the Maputo Protocol, The Gambia has domesticated the document by enacting the Women's Act 2010 and its subsequent amendments. Prior to the enactment of the Women's Act of 2010, scanty provisions relating to protection of women's rights were found in separate pieces of legislation, but the Act consolidated and improved the protection of women's

<sup>40</sup> The Gambia Police Force *The SGBV handbook for prosecutors* 2019.

rights. The broad themes of the Maputo Protocol such as non-discrimination, access to justice, right to health and healthcare, and marriage and family rights among others are all incorporated in the Act.

A significant amendment to the Act was made in 2015 when FGM was criminalised. The amendment inserted sections 32A and 32B in the Women's Act 2010. Section 32A of the Act prohibits the practice in all its forms and any person found culpable is liable on conviction to a term of three years imprisonment or to a fine of 50,000 Dalasis (approximately USD 955) or both. Where the act results in the death of the victim, the perpetrator is liable to life imprisonment. The Act also imposes a legal obligation on persons to report that the act has been done or is being done or about to be done. A person who fails to do so will be liable on conviction to a fine of ten thousand Dalasis (approximately USD 191).<sup>41</sup> As was highlighted by the African Commission's mission to The Gambia,<sup>42</sup> even though a ban is legally in place pursuant to the amendment, enforcement of the ban is still a challenge as some sectors of society still believe in the practice of FGM.<sup>43</sup>

An important omission in the Women's Act as was noted earlier is the universal right to abortion. This is despite the inextricable and indivisible link between the right to 'exercise full control over one's fertility, to decide one's maternity, the number of children

and the spacing of births and to choose a contraception method.'<sup>44</sup> Abortion remains illegal except for situations where the keeping of the pregnancy endangers the life of the mother.<sup>45</sup>

Other important legislative enactments for the protection of women's rights came with the Sexual Offences Act 2013, Tourism Offences Act, Trafficking in Persons Act and the Domestic Violence Act 2013. The Sexual Offences Act, though did not explicitly state that it domesticates the Maputo Protocol, expanded on the protections that are afforded to women in general and victims of sexual violence. The Act also provides for an improved procedure in the trial of rape and related cases.<sup>46</sup> Several penalties are provided for the various degrees of rape including life imprisonment for instances where violence is used, transmission of sexually transmitted infections, where the victim is under 18 years or where the victim suffered grievous bodily or mental harm.<sup>47</sup> The Act also abolished the long standing 'cautionary rule' which required courts to treat evidence of complainants with caution.<sup>48</sup> This rule had the effect of attaching little or no weight to the uncorroborated testimonies of victims of sexual violence.

Further, the Children's Act 2005 also provides for some protection of the girl child. Section 19 of this Act, in line with the Maputo Protocol, prohibits harmful social and customary practices on girls. Sections 24 and 25 of the Act, subject to personal law also prohibit child marriage and child betrothal

41 Women's Act (n 17) sec 32B(2); Republic of The Gambia 'Initial Report Under the Protocol to The African Charter on Rights of Women' 138.

42 African Commission 'Report of the human rights promotion mission to the Republic of The Gambia 19-24 April 2017.'

43 As above 14.

44 African Commission General Comment 2 (n 26).

45 Criminal Code Act 25 of 1933 (as amended) secs 140-143.

46 The Sexual Offences Act 15 of 2013 sec 1(2).

47 The Sexual Offences Act (n 46) sec 4(1)(iii).

48 The Sexual Offences Act (n 46) sec 7.

respectively. In 2015, the Children's Act 2005 was also amended to totally criminalise child marriage and betrothals irrespective of personal law.<sup>49</sup>

Perhaps the most troubling failure in terms of law reform in the history of The Gambia is the rejection of its Draft Constitution of 2020 at the level of the National Assembly after the presentation of the draft by the Minister of Justice. Members of the National Assembly could not get the required votes for the draft to proceed to the Committee stage of the constitutional review process. This Draft was not only the most widely consulted document in The Gambia, but it also contained very progressive provisions on the protection and promotion of women's rights. During the drafting process, commissioners at the Constitutional Review Commission consulted and were guided by all the regional and global human rights instruments that The Gambia has ratified. The Draft contains provisions such as the reservation of 14 elected seats for women in the National Assembly,<sup>50</sup> gender mainstreaming generally and representation of women at the top executive of all public enterprises so that if the top official is a male, the deputy shall be a woman; if a top male resigns, dies in office or loses the position, his successor would be a woman.

## 7 Policy reform

National policies are formulated and implemented by governments around the world to attain and fulfil various state obligations and objectives. The

Gambia has various policies in place. Several of these policies contain obligations enshrined in both domestic and international legal instruments. Section 14 of the Women's Act 2010 outlines the government's obligations to eliminate all forms of discrimination against women in all institutions, agencies, and organs, in line with its obligations in both the Maputo Protocol and CEDAW. It further requires Ministries and Departments to take appropriate steps for the implementation of the Act. This implies that every Ministry or Department is supposed to conduct a gender audit of all laws and policies to further reinforce the principle of equality between men and women. All policies to be adopted should also bear these obligations in mind.

The National Development Plan (2018-2021) continues to be the blueprint of the development agenda of the current government. It outlines eight priority areas targeted at realising a vision of development and provides guidelines on how the development in these priority areas will be implemented by the state. Even though the Maputo Protocol is not specifically mentioned in the National Development Plan, among the priorities is 'restoring good governance, respect for human rights, the rule of law, and empowering citizens through decentralization and local governance'.<sup>51</sup> This priority has the potential of achieving some of the key themes of the Maputo Protocol and the Women's Act 2010.

Following the expiry of the Education policy of 2004-2015, the 2016-2030 Education Sector Policy was jointly adopted by the Ministries of Basic and

49 The Republic of The Gambia's combined report on the African Charter on Human & Peoples' Rights & initial report on the Protocol to the African Charter on the rights of women in Africa, 138.

50 Schedule 3 CRC Draft Constitution 2020.

51 The National Development Plan (2018-2021) strategic priority 1.

Secondary Education and the Ministry of Higher Education. This policy covers the entire education sector from primary to tertiary education. Even though the Maputo Protocol is not specifically mentioned, the policy is guided by, among other things, non-discriminatory and all-inclusive provision of education and gender equity.<sup>52</sup> The policy is aimed at 'improving access to quality education for all, particularly girls, and for greater gender equality'.<sup>53</sup> Despite the significant increase of girls' enrolment into basic education, a high percentage of girls continue to drop out of school before attaining secondary or tertiary education.<sup>54</sup>

The National Health Policy 2012-2020 was the last policy document used in The Gambia. Among its guiding principles is the need for gender equity and equality between men and women, health system reforms and respect for patient's rights. Yet, there remains a high number of incidents of maternal mortality in The Gambia especially in the rural areas and this situation continues to be compounded by a fragile health system.<sup>55</sup> This shows that at the expiry of this Policy, its objectives remain largely unattained. The Ministry of Health is in the process of adopting a new health policy but since April 2021, after the review of the first draft, there

have not been substantive developments.<sup>56</sup>

The 2010-2020 Gender Policy of the Gambia was adopted in fulfilment of recommendations that emanated from a mid-term review of the National Policy for the Advancement of Gambian Women (NPAGW) which was enacted in 1999. The Gender Policy is intended to make a shift in policy from 'women empowerment only' to the promotion of gender equality and equity.<sup>57</sup> The development of the Gender Policy was guided by provisions of the 1997 Constitution of The Gambia, best practices in women empowerment and the provisions of global conventions that the Gambia is a party to.<sup>58</sup> Consequently, the policy was informed by provisions of the Maputo Protocol among other international treaties. The Gender Policy serves as reference material and direction for implementation of development projects, resource allocation and providing a gender perspective. All these policies despite envisaging the furtherance of enforcing and applying the provisions of the Maputo Protocol, remain largely unimplemented and they continue to be curtailed by claw back provisions in both the 1997 Constitution and other laws subjecting the enjoyment of the rights of women to personal laws.

## 8 Court judgments

The Gambia operates a dualist legal system which requires domestication of international law before it can be

52 The Republic of The Gambia 'Education Sector Policy 2016-2013: accessible, equitable and inclusive quality education for sustainable development' 5.

53 Education Sector Policy 2016-2013: accessible, equitable and inclusive quality education for sustainable development (n 52) 2.

54 Education Sector Policy 2016-2013: accessible, equitable and inclusive quality education for sustainable development (n 52) 4.

55 UNICEF available at <https://www.unicef.org/gambia/maternal-and-child-health> (accessed 2 March 2021).

56 WHO Africa 'The Gambia Reviews the National Health Policy and Strategic Plan (2021-2030)' 29 April 2021 <https://www.afro.who.int/news/gambia-reviews-national-health-policy-and-strategic-plan-2021-2030> (accessed 6 December 2021).

57 The Republic of The Gambia 'National Gender Policy 2010-2020' 1.

58 National Gender Policy 2010-2020 (n 57) 4.

invoked as binding authority before the domestic courts. International treaties such as the Maputo Protocol need to be enacted into local legislation before they can be successfully invoked as binding authorities before the domestic courts. This has affected the direct use and enforcement of the Maputo Protocol before the domestic courts. However, this does not abdicate The Gambia's obligations under the treaty as the principle of *pacta sunt servanda*<sup>59</sup> continues to bind the Gambia to its obligations under the Maputo Protocol. Further, reliance on domestic law does not excuse failure to perform international treaty obligations.<sup>60</sup>

It is worth noting that The Gambian courts have, on several occasions, referred to and relied on decisions of the African Commission and recognised The Gambia's obligations under international human rights law.<sup>61</sup> This is an indication of the potential to rely on provisions of international law to give effect to domestic law, fill in gaps in domestic law and enforce basic human rights. Despite this potential, there is no record of any direct reference to the Maputo Protocol in both court judgments and legal arguments by lawyers.

The Women's Act remains the main piece of legislation for the protection of the rights of women but cases involving the enforcement of this Act remain minimal. The low number of cases on enforcement of this legislation is not entirely owing to lack of awareness by

lawyers of the legislation but to some other equally important factors. These include the application of personal law in matters of marriage, divorce, and inheritance,<sup>62</sup> lack of awareness of these rights by women, and unwillingness by victims of human rights violations to publicly proceed to court to enforce their rights. Section 7 of the 1997 Constitution allows for the application of both Sharia and customary law to members of certain groups. Most of the population being Muslims, coupled with the creation of *Cadi*<sup>63</sup> courts within the judicial system, means that many cases that would have resulted in invoking the provisions of the Women's Act or the Maputo Protocol in the conventional courts, are now under the jurisdiction of the Sharia *Cadi* courts. Several decisions on property, marriage, inheritance, and family related problems have been decided by these courts based exclusively on Sharia law. The Supreme Court of The Gambia affirmed the application of Sharia in these matters in *Isatou Secka v Susan Badgie*,<sup>64</sup> a matter that involved the validity of a polygamous marriage of a deceased Muslim man and subsequent sharing of his estate between his two surviving wives and children.

Exceptional cases involving rights of women have been decided before the courts and referred to the Women's Act 2010. In *Dawda Jawara v Matty Faye*,<sup>65</sup> an appeal case that was decided in the Supreme Court of The Gambia, counsel for the Respondent relied on the provisions of section 43(4) of the Women's Act to argue that the Respondent is enti-

59 Vienna Convention on the Law of Treaties of 1969 art 26.

60 Vienna Convention on the Law of Treaties (n 59) art 27.

61 See for example the Supreme Court decision of *Ousainou Darboe and Ors v IGP and Ors*, civil suit no SC 003/2016, *Mariam Denton v the Director General of the NIA and 5 Others* HC/24/06 MF/087/F1 and *Ousman Sabally v IGP* [1997-2001] GLR 878.

62 The Constitution of the Gambia (n 3) sec 7.

63 Islamic Courts administering Sharia law in matters of marriage, divorce, and inheritance for Muslim parties.

64 GSCLR (2014-2015) 102.

65 Unreported judgment of The Supreme Court of The Gambia civil suit no SC CA 023/2016.

tled to a share of the matrimonial property and that the provision is not subject to anyone's personal law. Even though the Supreme Court refused the application of section 43(4) of the Act on the basis that the property in question was acquired before the marriage, it ordered the full recovery of the expenses that the woman had incurred in the extensions and renovations carried out on the property. The use of the Women's Act in court can be enhanced by massive sensitisation of women on the rights incorporated in the Act and the possibility to enforce these rights before the domestic courts.

## 9 Awareness and use by civil society

The Maputo Protocol is well-known among Gambian based human rights non-governmental organisations (NGOs), and it remains one of the most important tools used by NGOs in advocacy and awareness creation. Since the advent of the current government of Adama Barrow, the NGO space has opened and as a result, the country has seen more proactive NGOs. Some of the most prominent NGOs operating in The Gambia are the Institute for Human Rights and Democracy in Africa (IHRDA), the African Centre for Democracy and Human Rights Studies (ACDHRS), Think Young Women (TYW), the Association of Non-Governmental Organisations (TANGO), Gambian Committee on Traditional Practices (GAMCOTRAP), the Foundation for Research on Women's Health, Productivity and the Environment (BAFROW), the Female Lawyers Association Gambia (FLAG), the Association for Promotion of Girl's and Women's Advancement in The Gambia, and the Forum for African

Women Educationalist The Gambia (FAWEGAM).

Both the IHRDA and the ACDHRS enjoy observer status before the African Commission.<sup>66</sup> The IHRDA is one of the most active litigants on human rights before the African human rights treaty bodies. It was the first to file a case based on the Maputo Protocol before the African Court on Human and Peoples' Rights (African Court) in Arusha. Even though the IHRDA has not filed a case against The Gambia based on the Maputo Protocol before any international, regional or domestic court, it has extensively used the document in advocacy, capacity building and awareness creation nationwide.<sup>67</sup> It has also conducted many trainings for the police and security sector, and other NGOs. In this way, the IHRDA continues to effectively use the Maputo Protocol to enhance its implementation and create awareness among stakeholders. For example, during one of the trainings organised by the IHRDA for police prosecutors, participants were enlightened on the use of provisions of the Women's Act, 2010 beyond just declaration of human rights of women but also for prosecution of violations of provisions of the Act by both corporate and natural persons based on sections 73 and 74 of the Act.<sup>68</sup>

Even though the IHRDA did not submit a formal shadow report on The Gambia's initial report under the Maputo Protocol, it was able to contribute to the process by directly reaching out to commissioners with notes on important

66 S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in V Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 38.

67 As above.

68 As above.

alternative dimensions of the situation in The Gambia.<sup>69</sup> Consequently, the IHRDA has used this technique to not only lobby for certain conclusions but also provide a more objective picture of the situation of the rights of women in The Gambia. Communication barriers between the African Commission and IHRDA however continue to affect effective follow-up on recommendations and concluding observations from the African Commission.

The FLAG is another NGO that is involved in advocacy and litigation for the enforcement of fundamental rights of women. FLAG uses the Maputo Protocol, the Women's Act 2010, the Children's Act, 2005 and other relevant legislation to fulfil its aims and objectives.<sup>70</sup> The association is a leading advocate for legislative reform in areas of gender equality, awareness creation and litigation.<sup>71</sup> FLAG provides free legal assistance to women in diverse areas and serves as a negotiating institution on behalf of women where necessary. In this regard, FLAG was the first institution to initiate proceedings on the Women's Act before the courts in *Matty Faye*.<sup>72</sup>

Another leading NGO engaged in the promotion of women's rights in The Gambia is the women led TYW. This organisation's work is largely based on the provisions of the Maputo Protocol and the Women's Act 2010. Its staff are conversant with the provisions of the Maputo Protocol and use it for advocacy, preparation, and provision of training materials and in the fight against discrimination against women general-

ly. The organisation has conducted massive sensitisation and advocacy programmes countrywide and organised trainings for other NGOs.<sup>73</sup>

Even though TYW has some lawyers in the organisation, it has not litigated cases in the field of women's rights in the domestic courts or regional human rights bodies. It is however in collaboration with other institutions in the consortium of the Network Against Gender Based Violence. This consortium has other members such as FLAG which can and do file cases on behalf of victims of human rights violations before the domestic courts. However, litigation of women's rights faces various challenges such as patriarchal influences and general societal backlashes for victims.<sup>74</sup> For these reasons, one of the cases that TYW referred to a law firm for litigation was withdrawn from the court after the victim was pressured by her family into abandoning the case.<sup>75</sup>

## 10 Awareness and use by lawyers

One major challenge that the protection of the rights of women face in The Gambia is lack of litigation to enforce these rights. Like CSOs in The Gambia, lawyers are generally aware of the Women's Act 2010 and many of them are conversant with the provisions of the Maputo Protocol. This is because it is part of the law curricula of the country and many lawyers that received training from abroad have specialisations on human rights and international law. The lack of litigation on the Maputo Protocol and the Women's Act is not owing to want of awareness by lawyers about these instruments, but instead a combi-

69 As above.

70 Email from FB Bah, Coordinator FLAG, 11 November 2020.

71 As above.

72 The *Faye* case (n 65).

73 The *Faye* case (n 65).

74 The *Faye* case (n 65).

75 The *Faye* case (n 65).

nation of general ignorance of the public about their rights, patriarchal influences and stereotypical challenges that continue to be associated with women taking up matters of their rights and interests to the courts.<sup>76</sup>

## **11 Incorporation into law school education**

Human rights law has been an integral part of the University of The Gambia's Faculty of Law curriculum. This presence has improved over the years with expertise from the Centre for Human Rights, University of Pretoria making a huge impact in human resource capacity and curriculum development. Currently, human rights law is offered in the third year of studies at the Faculty of Law of the University of The Gambia. The Maputo Protocol as well as the African regional human rights system in general are sufficiently covered in the curriculum. Themes such as discrimination against women, sexual and GBV, sexual and reproductive rights and harmful traditional practices are recurrent discussions in the course.

Students at the University of The Gambia as well as graduates have a good understanding of the Maputo Protocol, its domesticating instrument as well as enforcement mechanisms. Some of these graduates have gone on to become judges, magistrates, state counsels, government departments' advisers, private legal practitioners and the current Attorney General and Minister of Justice is a graduate of the Faculty of Law, University of The Gambia. The impact of this collection within both the public and private sectors on the protection of women's rights can be massive considering the knowledge they have on

the Maputo Protocol. With the ongoing transition in The Gambia and the more favourable conditions for the protection of human rights there are more opportunities for the effective use of the knowledge of the Maputo Protocol in day-to-day enforcement of the law.<sup>77</sup>

Students also participate in various moot court competitions including the African Human Rights Moot Court Competition organised by the Centre for Human Rights, University of Pretoria. These activities help students to keep international treaties abreast and have interest in these treaties and their implementation. The recent launching of the Sir Dawda Jawara Moot Court Competition by the Human Rights Commission in collaboration with the Faculty of Law, University of The Gambia is another welcome development as this incentive has the potential of exposing students to a variety of human rights issues in The Gambia and beyond.

## **11 National human rights institutions**

The 1997 Constitution of The Gambia does not provide for the establishment and operation of an independent national human rights institution. The closest office to a human rights institution under the Constitution is the Office of the Ombudsman which is provided for in section 163 of the Constitution and operationalised by virtue of an Act of the National Assembly.<sup>78</sup> The Office of the Ombudsman is vested with power to investigate discrimination against members of the public by any public department, authority or public body in

76 The *Faye* case (n 65).

77 Email from SA Ndasi, Legal Counsel National Agency for Legal Aid and former human rights law lecturer, University of The Gambia, 19 October 2020.

78 Ombudsman Act 3 of 1997.

the exercise of the administrative function of that authority or body.<sup>79</sup> Discrimination here covers the general grounds of discrimination found under Chapter IV of the 1997 Constitution and also the prohibition of discrimination as provided in the Women's Act. On these premises, it is plausible to argue that the Office of the Ombudsman can only have a human rights impact for the purposes of the Women's Act and the Maputo Protocol on issues of discrimination against women by public bodies. There is nothing in the Act establishing the Office or in the 1997 Constitution referring to grievances arising specifically from breach of other duties or legal obligations imposed by the Women's Act 2010 or the Maputo Protocol.

The most significant development in the protection of human rights in The Gambia is the establishment of the National Human Rights Commission (NHRC). This is an independent<sup>80</sup> human rights institution established in 2017 by virtue of the National Human Rights Commission Act<sup>81</sup> 2017 (NHRC Act). The NHRC is established with the distinguished role of promoting and protecting human rights in The Gambia. The NHRC is an independent legal entity which has standing before the Gambian courts.<sup>82</sup> In addition to having standing before the courts, the NHRC receives, hears, and determines complaints and enforces its decisions. Section 12 of the NHRC Act 2017 outlines the functions of the NHRC which include promotion and protection of human rights as well as to monitor, receive, investigate, and consider

human rights violations including by private persons and entities. The NHRC can also recommend appropriate remedial action to the government and seek redress on behalf of complainants and promote awareness and respect for human rights.<sup>83</sup>

Out of the five Commissioners at the NHRC, only two are women representing less than 50 per cent of the Commissioners.<sup>84</sup> However, in its 2019 Annual Report, the NHRC noted the prevalence of gender inequality despite the ratification and domestication of the Maputo Protocol and other women's rights protection legislation and treaties.<sup>85</sup> The NHRC therefore recommended the Government of The Gambia to take various measures including the institution through legislation of gender quota system in all elective bodies at local and national levels 'by allocating a minimum 30 per cent of seats to women' in both legislative and local government elections.<sup>86</sup>

## 12 Academic writing

The literature in The Gambia on the impact of the Maputo Protocol remains scanty as academic writing is very limited.<sup>87</sup> There have been various recent publications centered on rights of women enshrined in both the Maputo Protocol and the Women's Act by Dr Satang Nabaneh.<sup>88</sup> The publications

79 The Constitution of the Gambia (n 3) sec 163(1)(a).

80 Ombudsman Act (n 78) sect 16.

81 National Human Rights Commission Act 18 of 2017.

82 National Human Rights Commission (n 81) secs 3(2)(a) and 12(d).

83 National Human Rights Commission (n 81) sec 12.

84 See <https://www.gm-nhrc.org/commissioners> (accessed 1 March 2021).

85 The National Human Rights Commission 'Annual Report 2019' 29.

86 The National Human Rights Commission 'Annual Report 2019' (n 85) 30.

87 Ndasi (n 77).

88 Alumni of the LLM HRDA Class of 2012.

cover topics such as sexual and reproductive rights,<sup>89</sup> child marriage in The Gambia and political participation of women in The Gambia. She is also the author of the 2016 chapter of the impact of the African Charter on Human and Peoples' Rights and the Maputo Protocol in the Gambia.<sup>90</sup> The author is also a co-founder of an online legal resource centre – the Law Hub which helps provide free access to online legal resources of The Gambia.<sup>91</sup>

### 13 State reporting

The Gambia's record in terms of state reporting before the African human rights bodies is poor. The state tends to prioritise submission of reports to the UN Human rights system.<sup>92</sup> Even though it meets its obligations under the UN system, The Gambia submitted its combined report on the African Charter for the period of 1994-2018 and its initial report under the Maputo Protocol in 2019.<sup>93</sup> This report signifies a milestone in the state's endeavours to fulfil its obligations under the African human rights system. It is the first since The Gambia ratified the Maputo Protocol on 25 May 2005. In accordance with the African Commission's Guidelines for National Periodic Reports, this report reflects legislative and other measures taken by the Republic of The Gambia for the full realisation of women's rights as recognised in the Protocol.

The Report was prepared by the Ministry of Justice in collaboration and consultation with other ministries and stakeholders as an inter-ministerial task force was set up for this purpose. The preparation of the initial report has however been criticised on several grounds. One of the most aired concerns is the failure of the state to sufficiently consult and engage relevant NGOs that are involved in the promotion of the rights of women. This has resulted in an insufficient coverage of relevant themes in the Maputo Protocol and making reference to irrelevant instruments.

On the issue of non-submission of reports to the African Commission, it is noteworthy that the Ministry of Justice suffers from financial and human resource constraints for the preparation and submission of state reports to the African Commission. The preparation of reports requires the hiring of services of consultants which requires substantial amounts of money that may not be readily available to the ministry.<sup>94</sup> Unlike under the UN system – where the UN Office of the High Commissioner and other UN agencies do regular follow ups on due reports and provide support for states, under the African system, there is no such support and follow up.<sup>95</sup> Even though there is a pre-existing obligation on the state to protect, promote and fulfil rights, financial support and constant reminders from the UN serves as a catalyst for states to double their efforts in terms of meeting their reporting obligations.<sup>96</sup>

89 See S Nabaneh 'The Gambia's political transition to democracy: is abortion reform possible?' (2019) 21(2) *Health and Human Rights Journal* 167-179.

90 See Nabaneh (n 66).

91 See Law Hub-Gambia <https://www.lawhubgambia.com/> (accessed 2 November 2020).

92 Nabaneh (n 66) 87.

93 'Gambia submits human rights report to African Commission' *Foroyaa* 3 May 2021 <https://foroyaa.net/gambia-submits-human-rights-report-to-african-commission/> (accessed 6 December 2021).

94 As above.

95 As above.

96 As above.

## 14 Communications involving the state

There has not been any communication against The Gambia based on the Maputo Protocol before the African Commission or the African Court. There have been several communications against The Gambia before the African Commission primarily based on the African Charter. In *Dawda Jawara v The Gambia*,<sup>97</sup> the African Commission found The Gambia in violation of several articles of the African Charter and urged The Gambia to bring its laws in conformity with the document. In *Purohit & Moore v The Gambia*,<sup>98</sup> The Gambia was found in violation of several articles of the Charter and among other things recommended to repeal the Lunatics Detention Act.<sup>99</sup> Neither of these recommendations have been implemented.

The Economic Community of West African States (ECOWAS) Court also found The Gambia in violation of its obligations in several cases but just like those that were decided by the African Commission, the findings were not fully implemented by the government.<sup>100</sup> The general failure of the state to implement recommendations of these treaty bodies remains one the major pitfalls to protection of rights in The Gambia.

97 (2000) AHRLR 107 (African Commission 2000).

98 (2003) AHRLR 96 (African Commission 2003).

99 Lunatics Detention Act 3 of 1918 (as amended).

100 See *Chief Mameh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008); *Musa Saidykhan v The Gambia* ECW/CCJ/JUD/08/10.

## 15 Special mechanisms and visits of the African Commission

There has been a limited number of promotional and fact-finding missions to The Gambia by special mechanisms mandate holders from both regional and global levels largely owing to The Gambia government's non-cooperation over the years.<sup>101</sup> The first ever and only human rights promotion mission undertaken by a delegation of the African Commission to The Gambia was in April 2017 lasting for five days from 19 to 24 April 2017. The mission was conducted in the form of interactive sessions with the authorities and stakeholders with the help of staff from the Ministry of Justice. The mission was aimed at strengthening collaboration between the African Commission and The Gambia, to promote the African Charter and other human rights instruments and engage in dialogue with the government regarding policy and legislative reform.<sup>102</sup> Even though the mission expressed delight in the progress made by The Gambia in human rights protection and promotion since the change of government, it expressed concerns over the low level of representation of women in parliament and other decision making bodies, challenges facing women and girls in accessing and enjoying equal rights as men including property rights, reproductive rights, protection from violence as well as violence due to patriarchy and customary practices.<sup>103</sup>

101 Nabaneh (n 66) 90.

102 African Commission on Human and Peoples' Rights Report of the Human Rights Promotion Mission to The Republic of The Gambia 19- 24 April 2017.

103 As above.

## **16 Factors that may impede/ enhance the impact of the Protocol**

Since the ratification and subsequent domestication of the Maputo Protocol by The Gambia, there has been tremendous progress in protection of women's rights. The criminalisation of FGM, child marriage and betrothal and the adoption of several policies that are informed by the Maputo Protocol are welcome developments. The state's willingness to relax some of the restrictions on advocacy by women's rights groups and the general widening of civil society space has contributed to this progress.<sup>104</sup> The Gambia has also submitted its initial report on the Maputo Protocol and has also allowed and received a mission of the African Commission to The Gambia. A revived, growing and more vibrant civil society has also emerged in recent years.

However, several major impediments continue to slow the progress of positive impact of the Maputo Protocol in the Gambia. These include political, religious, cultural, and legal obstacles. There is a lack of political will on the part of the state to implement legislation, international and regional obligations on the protection of women's rights and decisions of human rights treaty bodies. Even though there is no decision against The Gambia based on the Maputo Protocol, previous decisions from the African Commission, the ECOWAS Court and other international human rights treaty bodies' recommendations and findings are not fully implemented. Progressive domestic legislation and policies also continue to

be mere texts that are not enforced and implemented by the state.

Cultural and religious beliefs continue to also contribute to the failure of the provisions of the Maputo Protocol to have a wide positive impact in The Gambia. The country being a predominantly African Muslim country, remains very conservative and hostile to some of the provisions of the Maputo Protocol such as those on property rights, sexual and reproductive rights, and matrimonial rights of women. The provisions of Sharia law and customary practices remain an integral part of the legal system thus serving as legitimate limitations to the rights of women.

The greatest conundrum that continues to hinder the application of the Maputo Protocol and indeed other human rights instruments is a legal one.<sup>105</sup> The 1997 Constitution of The Gambia provides for the application of Sharia personal laws in matters of marriage, divorce and inheritance for Muslims and also customary law to communities where it applies.<sup>106</sup> This provides a constitutional basis for the validity of practices that run counter to the letter and spirit of the Maputo Protocol as section 33 of the 1997 Constitution lays the constitutional basis for continued discrimination against women on the basis of personal laws. The Committee on the Elimination of Discrimination Against Women noted with concern the effect of personal law on the effective application of progressive human rights legislation in The Gambia such as the Women's Act 2010,

104 This was a common opinion of all the interviewees during the research.

105 As above.

106 See The Constitution of the Gambia (n 3) sec 7.

the Domestic Violence Act, 2013 and the Sexual Offences Act, 2013.<sup>107</sup>

Furthermore, many Gambian legislation are filled with provisions subjecting the protection of rights to personal laws thereby effectively nullifying these provisions. This is despite the obligation of the state to avoid the use of claw back clauses in its laws and reliance on domestic law to violate its obligations under international law. For example, sections 42, 43, 44 and 45 of the Women's Act respectively subject the right to acquire property, to choose matrimonial home, separation, divorce and annulment of marriage and rights of widows all to personal laws.

Lack of litigation challenging illegal actions and inaction of both the state and private individuals continues to affect the effective enforcement and implementation of the Maputo Protocol, the Women's Act, 2010 and other laws protecting and promoting the rights of women and girls in The Gambia. The mere enactment of laws is not enough to protect women's rights in a country. For instance, the various rights that are protected by the Women's Act 2010 continue to be violated daily as women are sexually abused, discriminated against and deprived of property based on cultural practices. However, lawyers, litigants and the courts remain less involved in proper litigation that could have helped curb violation of the rights of women. Section 74 of the Women's Act criminalises any contravention of the Act, thus giving prosecuting authori-

ties the legal basis to prosecute any person corporate or natural that violates the rights and other provisions in the Act. Nevertheless, very few cases have been decided initiated in the domestic courts.

For a better impact of the Maputo Protocol in The Gambia, there should be massive legislative and institutional reforms to harmonise domestic laws and bring them in line with international obligations and to improve women participation in decision making processes. There should also be affirmative action to ensure equal participation of women, massive sensitisation to raise awareness on the Maputo Protocol and general attitudinal change of society towards litigation.

107 United Nations Office of the Commissioner for Human Rights 'Committee on the Elimination of Discrimination Against Women considers the reports of The Gambia' available at <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16222&LangID=E> (accessed 18 October 2020).