

THE IMPACT OF THE MAPUTO PROTOCOL IN KENYA



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1 Introduction

On 27 August 2010, the Kenyan people ushered in a transformative Constitution which engenders their aspiration for a society that is founded on essential values of human rights, equality, democracy, freedom, social justice, and the rule of law.¹ In particular, the Constitution has outlined numerous gains for women in matters such as elimination of gender discrimination, citizenship, gender equity with the electoral and political sphere, protection of women's land and property rights, and equal rights during and after dissolution of marriage.

Importantly, the Constitution recognises Kenya's place within the international community and its commitment to the obligations that accrue from international treaties and customary law. The Constitution provides that 'the general rules of international law shall form part of laws of Kenya'² and that 'any treaty or convention ratified by Kenya shall form part of the laws of

Kenya' under the Constitution.³ Due to the prevailing constitutional dispensation in Kenya, the international obligations arising from the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) have to be adhered to by the country to the extent that the Maputo Protocol forms part of the laws of Kenya.

The country has significantly progressed in the protection of the rights of women as contemplated under the Maputo Protocol. Notably, since 2016, the judicial system is showing a better appreciation of Kenya's obligations under the Maputo Protocol while the civil society, human rights institutions and academics, among others, continue to take positive steps towards protecting the rights of women as demonstrated in this report. Although the government has taken systematic measures through enactment and implementation of legislation and policy, there are significant

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1 The Preamble of the Constitution of Kenya 2010.

2 Constitution of Kenya 2010 art 2(5).

3 Constitution of Kenya (n 2) art 2(6). See also Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority*; Initiative for Strategic Litigation in Africa (ISLA) Petition 3 of 2018, para 135 'The Supreme law in Kenya is the Constitution and if any general rule of international law or Treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails.'

challenges and gaps that hinder the full realisation of the rights under Maputo Protocol.

2 Ratification of Maputo Protocol⁴

As a show of commitment to human rights promotion and protection, Kenya ratified the African Charter on Human and Peoples' Rights (African Charter) on 23 January 1992 and deposited the instruments of ratification on 10 February 1992. While Kenya signed the Maputo Protocol on 17 December 2003, it ratified it on 6 October 2010, and deposited the instruments of ratification on 13 October 2010. The country ratified the Maputo Protocol in October 2010 against the backdrop of lobby groups' pressure.⁵ This was barely two months after the promulgation of the Constitution.

The government took seven years to ratify the Maputo Protocol since it had certain concerns on some of its provisions such as article 10 that requires governments to reduce their military

budget so as to use the resources to facilitate women's development.⁶ Further article 14(2)(c),⁷ being interpreted as potentially allowing abortion, is outlawed by article 26 of the Constitution of Kenya of 2010.⁸ Kenya thus entered a reservation on this provision as it was contrary to the country's Constitution. The Kenya National Commission on Human Rights (KNCHR) which is the body mandated to ensure the protection and promotion of human rights in Kenya, has advocated for the Kenyan government to lift its reservation on article 14(2)(c) of the Maputo Protocol in its yearly reports to the President of Kenya.

3 Domestication⁹

Pursuant to article 2(6) of the Constitution, the Maputo Protocol forms part of the Kenyan law. In its usage, it plays second fiddle to the Constitution because the latter is the supreme law of Kenya.¹⁰ The Constitution contains a progressive bill of rights that espouses a

4 This section largely reflects the contents of C Bosire and others 'The impact of the African Charter and the Maputo Protocol in Kenya' in Centre for Human Rights *The impact of the African Charter and the Maputo Protocol in selected African states* (2012); ST Griffith & P Ogendi 'The impact of the African Charter and the Maputo Protocol in Kenya' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) because the history of ratification of Maputo Protocol by Kenya has not changed.

5 The ratification of the Maputo Protocol by Kenya coincided with the 'Africa Women's decade' which was organised by the African Union and was hosted in Nairobi. FIDH 'Kenya: Concrete steps required to demonstrate government's will to respect women's rights' 11 October 2010 <http://www.fidh.org/Kenya-Concretesteps-required-to-demonstrate> (accessed 12 November 2020).

6 Griffith & Ogendi (n 4) 116.

7 'State Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes the right to decide whether to have children, the number of children and the spacing of children.' See also, the 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 available at https://www.achpr.org/public/Document/file/English/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf (accessed 3 March 2021).

8 Parliament of the Republic of Kenya 'National Assembly Official Report' 13 April 2005, 644-646.

9 This section largely reflects the contents of Bosire and others (n 4) because the history of domestication of Maputo Protocol by Kenya has not changed.

10 Constitution of Kenya (n 2) art 2(1) 'the Constitution is the supreme law of the Republic.' See also Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority*; Initiative for Strategic Litigation in Africa (ISLA) Petition no 3 of 2018, para 135

litany of justiciable rights. For instance, article 43 on socio-economic rights adds Kenya to a list of few countries in Africa to recognise justiciability of socio-economic rights in the constitution.¹¹

The adoption of the 2010 Constitution was the culmination of a long struggle to embed constitutional reforms, respect for the rule of law and human rights in Kenya. The African Charter and other human rights instruments such as the Maputo Protocol informed the political and constitutional reform agenda in the run up to the adoption and promulgation of the Constitution in 2010.¹² The African Charter provisions were incorporated in the repealed constitution through a raft of amendments and political truce actions such as the introduction of multi-party democracy in 1992,¹³ gender considerations in nominating members of parliament,¹⁴ and the addition of 'sex' as one of the grounds for prohibition of discrimination.¹⁵ Suffice to add that these rights form part and parcel of the current Kenyan Constitution.

'The Supreme law in Kenya is the Constitution and if any general rule of international law or Treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails.'

- 11 South Africa and Ghana remain some of the few countries that recognise socio-economic rights within their constitutions. See JC Mubanguzi 'Constitutional protection of socio-economic rights' (2006) 2 *African Journal of Legal Studies* at 1 as quoted in Griffith & Ogendi (n 4).
- 12 GK Kuria 'The rule of law in Kenya and status of human rights' (1991) 16 *Yale Journal of International Law* 217. See also Bosire and others (n 4) 67.
- 13 Sec 1A of the 1969 Constitution (Act 5).
- 14 Sec 82(3) of the 1969 Constitution.
- 15 Statutes such as the Children's Act make direct reference to the UN Convention on the Rights of the Child. Sec 7(2) of the Act provides that: 'Every child shall be entitled to free basic education which shall be compulsory in accordance with Art 28 of the United Nations Convention on the Rights of the Child'.

Many present-day statutory laws borrow heavily from the Maputo Protocol. They include the Protection Against Domestic Violence Act 2015, Marriage Act 2014, Matrimonial Property Act 2014 and Kenya National Commission of Human Rights Act 2011. The other treaty that continues to influence legislation and policy is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶ There is also a litany of policy formulations as illustrated below that greatly draw inspiration from the Maputo Protocol.

4 Legislative reform or adoption

As already noted, the promulgation of the Constitution of Kenya heralded a new era for the promotion and protection of human rights in Kenya. Ever since the promulgation of the Constitution on 27 August 2010, there have been numerous developments on the legislative front aimed at mainstreaming gender values that directly and indirectly contribute to the realisation of the rights in the Maputo Protocol.

The Constitution of Kenya 2010 enshrines within its articles many of the aspirations and provisions that are captured in the Maputo Protocol. Prior to the adoption of the Constitution, the Maputo Protocol was a trigger for wide ranging reforms in various sectors of the Kenyan legal structure. The enactment of the Sexual Offences Act 3 of 2006 that affords protection to victims of sexual offences was a milestone towards the implementation of the Maputo

- 16 The Protection against Domestic Violence Act 2 of 2015 https://ke.boell.org/sites/default/files/uploads/2015/08/protectionagainstdomesticviolenceact_2015_1.pdf (accessed 12 November 2020). See also Griffith & Ogendi (n 4) 116.

Protocol. The Act substantively defined the whole spectrum of rape and simplified the rules of evidence to afford better protection to the victims of this heinous crime that robs the victims of their dignity.

At the time of the adoption of the Constitution in 2010, many of those opposed to its passage among them the Catholic Church based their opposition on its provisions on abortion. Article 26(4) of the Constitution provides that abortion is not permitted unless in the opinion of a trained health professional there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other law. The contest was delicately balanced to capture the aspirations of the Maputo Protocol and the religious protest it had attracted in Kenya. Section 6 of the Health Act of 2017 provides for the right to reproductive health which includes the right to be 'informed about and have access to reproductive health services including to safe, effective, affordable, and acceptable family planning services.' The recent attempts to introduce a Reproductive Health Bill into the Senate have, however, met opposition from quarters such as the National Council of Churches of Kenya.¹⁷ Based on the opposition facing the adoption of the Reproductive Health Bill, it is evident that challenges to realisation of reproductive health as contemplated under Maputo Protocol still exist.

In addition to pieces of legislation such as Human Immunodeficiency Virus (HIV) Prevention and Control Act of 2006 and the Environmental Coordi-

nation and Management Act of 1999 which were enacted prior to the promulgation of the Constitution, some of the pieces of legislation adopted under the new constitutional dispensation that give effect to Maputo Protocol include the Prohibition of Female Genital Mutilation Act 2011, Land Act 2012, Land Registration Act, Marriage Act 2014, Matrimonial Property Act 2014, the Protection Against Domestic Violence Act 2015, the Legal Aid Act 2016, the Community Land Act 2016, and the Health Act 2017.

The Prohibition of Female Genital Mutilation Act 2011 seeks to root out the culture and practice of female genital mutilation.¹⁸ Despite the enactment of the Act, clandestine practices of female genital mutilation in several communities such as the Abakuria, Abagusii and the Maasai still subsist to date.¹⁹ The Marriage Act 2014 and the Matrimonial Property Act 2014 promote the equality of women and men during and after the dissolution of marriage in line with article 45 of the Constitution and the Maputo Protocol.

The Protection Against Domestic Violence Act 2015 provides a framework of ensuring safety for women who are the major victims of domestic violence while at the same time ensuring that the violators of the victims' human rights are brought to book. Unfortunately, the regulations that are envisioned under the Act to give effect to its provisions have not been adopted thus leaving an enforcement gap. Further, the government is yet to allocate enough resources for the full implementation of

17 The Bill was introduced in the Senate by Nakuru County Senator Susan Kihika but faced a lot of opposition by various actors under the auspices of it allowing immorality, abortion etc.

18 The Prohibition of Female Genital Mutilation Act 32 of 2011.

19 S Kimani et al 'Female genital mutilation/cutting: Emerging factors sustaining medicalization related changes in selected Kenyan communities' (2020) 15(3) *PloS One*.

the Act. The Legal Aid Act of 2016 provides an avenue for women, especially indigent and vulnerable women, to access justice. However, regulations that are required to give effect to the Act are yet to be adopted.

The Land Act 2012 and Land Registration Act are progressive acts that provide for the protection of women's interest in land. However, the Land Laws (Amendment) Act of 2016 watered down the protection of women's rights to land and property. Pursuant to the Land Laws (Amendment) Act of 2016, spousal rights over matrimonial property are no longer considered as overriding as was the case initially under section 28 of the Land Registration Act. Section 93 of the Land Registration Act which provided for the requirement of spousal consent before charging or transfer of land was deleted and replaced with another phrasing that reads as follows:

... if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

However, even if the law has changed, the practice has not changed in terms of the requirement to provide spousal consent in case one intends to charge or transfer land. While these amendments appear subtle, they are a clawback on rights of women to land and property.

The Community Land Act of 2016 and Community Land Regulations of 2017 are progressive as regards women's right to land. Section 30 of the Act provides that women, men, youth, minorities, persons with disabilities and marginalised groups 'have right to equal

treatment in all dealings in community land.' Notably section 30(5) of the Act provides that 'every man or woman married to a member of a community shall gain automatic membership of the community.' These provisions are progressive and instrumental to the protection of rights of women to land and property considering that in Kenya, 70 per cent of land is communal land.

Despite the progress on legislative enactment and reform, there have been futile attempts by the Parliament of Kenya to legislate on the two thirds agenda that seeks to ensure that parliament does not have more than two thirds from one gender.²⁰ Whipping by political parties and a litany of court orders have not served the intended purpose of enacting a law that will help in the implementation of the constitutional decree. In 2021, the Chief Justice Honourable David Kenani Maraga was served with six petitions all seeking him to advise the president to dissolve parliament on grounds that it had failed to enact the law within the stipulated time-frame. Invoking article 261(7) of the Constitution, the Chief Justice transmitted the advice to the president reigniting yet another court battle that moved to the High Court of Kenya for determination.²¹ The whole gender issue was reduced to a battle of wits as to what the word 'shall' means as used in article 261(7) of the Constitution of Kenya. At

20 The Chief Justice's advice on the dissolution of parliament dated 21 September 2020 notes the failed attempts made by the Parliament of Kenya to legislate on the two thirds act. Despite whipping from within and without parliament by the political party leaders this has not come to pass.

21 Business Daily, Judge freezes Maraga's Parliament dissolution advisory 25 September 2020 <https://www.businessdailyafrica.com/bd/economy/judge-freezes-maraga-s-parliament-dissolution-advisory-2371660> (accessed 3 March 2021). The cases are still pending before the High Court of Kenya as at 3 March 2021.

the time of writing, the matter was still pending in the High Court of Kenya.

Following the divisive 2017 election in Kenya and the handshake that brought about a truce between the two main contenders in the race, President Uhuru Kenyatta and former Prime Minister Raila Amolo Odinga, that birthed the Building Bridges Initiative (BBI), there have been a number of recommendations made by the BBI Committee.²² Some of the recommendations require policy formulations, legislative interventions and even a referendum to amend the Constitution. Some of the proposed policies will have far reaching effects on the realisation of the rights of the Maputo Protocol and indeed several constitutional requirements. The requirement to enact a National Policy Guide on Citizen Education will equip the citizens, including women, with skills, expansion of knowledge and in the end improve the quality of life of Kenyans.

5 Policy reform or formulation

In the ordinary Kenyan legislative journey, policy formulation is a critical stage. Various government departments and agencies formulate policy statements that inform a legislation of a substantive Act with the exception of self-executing policies. There are various policies that cover rights enshrined in the Maputo Protocol. The following policies and their impact on the realisation, protection, promotion and safeguarding of women rights are worth mentioning.

The Kilimanjaro Campaign that was launched in the year 2015 with a focus on mainstreaming Global and Regional Movement on Women Land Rights has led to the adoption of the Rural Women's Land Rights Charter by the Ministry of Lands of the Republic of Kenya. The Charter that was adopted in the year 2016 espoused the concerns, issues and aspirations of women living in rural Kenya with regards to land. Land-based livelihoods are at the centre in rural Kenya and therefore a denial of this essential commodity is tantamount to subjecting the women to starvation. The Charter identified ten reform areas that formed key recommendations necessary for securing the land rights for women living in rural areas. The recommendations are: involvement of women in land governance from the local level, enacting of policy on women and rights, engendering of land administration and governance, strengthening women's access to ownership of land, regulation of acquisitions of land that affects women, access to formal and informal justice to women concerning their land rights, social inclusion for women with disability and those suffering from such endemic diseases as HIV/AIDS to land, protection of land rights activists for women who are subject of ridicule, and accountability in the delivery of the demands as captured in the charter. The mainstreaming and realisations of these aspirations will ensure that women have access to land through individual and joint titling and thus accord them an invaluable source of livelihood.

Kenya adopted the National Policy on Gender and Development in 2019.²³ The policy was spearheaded by the Ministry of Public Service, Youth and Gender and the National Gender and

22 Available at www.bbi.go.ke; Final 19 October 2020 Designed Steering Committee Report Formatted Edition (filesusr.com) (accessed 3 March 2021).

23 Sessional Paper 2 of 2019.

Equality Commission. The policy seeks to create a just, fair and transformed society free from gender-based discrimination in all spheres of life. The policy seeks to ensure that women are involved in key aspects of labour and employment, education, health, land, housing, agriculture, environment and natural resources, peace and security, governance, information and communications technology (ICT) and respect for human rights. The policy has tasked both the national and county governments and other state agencies, organs and independent commissions and offices with ensuring its implementation, integration and realisation of the policy.

Kenya launched the Kenya National Action Plan on International Women's Day 2016. The Action Plan was launched on 8 March 2016. It was primarily created to provide a framework for the steady implementation and realisation of the United Nations Security Council Resolution 1325 (UNSCR 1325). The Action Plan encompasses the pillars of participation and promotion, prevention, protection and relief and recovery. The Action Plan will ensure that women do not suffer the greatest violations during conflicts and victims of events such as the post-election violence in Kenya are accorded the necessary physical and psychological medical support. It also aims to save the women from the scourge of lack of financial independence that leaves them vulnerable to atrocities such as domestic violence.

Lack of awareness and access to the judiciary is also a key hindrance towards achieving justice for all. In this regard, the Alternative Justice Systems Baseline Policy and Policy Framework were adopted in August 2020. This policy is a momentous step towards the

transformation of the judiciary that the Constitution of Kenya 2010 set out to achieve. The policy seeks to ensure expeditious justice for all Kenyans, including women.

The Ministry of Energy in Kenya also adopted a Gender Policy. The Policy that was launched in November 2019 seeks to, among others, raise awareness on gender, change attitudes and inculcate a gendered work culture in this very important sector. The energy sector is a key element in the development agenda of any country. This policy is therefore timely in ensuring that equal opportunities are available to all practitioners and Kenyans. The policy will go a long way in providing a framework for all state and non-state agencies to mainstream gender in all the projects that they undertake under the energy sector. The policy follows in the footsteps of its role models and partners such as the African Union, the New Partnership for Africa's Development (NEPAD) and the Economic Community of West African States (ECOWAS) Centre for Renewable Energy and Energy Efficiency that have gender policies as part of their working structures.

In addition, the National Policy for the Prevention and Control of HIV/AIDS and Sexually Transmitted Infections (STIs) which was adopted under the HIV Prevention and Control Act of 2006 in 2016, focuses on the prevention of HIV Infections among key populations in Kenya.²⁴ These policies are human rights based and acknowledge and seek to enforce key provisions of various international instruments on prevention of infections of the above diseases.

24 The Policy was launched in March 2016 by the Ministry of Health.

The Ministry of Lands formulated the National Land Policy in 2009 with the aim of guiding the country towards efficient, sustainable and equitable use of land for prosperity and posterity.²⁵ Arising from the policy, several acts concerning land such as the Land Act, the Land Registration Act and the enabling regulations have been enacted. The Land Registration Act for instance recognises the important role that land plays for critical economic, social and cultural development. The act entails overriding interests towards any transaction on land and, among others, requires several consents such as spousal consent to sell, transfer and charge land. These legal requirements that derive their lifeline from the National Land Policy of 2009 have gone a long way in ensuring equality, equity and according women a lifeline to unleash their economic and social potential.

In realisation of the toll and the seriousness of sexual violence in Kenya and committed to implementing the right to the dignity of women, Kenya drafted the National Guidelines on Management of Sexual Violence in Kenya,²⁶ to give general guidance on management of sexual violence in Kenya. These Guidelines have a keen focus on medical, psychological and legal needs of the survivors of sexual violence. Sexual violence robs the victims, mostly women and children, of their dignity and therefore the guidelines offer grounds for ensuring comprehensive care for the victims.

The state has also enacted the National Housing Policy,²⁷ which is a right step in implementing the Constitu-

tional requirement in article 43 on accessible and adequate housing and to reasonable standards of sanitation. The Policy that is updated from edition to edition seeks to enable low income households to access housing, basic services and infrastructure necessary for healthy living in urban and pre-urban areas. The policy also seeks to provide a framework for slum upgrading. Suffice to note that a vast majority of single mothers have low income status, dwell in the slum areas like Kibera within the Nairobi City County and cannot afford decent housing. The policy comes in handy and helps in the realisation of one of the Big Four Agenda of the President of Kenya. Despite the policy and other progressive measures to enhance the right to housing and property rights, women and other members of their families still face forced evictions. In the recent past, and during the global coronavirus pandemic, women and children were evicted in the Kariobangi and Ruai areas of Nairobi City County despite court orders in the form of injunctions against the intended evictions.

Article 43 of the Constitution of Kenya provides for several socio-economic rights. Among the rights are the rights to highest attainable standards of health, food, social security, clean and safe water, accessible and affordable housing. In this regard, President Kenyatta developed the Big Four Agenda that is geared towards creating jobs that will ultimately improve the people's standards of living and enable them to meet their basic needs. The key themes of the agenda are enhancing manufacturing, food security and nutrition, universal health coverage and affordable housing. However, the prospect of realising the Big Four Agenda is hindered by many challenges such as corruption, delays and the COVID-19 pandemic.

25 Sessional Paper 3 of 2009 on National Land Policy.

26 3rd Edition published in 2014.

27 Sessional Paper 3 of 2016.

6 Court judgments

Courts in Kenya continue to build up judicial philosophy that borrows more from the provisions of the Maputo Protocol when deliberating on legal issues surrounding the rights of women in Kenya. Various judicial officers have, therefore, invoked and relied on the provisions of the Maputo Protocol while deliberating over issues such as political representation, equality, discrimination of women, abortion, maternal health care and human dignity as demonstrated in this part.

In March 2017, following a petition presented by the *Center for Rights Education and Awareness and 2 others v Speaker the National Assembly & 6 others*, the High Court issued a declaration that the National Assembly and the Senate had failed in their constitutional obligation to bring into force the constitutional principle that not more than two thirds of the members of the two houses, the National Assembly and the Senate, should be of the same gender.²⁸ The court arrived at this decision having been persuaded by the Kenya Human Rights Commission which invoked Kenya's international obligations to uphold equality in political representation entrenched in article 9(1)(a) of Maputo Protocol.

Regarding discrimination, the provisions of the African Charter played an important role in a petition that was brought before the High Court of Kenya in 2016 challenging the constitutionality of the criminalisation of homosexual conduct. However, the petitioners were unsuccessful in arguing that the criminalising sections (162 and 165) of the

Penal Code contravened assorted rights entrenched under the African Charter including the rights to elimination of discrimination on the grounds of sexual orientation.²⁹

In May 2018, the Federation of Women Lawyers, while relying on article 7 of the Maputo Protocol, moved the High Court to challenge the constitutionality of section 7 of the Matrimonial Property Act (MPA) in Kenya. On the one hand, section 7 of the Act provided for the division of matrimonial property solely on the grounds of contribution, but also based on the principles of gender equality. On the other hand, article 7 of the Maputo Protocol contemplates that both men and women shall enjoy the equitable sharing in property owned jointly as a result of the marriage. As such, the court was tasked with establishing whether section 7 of the MPA was unconstitutional. The Constitutional Court in its deliberation proceeded to dismiss the petition on a finding that section 7 of the MPA was constitutional.³⁰

With regard to maternal health care, the High Court of Kenya, early in 2018, also awarded damages of Kshs. 2,500,000 (about USD 22,500) to the petitioner in *J O O v Attorney General & 6 others* based on the declaration that the petitioner's right to dignity was violated. The court relied on different provisions³¹ of the Maputo Protocol to establish that the verbal abuse meted against the petitioner when they sought mater-

28 *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* (2017) eKLR

29 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* para 65 & 400.

30 *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* (2018) eKLR para 59.

31 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art 2(1), 3(4), 4(1), 4(2)(b), 5, 14(1).

nal health care from the fifth respondent (Bungoma County Referral Hospital) in that case contravened the right of respect of dignity that is inherent to all human beings.³² Further, in *Federation of Women lawyers & 3 others v Attorney General & 2 others*, the High Court upheld the provisions of the Maputo Protocol regarding the right of women of reproductive age to safe abortion in the event the pregnancy threatens the life and health of the mother or the foetus. The decision was also accompanied by the orders for compensation of the family of a victim who lost her life because of unsafe abortion.³³

The High Court in *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (2017) affirmed the equality between men and women relying on article 27 of the Constitution and article 8 of Maputo Protocol which provides that 'women and men are equal before the law... and that states should take appropriate measures to ensure effective access by women to judicial and legal services including legal aid.'³⁴ The Petitioners in this case argued that based on the two-thirds gender principle under article 27(8) of the Constitution 'there should have been another female judge recommended for appointment to the Supreme Court instead of Hon. Justice Lenola.'³⁵ The nomination of Justice Lenola to the Supreme Court meant that of the seven judges constituting the Court,

five would be men and two would be women.

However, the High Court held that considering other provisions of the Constitution, the Judicial Service Commission Act 2011 and the Supreme Court's jurisprudence, the Judicial Service Commission was not in breach of the Constitution following the recommendation of Honorable Justice Lenola as a judge of the apex court.³⁶ The High Court stated:³⁷

It would have been ideal to recommend a woman for appointment, but that is not to say an ideal situation is the same as a clear breach of the Constitution or the law on the two-thirds gender. Even if one applied a mathematical formula to the question at hand, the result would invariably have been the same, that two-thirds is 5 while one-third is 2. The number of judges being uneven, the figure can only be approximate and not exact. The 1st respondent cannot be blamed for that.

Further, in the case of the *Coalition on Violence Against Women & 11 others v Attorney General & 5 others*,³⁸ which related to violence against women during the 2007-2008 post-election violence in Kenya, the High Court in December 2020 held that sexual violence was an infringement on the right to life under article 4 of the Maputo Protocol. The court relied on *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty* 1996 AIR 922 where the Supreme Court of India held that rape violated the right to life. The High Court held that the petitioners' rights to life, prohibition of torture,

32 *J O O (also known as J M) v Attorney General & 6 others* (2018) eKLR.

33 *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others* (n 31); *East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* (2019) eKLR.

34 *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (2017) eKLR para 31.

35 *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (n 35) para 22.

36 *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* (2017) eKLR para 41.

37 As above.

38 *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* (2020) eKLR; Petition No 122 of 2013.

protection of law were violated 'during the 2007-2008 post-election violence, as a result of the failure of the Government of Kenya to protect those rights and awarded damages for the violations.'

Whether or not litigating parties have been keen to invoke the provisions of the Maputo Protocol during litigation, the courts in Kenya have been keen to uphold the provisions of the Maputo Protocol. However, in many other instances that warrant the same, some of the courts have failed to invoke the Maputo Protocol while deliberating on issues it covers comprehensively as they considered the provisions of the Constitution to be sufficient.

7 Awareness and use by civil society

Various non-governmental organisations (NGOs) in Kenya have been active in advocating awareness and actively participating in the promotion of rights protected under the Maputo Protocol. The Centre for Rights Education and Awareness (CREAW), CRADLE the Children Foundation, and the Independent Medical Legal Unit (IMLU) fall among eight other NGOs in Kenya that currently have observer status with the African Commission on Human and Peoples' Rights (African Commission).³⁹ First, they participated in the last state reporting procedure by the government of Kenya where they submitted shadow reports on Kenya's compliance with the African Charter and the Maputo Protocol. In addition, the NGOs educate and create awareness among citizens, inspire community-led activism and mobilise with affiliated

networks to advance the protection of women rights as contemplated under the Maputo Protocol.

Owing to the concluding observations issued by the African Commission on Kenya's state report, the NGOs have been keen to hold Kenya accountable to implement the recommendations to ameliorate the rights of women in Kenya. For instance, CREAW in 2017 was active in holding the government of Kenya accountable for implementing the constitutional principle in Kenya that guarantees political representation of women in both elective and appointive positions in the country.⁴⁰ The same role has also been played by other NGOs that do not enjoy observer status with the African Commission such as the Federation of Women Lawyers in Kenya (FIDA-Kenya) Women's Link World Wide and Article 19 East Africa.⁴¹

Apart from holding the government accountable, civil society has also been actively involved in protecting and promoting awareness of the rights of women throughout the country through publications, programs and initiatives targeted at improving the state of women rights in Kenya. For instance, the Women's Empowerment Link in Kenya has been actively involved in promoting the education of girls in Kenya while fighting violence against women through advocacy for the development of policies and legislation. In addition they push for the enforcement of existing legislation through court

39 African Commission 'NGOs Granted Observer Status' <https://www.achpr.org/states/detail?id=25> (accessed 12 November 2020).

40 *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (29).

41 *Federation of Women Lawyers (Fida - Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* (2019) eKLR

processes.⁴² The NGO, under the same mission also dedicates 16 days of activism every year to undertake activism campaigns throughout the country.⁴³

The Kenya Land Alliance which advocates for women's land and property rights relies on the Maputo Protocol either directly or indirectly in its programming and advocacy work. The Kenya Human Rights Commission (KHRC) also relies on the Maputo Protocol directly or indirectly in community trainings, capacity-building workshops, monitoring and documenting human rights violations, and creation of platforms to increase protection of women's rights violations.

While there is a level of awareness about Maputo Protocol among civil society organisations in Kenya, there is still room for improvement. Civil society organisations at the grassroots level often focus on domestic law and may not have a high level of awareness about the Maputo Protocol compared to those who work at the regional level.

8 Awareness and use by lawyers

Public Interest litigation is a fertile area of practice in Kenya. This development can largely be attributed to the impetus created by the promulgation of Constitution of Kenya 2010 which is an anchor for public interest litigation.⁴⁴ The practitioners in this area rely on the provisions of the Maputo Protocol to advance their arguments and make their cases, albeit, to a limited extent. In *Centre for Rights and Education Awareness*

& 2 Others v Speaker of the National Assembly & 6 Others 2017,⁴⁵ the advocates argued that the Parliament of Kenya had failed to enact law to implement the requirement that not more than two thirds of elected and appointed members should be of one gender. The petitioners argued that the Constitution espouses the equality in law of women and men, who are entitled to enjoy equal opportunities in the political, social, and economic spheres. The state is required to enact and adopt affirmative action programs and policies to redress any disadvantages suffered by individuals or groups because of past discrimination.

In *Re Estate of CCBH (Deceased)* 2017⁴⁶ the applicants cited the provisions of article 2 of the Maputo Protocol. The applicants averred that Kenya is bound by, among others, the Maputo Protocol and the CEDAW to respect, protect, and enforce the rights of children to inherit from their parents without discrimination of any kind without regard to their gender. In *JOO (also known as JM) v Attorney General & 6 Others*,⁴⁷ the petitioner argued that she was a woman from a low-income background and thus could not afford maternal care at a private hospital in Bungoma County. In their submissions, the petitioners and *amicus curiae* submitted, relying on the Maputo Protocol and CEDAW, that the state is morally obligated and legally mandated to take appropriate measures to eliminate discrimination against women in the field of healthcare to ensure on a basis of equality of men and women, access

42 Women's Empowerment Link 'Elimination of Violence against Women and Girls' <https://wel.or.ke/elimination-of-violence-against-women-and-girls/#1542034290604-3739a91f-0d4b> (accessed 16 March 2021).

43 As above.

44 Art 22 of the Constitution of Kenya (n 2).

45 *Centre for Rights and Education Awareness & 2 Others v Speaker of the National Assembly & 6 Others* (n 29).

46 *Re Estate of CCBH (Deceased)* (2017) eKLR.

47 *JOO (also known as JM) v Attorney General & 6 others* (n 33).

to health care services including those related to family planning.

In the earlier cases like the *Satrose Ayuma v the Registered Trustee of Kenya Railways Staff Retirement Scheme*,⁴⁸ the petitioners' advocates relied on the Maputo Protocol to make their case against the state's decision to evict squatters living in land belonging to the former Kenya Railways without proper guidelines and the provision of alternative areas of settlement.

While there is progress, the use of the Maputo Protocol provisions by lawyers is not a complete success. Due to biases of practice and lack of awareness on how to best apply the provisions of the Maputo Protocol, many lawyers still do not rely on the Maputo Protocol in the practice of law. Awareness needs to be created to better protect, fulfil and promote the realisation of the rights in the Maputo Protocol.

9 Incorporation in law school education

Kenya, through the Council of Legal Education (CLE), has accredited twelve law schools⁴⁹ that offer Bachelor of Laws Degree, with the University of Nairobi and Strathmore Law School being accredited to offer Master of Laws. The former also offers Doctor of Philosophy Degrees in Law. Human

Rights as a course is taught in all these universities at different stages. Courses on gender are also taught in all the universities. At the University of Nairobi, the course Human Rights Law is taught as a compulsory subject in third year. Additionally, in fourth year, human rights is one of the five thematic areas of specialisation. Students who opt for this specialisation are exposed to in-depth study, research and information that prepares them for postgraduate specialisation. At the postgraduate level, the Centre for Human Rights and Peace Studies established at the university since September 2012 offers, among others, a multi-disciplinary course in human rights. There are also aspects of human rights taught in a number of other core units such as Constitutional Law that focuses on the progressive Bill of Rights, the different chapters of the Constitution and International Humanitarian Law, amongst others.

At the same university, the curriculum includes Equality Law. This unit is offered as a compulsory subject for students in fourth year. It exposes the students to the aspects of equality and equity between men and women. One of the core instructors of this course unit is Dean Emeritus Professor Kameri-Mbote, an advocate of women empowerment. The course is also taught by Mr Lawrence Mute, a Commissioner of the African Commission. Additionally, Gender and the Law is also offered in fourth year as an elective. Reliance on the provisions of the Maputo Protocol is core to the teaching of the two courses. Gender and the Law as a unit focuses on the impact of gender on the dominant constructions of citizenship, nationhood, nationality and belonging. The unit also puts into perspective to what extent men and women are able to effectively exercise their citizenship

48 *Satrose Ayuma and 11 Others v the Registered Trustee of Kenya Railways Staff Retirement Scheme and 2 Others*, Constitutional Petition No 65 of 2010.

49 These include the University of Nairobi with three campuses in Nairobi, Mombasa and Kisumu; Kenyatta University, Moi University, Strathmore University, Riara University, Kisii University, Jomo Kenyatta University of Science and Technology, Mount Kenya University, Catholic University of East Africa, African Nazarene University, Egerton University and Kabarak University.

rights, the barriers that exist to the effective exercise of these rights and the measures that can be adopted as responses. Additionally, Equality Law focuses mainly on the theoretical dimensions of the twin doctrines of equality and non-discrimination, analysing the equality jurisprudence of the Kenyan Courts historically and comparatively and equipping the students to think critically about the possibilities and limits of using law to address various manifestations of inequality and discrimination.

Human rights law exposes the students to the philosophical and historical aspects of human rights, the United Nations and African human rights systems. Inter-American and European systems are expanded on in later years of undergraduate and postgraduate studies. The students are also exposed to the agencies and various structures available for the protection, promotion, safeguarding of human rights including those provided for in the Maputo Protocol at the national, regional, and global fora.

In Jomo Kenyatta University of Science and Technology law school, the course International Human Rights Law is taught *in tandem* with International Humanitarian Law. At Moi University's School of Law, the course International Human Rights Law is taught under the Gender Studies module in the third year. In both universities as is the case with the University of Nairobi, human rights is also taught as part of the Constitutional Law, Public International Law although not to a considerable depth as compared to when it is taught as a subject of its own in upper years of study in both the undergraduate and postgraduate studies. The Strathmore Law School offers the courses International Human Rights Law, International

Humanitarian Law and Gender. The units equip the students with the philosophical and historical aspects of human rights and analyse the jurisprudence arising from within and without Kenya.

10 Academic writing on the Maputo Protocol

Unlike the period before 2016 when there was little reference to the Maputo Protocol by Kenyan academics,⁵⁰ in the post-2016 period, various academics have demonstrated their appreciation of the role of the Maputo Protocol in Kenya based on studies published in different authoritative periodicals. Hence, there has been more reference to the Maputo Protocol in academic writings discussing human rights issues.

In a study advocating for the transformation of laws governing access to safe abortion in Kenya, Jaldesa and five other authors appraise the role that the ratification of the Maputo Protocol could potentially play in transforming the access to safe abortion practices.⁵¹ They observe that the Maputo Protocol played an essential role in creating awareness among the Kenyan public regarding the protection of reproductive rights and the authorisation of safe abortion if continued pregnancy is fatal.⁵² As such, they perceive that the coming into force of the Maputo Protocol influenced the endorsement of the Constitution by the people of Kenya during the 2010 referendum, leading to inauguration of the Constitution that entrenched these principles.

50 See Griffith & Ogendi (n 4) 125.

51 G Jaldesa and others 'Advocacy towards changes on laws governing access to safe abortion in Kenya' (2014) 4(9) *Gynecology & Obstetrics* 2.

52 As above.

In 2018, Kameri-Mbote published her research making observations on the role of constitutions in creating the pathways to gender equality.⁵³ She raises concerns that despite the formal recognition of gender equality and non-discrimination in Kenya through formal laws such as the Constitution and the Maputo Protocol, gender equality is yet to be fully realised in Kenya. She attributes this problem to the inconsistency between formal and informal norms, considering the impact of informal norms especially in pluralistic legal contexts such as Kenya.⁵⁴ This is attributed to the realities of the fabric of Kenya's society where customary laws are still deeply embedded in the day to day lives of individuals. As such, she advocates for civil education and the constructive engagement of formal and the informal tenets of customary law to ensure the society is removed from tenets that go against acceptable norms of equality as contemplated by the formal laws. Kameri-Mbote, while writing on the fallacies associated with equality and inequality in legal discourses, conducts an exegesis of human rights regimes in Kenya as well as in Africa regarding the extent to which they protect equality. However, she notes that even though international laws such as the Maputo Protocol contemplate that all men and women are born equal, the nature and influence of power relations make inequalities inevitable among human beings.⁵⁵ Hence, she observes that it is the role of the judiciary to actualise the realisation of the robust exposition of rights that the

Kenyan legal regime depicts. Otherwise, it is not enough to have a progressive constitution if the rights enshrined in it are not enforced for the benefit of the holders of these rights, for instance, women, when it comes to the right to equality.

Biegon appraises the state of gender equality in political processes in Kenya by contrasting the legal dispensation establishing gender equality in Kenya while contrasting the same with the actual state of affairs. He observes that even though Kenya undertook to make positive steps towards promoting the participation of women in political processes, the country is yet to enact such laws that would guarantee the realisation of this undertaking.⁵⁶ He notes that the failure by the Parliament of Kenya to implement the constitutional two-third gender rule accounts for the finding that Kenya is yet to seal the gender gap when it comes to political representation in Kenya.

Kinyanjui and Kameri-Mbote in a 2018 study also investigated the efficacy of Kenya's constitutional promise of gender equality and non-discrimination.⁵⁷ From their findings, they concluded that even though the Constitution and the Maputo Protocol guarantee equal treatment of individuals regardless of their gender, the same guarantee does not apply to the enjoyment of opportunities.⁵⁸ As such, they argue that gender equality can only be realised when the formal recognition of equal treatment is supported by other

53 P Kameri-Mbote 'Constitutions as pathways to gender equality in plural legal contexts' (2018) 5 *Oslo Law Journal*.

54 Kameri-Mbote (n 54) 40.

55 P Kameri-Mbote 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' (2013) *Inaugural Lecture University of Nairobi* 4.

56 J Biegon *Gender equality and political processes in Kenya* 2 and 53.

57 SM Kinyanjui & P Kameri-Mbote 'The constitutional promise: Realising the right to gender equality and non-discrimination in Kenya' (2018) 19 *East African Law Journal*.

58 As above.

considerations that entail positive measures to guarantee substantive equality.

Muigua appreciates the critical role of the Maputo Protocol in his academic works that contemplate the essential role of gender equity in the achievement of inclusive development in Kenya.⁵⁹ In this regard, he argues that as long as Kenya's legal and institutional framework facilitates the participation of women in planning and management, the Maputo Protocol can guarantee gender equity as well as inclusive development.⁶⁰

From a research conducted on pharmaceutical trade policies as they relate to access to medicine in Kenya, Ogendi makes the following findings.⁶¹ First, that even though the African Charter cements the right to health with the support of various regional and national laws in Kenya, he anticipates that the right to health as conferred by these instruments can only be safeguarded by integrating trade policies with human rights impact assessment as a routine.⁶² This, according to Ogendi, would ensure that pharmaceutical trade practices do not undermine the right of women and other Kenyans to health care by limiting access to medicines.

In a study published by the Economic and Social Rights Review, Wekesa attempts to establish the role that Maputo protocol plays in the realisation of the right to clean and safe

water in Kenya.⁶³ He observes that the African Charter and Maputo Protocol do not guarantee the right to clean and safe water.⁶⁴ Rather, the Maputo Protocol alludes to clean and safe water as conditions that are critical to women's right to health. As such, it is apparent that more reference has been made to the Maputo Protocol in research work pursued by different academics since 2016 as a slight, but significant, improvement from the preceding period between 2012 and 2016.

11 National human rights institutions

Article 59 of the Constitution of Kenya 2010 creates the office of the Kenya National Commission on Human Rights (KNCHR). The KNCHR is obligated to promote a culture of human rights in Kenya. It is tasked with a duality of roles both as an overseer and advisor on the promotion and protection of human rights. In its performance of the roles, it investigates violations and alleged violations of human rights and secures justice for the victims of those violations.

KNCHR is guided by the Paris Principles⁶⁵ developed and approved by the United Nations that guide the establishment and functioning of independent national human rights institutions. Towards this end and clothed under the Paris Principles, KNCHR is the principal state organ charged with ensuring compliance with global and regional human rights treaties and conventions ratified by the Republic of Kenya. The

59 K Muigua 'Attaining Gender Equity for Inclusive Development in Kenya' (2015) <http://kmco.co.ke/wp-content/uploads/2018/08/Attaining-Gender-Equity-for-Inclusive-Development-in-Kenya-20th-May-2015.pdf> (accessed 12 November 2020).

60 As above.

61 PO Ogendi 'Pharmaceutical trade policies and access to medicines in Kenya' (2019) 19 *African Human Rights Law Journal* 698.

62 As above.

63 M Wekesa 'Right to clean and safe water under the Kenyan Constitution 2010' (2013) 14(1) *ESR Review*.

64 As above.

65 Adopted by the United Nations General Assembly as Resolution 48/134 on 20 December 1993.

KNCHR is established at the end of the Bill of Rights of the Constitution and therefore constitutionally mandated and morally obligated to see to it that the human rights therein provided for and which to a large extent are captured in the Maputo Protocol are safeguarded, protected, promoted and achieved.

The KNCHR has endeavoured to increase and create awareness of human rights while striving to hold the government accountable in its obligation to promote and protect human rights in Kenya. It often gives its status update to the President and Parliament of the Republic of Kenya.⁶⁶ In the status report, the KNCHR has often advocated for the adoption of various protocols to the African Charter to expand the regime for the realisation of the Maputo Protocol. In its 2017/2018 Financial Year Report, the KNCHR urged the government of the Republic of Kenya to lift its reservation on article 14(2)(c) of the Maputo Protocol on termination of pregnancies.⁶⁷

KNCHR has been at the forefront of the fight to ensure that affirmative action enshrined in various Acts and the Constitution is achieved. In the financial year 2016/2017, the Evaluation Report on Public Service Compliance with Values and Principles in articles 10 and 232 of the Constitution enforced the Access to Government Procurement Opportunities (AGPO) and indicated that the benefits accruing from the AGPO scheme had not hit their maximum. The KNCHR therefore has been championing for the full implementa-

tion of the AGPO affirmative action so as to avail enough resources to women, youth and people with disabilities.

Of great interest towards the realisation of the rights in the Maputo Protocol is the establishment of the National Gender and Equality Commission (NGEC). The NGEC was established pursuant to article 59 of the Constitution of Kenya and the National Gender and Equality Commission Act.⁶⁸ NGEC derives its mandates from articles 27, 43 and 59 of the Constitution of Kenya as well as Chapter 15 of the Constitution. The National Gender and Equality Commission Act of 2011 under section 8(c) provides that the NGEC is principally mandated to ensure the following:

... compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities and children.

The establishment of the NGEC post the 2010 Constitution is a critical and fundamental step in ensuring proper articulation of the women agenda and realisation of the provisions and aspirations of the Maputo Protocol.

12 State reporting

Since its combined 8th to 11th Periodic Report submitted in November 2015, Kenya is yet to submit another periodic report before the African Commission at the time of writing. In the 2014 report, the African Commission commended Kenya for the ratification of the Maputo Protocol in a decision that the government formalised ten years ago in Octo-

66 See art 254(1) of the Constitution and sec 53 of the Kenya National Commission on Human Rights Act 2011 (Revised 2012).

67 Kenya National Commission on Human Rights Annual Report and Financial Statements 2017/2018, 29 knchr.org (accessed 3 March 2021).

68 National Gender and Equality Commission Act 2011.

ber 2010.⁶⁹ Regarding the rights of women, the African Commission commended steps taken by the government of Kenya to introduce free maternal health care in public hospitals in an initiative that also saw the increase in the number of hospitals in the country from 167 to 275 as of the year 2012.⁷⁰

The African Commission also found it commendable that the government of Kenya has been taking positive steps to alleviate women in Kenya from harmful and retrogressive practices such as female genital mutilation and gender-based violence through the establishment of the National Gender-Based Violence Campaign and the Anti Genital Mutilation Board respectively.⁷¹ The African Commission also took note of such steps taken towards women empowerment such as the introduction of the UWEZO Fund Initiative and the commencement of the drafting of the Guidelines to Safe Abortion.

Despite the improvement in the participation of women in political representation, the African Commission was still concerned with the poor level of inclusion of women in decision-making.⁷² As such, it maintained that there was room for improvement as regards gender equality in Kenya. The African Commission also registered its concerns regarding persistent retrogressive cultural practices such as female genital mutilation and early marriage.

In the 2015 report, the African Commission reported that Kenya had been decent in discharging its reporting obligation. However, its performance regarding cooperation with the African Commission has been called to question following the observations that Kenya, in its last report, did not provide comprehensive responses to questions invoked by the body. The African Commission, therefore, reported that poor cooperation fetters the accurate assessment of Kenya's level of compliance with its obligations under the African Charter. Further, it also took note of the fact that Kenya was yet to implement State Reporting Guidelines under the Maputo Protocol in its reporting, hence making it difficult to appraise the level of compliance.

Following those observations, the African Commission recommended that Kenya implements the constitutional principle that not more than two thirds majority of members in elective or appointive bodies as contemplated under the Constitution.⁷³ Further, it recommended that the government takes positive steps to end retrogressive traditional practices that cause harm against women such as female genital mutilation and early marriages. The African Commission also contemplated that as the government of Kenya finalises the Guidelines on Safe Abortion, it ought to expedite the legislative process on safe abortion. For efficacy in the assessment of its compliance with its obligations, the African Commission recommended that Kenya complies with

69 African Commission on Human & Peoples' Rights 'Concluding Observations and Recommendations on the 8th to 11th Report of the Republic of Kenya' 2015 https://www.achpr.org/public/Document/file/English/kenya_concluding_observations_8th_to_11th_periodic_report_.pdf (accessed 12 November 2020).

70 As above.

71 As above.

72 As above.

73 Article 27(6) of the Constitution of Kenya (n 2).

State Reporting Guidelines established under the Maputo Protocol.⁷⁴

Since these recommendations were suggested to Kenya in 2016, the state is yet to implement the constitutional principle on the two-thirds gender rule. It is on this basis that the Chief Justice invoked article 261 of the Constitution by issuing an advisory to the President to dissolve Parliament in anticipation that the president shall do the same.⁷⁵

Kenya is also yet to finalise the Guidelines on Safe Abortion as the completion of the same is dependent on the success of the Reproductive Health Care Bill⁷⁶ that at the time of reporting is yet to be subjected to the first reading in the Senate. The government has taken positive steps towards protecting women from retrogressive practices that cause harm to women and young children by criminalising such harmful acts and violence against women through constitutional protection⁷⁷ as well as through the enactment of the Prohibition of Female Genital Mutilation Act,⁷⁸ the Children Act,⁷⁹ and the Protection Against Domestic Violence Act.⁸⁰

As at 2021 Kenya was among 18 African states that are late by three or more reports with Kenya being late by

three reports.⁸¹ In March 2021, the country submitted its 12th to 13th combined report which is expected to be reviewed by the African Commission during its 69th Ordinary Session from 15 November to 6 December 2021.⁸²

Notably, towards the end of 2019, the NGEIC together with stakeholders such as Ministry of Foreign Affairs, the Attorney General's Office and civil society organisations developed a draft scorecard for the implementation of Maputo Protocol. The scorecard is intended to enhance comprehensive reporting on Kenya's progress on the implementation of Maputo Protocol.

13 Factors that may impede or enhance the impact of the Maputo Protocol

In Kenya, there are several factors that either enhance or impede the impact of Maputo Protocol and the African Charter. Factors that enhance the realisation of the rights outlined in the Maputo Protocol and the impact of the African Commission include:

- (a) the Constitution which has provided the requisite environment for the promotion and protection of the rights contained in Maputo Protocol;
- (b) the national human rights institutions such as the KNCHR and NGEIC which are actively involved in promotion and protection of human rights;
- (c) the judiciary which more often than not has been keen to enforce human

74 *Concluding Observations* (n 69).

75 *Margaret Toili & 6 others v Speaker of the National Assembly & 20 others* para 18 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/09/Copy-of-CJs-Advice-to-President.pdf> (accessed 12 November 2020).

76 The Reproductive Healthcare Bill, 2019. Retrieved <http://www.parliament.go.ke/sites/default/files/2020-02/Reproductive%20Healthcare%20Bill%2C%202019.pdf> (accessed 12 November 2020).

77 Article 29(c), 43(3) & 53(d) of the Constitution.

78 Prohibition of Female Genital Mutilation Act 2011 sec 19.

79 Children Act 2001 sec 119(1)(h).

80 Protection Against Domestic Violence Act 2015 sec 3(a)(ii) & 19(1)(g).

81 African Commission 'State Reports and Concluding Observation' <https://www.achpr.org/statereportsandconcludingobservations> (accessed 12 November 2020).

82 Website of the African Commission available at <https://www.achpr.org/states/statereport?id=135> (accessed 7 October 2021).

rights as provided for under the Constitution and the Maputo Protocol;

- (d) civil society organisations which are equally engaged in the advocacy and protection of human rights; and
- (e) institutions of higher learning and scholars who are keen to teach and research on rights outlined under the Maputo Protocol.

However, several factors exist to impede the realisation of rights provided for under the Maputo Protocol and the impact of the African Commission. These factors include:

- (a) The reservations made by Kenya at the time of ratification of Maputo Protocol;
- (b) Continued manifestation and practice of certain cultural practices such as female genital mutilation;
- (c) Failure to link the rights outlined in Maputo Protocol to women's struggles especially in situations where vulnerable women do not know the procedures of claiming their rights;
- (d) Failure of the state to pass legislation and policies as well as delays in allocation of resources to ensure the realisation of rights provided under Maputo Protocol; and
- (e) Lack of gender disaggregated data which makes it a challenge to promote and protect women rights in certain instances.