

THE IMPACT OF THE MAPUTO PROTOCOL IN TANZANIA



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1 Introduction

The Bill of Rights (BOR) was incorporated in the Constitution of the United Republic of Tanzania (the Constitution) of 1977¹ in 1984, following the Fifth Amendment² of the Constitution.³ The incorporation of the BOR in the Constitution was driven by various factors such as pressure from the people who were airing their views in favour of having the BOR incorporated in the Constitution through the media,⁴ as well as pressure from Zanzibar, the other part of United Republic which had a BOR in its Constitution.⁵ In addition, there was pressure from developments that were taking place on the African continent significantly the adoption by

the Organisation of African Unity (OAU) of the African Charter on Human and Peoples' Rights (African Charter).⁶ Tanzania had taken a very active part in its formulation and ratified the African Charter on 31 May 1982.⁷

The BOR predominantly contains civil and political rights. Only three socio-economic rights, which are the right to work, the right to just remuneration and the right to property, are contained in the BOR part of the Constitution.⁸ Other socio-economic rights such as health and education are covered in a part of the Constitution which contains the fundamental objectives and directive principles of state policy which are not enforceable.⁹ The High Court has been given original jurisdiction in case of alleged violations of the BOR.¹⁰

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1 As amended to 2005.

2 Act 15 of the Constitution of United Republic of Tanzania 1984.

3 CP Maina 'Five years of the bill of rights in Tanzania: drawing a balance sheet' (1992) 4 *African Journal of International and Comparative Law* at 131.

4 CP Maina 'Blocking fundamental rights and freedoms in Tanzania' in National Organisation for Legal Assistance (NOLA) (eds) *Twenty years of the justiciability of the Bill of Rights in Tanzania 1988-2008* (2008) at 10.

5 Arts 14-31 of the Constitution of Zanzibar 1984 (as amended).

6 Maina (n 4) 10.

7 As above.

8 Arts 22-24 of the Constitution of United Republic of Tanzania.

9 Art 7(2) of the Constitution of United Republic of Tanzania.

10 Art 30(4) of the Constitution of United Republic of Tanzania.

Article 13 of the Constitution prohibits discrimination based on gender among other things.¹¹ Furthermore, article 12 of the Constitution states that all human beings are equal and every person is entitled to recognition and respect for his dignity.

However, it is important to note that the legal framework of Tanzania is pluralistic. This means that there are several systems of law operating side by side in the same jurisdiction.¹² There is customary law which is codified under the Customary Law Declaration Order (CLDO) of 1963; Islamic law (predominantly governed by the Holy Quran); and statutory laws.¹³ The application of these systems of law is regulated by the Constitution and in part by statutory law to the extent that it supersedes the other two systems. In the case of *Maagwi Kimito v Gibeno Warema*, the Court of Appeal held as follows:¹⁴

The customary laws of this country have the same status in our courts as any other law, subject to the Constitution and any other statutory law that may provide to the contrary.

The plural nature of the legal system can negatively affect the fundamental rights

of women contrary to relevant international instruments.¹⁵ Most of the provisions contained in the Customary Law Declaration Order¹⁶ contravene the rights of the women and girls.¹⁷ For example, it allows inheritance of widows by a relative of the deceased husband,¹⁸ ousts rights of widows for the custody of their children,¹⁹ has discriminatory inheritance rights against women,²⁰ and has discriminatory provisions relating to maintenance and division of matrimonial property after divorce.²¹ Islamic law which is also applicable in Tanzania on personal issues also has discriminatory provisions against women on various matters for example inheritance whereby women and girls are treated less than men and boys and also minimum age for marriage for girls is lower than that of boys.²²

As for statutory law, there are still laws in Tanzania which have not been amended to reflect the protection of women's rights, for example, the Law of Marriage Act (LMA) of 1971 which has significant shortfalls.²³ Such shortfalls include issues relating to age for marriage, spousal beating, polygamy and marital rape.²⁴ The Penal Code²⁵ also has some shortfalls for example not

11 Tanzania Women Lawyers Association (TAWLA) 'Review of laws and policies related to gender-based violence of Tanzania mainland' (2014) 11.

12 CM Drost and others 'Legal Pluralism and women's rights: a study in postcolonial Tanzania' (2007) 16 *Columbia Journal of Gender & Law* at 471 as quoted by M Matinda 'Implementation of the convention on elimination of all forms of discrimination against women (CEDAW): the Tanzania experience' (2019) 26 *Willamette Journal of International Law and Dispute Resolution* at 108.

13 TAWLA (n 11) 11.

14 *Maagwi Kimito v Gibeno Warema* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 20/1984 para 8.

15 As above.

16 This order codifies customary norms of patrilineal societies in Tanzania.

17 Matinda (n 12) 108-109.

18 Paras 62-70.

19 Paras 62-70.

20 Paras 1-53.

21 Paras 71A, 74.

22 TW Juynboll *Handleiding tot de kennis van de Mohammedaansche Wet. Volgens de leer der sjafi'itische school* (1943) at 184-189 as quoted by E Van Der Zweep 'The application of Islamic family law and human rights: A case study of Tanzania mainland' (2005) Unpublished Master Thesis, Universiteit Utrecht, 18.

23 TAWLA (n 11) 11.

24 TAWLA (n 11) 13.

25 Cap 16 RE 2019.

recognising marital rape and domestic violence as offences.

However, it is important to also note the milestones that Tanzania has reached regarding women's rights including the enactment of the 1999 Land Act²⁶ and the Village Land Act²⁷ which addressed the marginalisation of women in land access and holding rights,²⁸ enactment of the Sexual Offences Special Provision Act,²⁹ which forms part of the Penal Code to protect the dignity of women and children, illegalising child marriage through a judicial decision,³⁰ creation of the Gender and Children Desks³¹ designated to respond to issues related to gender-based violence³² in police stations in Tanzania and the enactment of various policies to promote gender equality.

This chapter gives an overview of the implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in Tanzania by expounding on specific aspects, for example, the ratification process, incorporation of its provisions in domestic law, its impact on legislative and policy reform, its impact on various institutions and organisations such as the judiciary, law society, academia and civil society organisations (CSOs), as

well as the reporting obligations established by the instrument.

2 Ratification of the Maputo Protocol in Tanzania

Tanzania ratified the Maputo Protocol on 3 March 2007 with no reservations.³³ There is no specific law in Tanzania that clarifies the procedure for ratification of international instruments.³⁴ Article 63(3) of the Constitution provides that the National Assembly in discharging its functions may deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification. Further, Tanzania is a dualist country and hence for a treaty to be enforceable, it requires enactment of enabling domestic legislation.³⁵

Therefore, ratification of international instruments falls within the ordinary powers and functions of the National Assembly.³⁶ In that context, the instruments of ratification are presented by the minister responsible to the parliament for discussion and possible ratification pending domestication.³⁷

It is not clear why Tanzania decided to ratify the Maputo Protocol.³⁸ However, the Government through policy had shown a general intention to implement

26 Land Act 4 of 1999.

27 Village Land Act 5 of 1999.

28 Matinda (n 12) 127.

29 1998.

30 *Attorney General v Rebecca Gyumi* (Civil Appeal 204 of 2017) [2019] TZCA 348; (23 October 2019).

31 There are currently 450 gender and children desks according to The Legal and Human Rights Centre (LHRC) 'State of human rights in Tanzania mainland: key issues and highlights for the year 2019' (2020) 189.

32 K Makoye 'Tanzania police set up special desks for gender violence cases' *Thomson Reuters Foundation* <http://news.trust.org/item/20131128131537-fitsc> as quoted by Matinda (n 12) 134.

33 Available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%20S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 20 October 2020).

34 C Mmbando & GK Kazoba 'The impact of the African Charter and the Maputo Protocol in Tanzania' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) at 251.

35 Art 63(3)(d) of the Constitution of the United Republic of Tanzania 1977.

36 As above.

37 As above.

38 Mmbando & Kazoba (n 34).

international agreements on the rights of women.³⁹

3 Government focal point

The Ministry for Constitutional and Legal Affairs (MoCLA) is responsible for the implementation of all international human rights obligations.⁴⁰ Coordination of state response to human rights treaties is under a specific department within the Attorney General's Chambers in the MoCLA called the Division of Constitutional Affairs and Human Rights.⁴¹ However, depending on the subject of the specific treaty, this mandate overlaps with the specific line Ministry which in the case of the Maputo Protocol is the Ministry of Health, Gender, Community Development, Elderly and Children.⁴² Within this ministry, the Directorate of Gender is responsible for the coordination of gender equality and women empowerment.⁴³ These departments are significantly aware of the contents and usefulness of the Maputo Protocol.

4 Domestication or incorporation

Unlike civil law countries where ratified international treaties form a direct part of their municipal laws, Tanzania as a common law country follows the dualism principle, which necessitates further domestication of international treaties in its domestic laws through legislation.⁴⁴ Tanzania has not enacted a specific law to domesticate the provisions of the Maputo Protocol. Human rights instruments, predominantly those that have been ratified by Tanzania but not yet incorporated in domestic legislation are applied only for persuasive purposes as a guide to interpreting the Constitution.⁴⁵

In the case of *Transport Equipment Ltd and Reginald John Nolah v Devran P Valambhia*,⁴⁶ on the aspect of using international instruments as an interpretative guide, the Court of Appeal stated the following:⁴⁷

... our Constitutional protection falls short of that which is provided by the International Covenant on Civil and Political Rights. But since we are party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogation law extremely strictly.

39 Ministry of Community Development, Women Affairs and Children, Policy on Women in Development in Tanzania, 1992 at 16, para 50.

40 As above.

41 The United Republic of Tanzania 'Consolidated second to tenth periodic report submitted by the United Republic of Tanzania to the African Commission for Human and People's Rights' (2006) at 2.

42 The Ministry of Health, Community Development, Gender, Elderly and Children was established in November 2015 after the integration of two Ministries: Ministry of Health and Social Welfare and Ministry of Community Development, Gender and Children.

43 The United Republic of Tanzania (URT) 'Country report on the review and progress made in implementation of the Beijing Declaration and Platform for Action - Beijing +25' (2019) 92.

44 The Constitution of the United Republic of Tanzania, 1977 at art 63(3)(d) and (e) (1977); K Kamanga 'International human rights law as reflected in Tanzania's treaty and court practice' in C Finnegan & W Binchy (eds) *Human rights, constitutionalism and the judiciary: Tanzanian and Irish perspectives* (2006) 55.

45 M Killander *International law and domestic human rights litigation in Africa* (2010) 60 as quoted by NH Msuya 'Challenges surrounding the adjudication of women's rights in relation to customary law and practices in Tanzania' (2019) 22 *Potchefstroom Electronic Law Journal* at 7.

46 *Transport Equipment Ltd & Reginald John Nolah v Devran P Valambhia* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Application 19/1993.

47 *Transport Equipment Ltd & Reginald John Nolah* (n 46) para 10.

There are certain rights applicable to all humans which are found in the justiciable BOR of the Constitution, for example, articles 12 and 13 of the Constitution which implicitly require the respect of the rights of women as provided for by the Maputo Protocol. Article 12(1) asserts that all human beings are born free, and are equal and that every person is entitled to recognition and respect for his dignity. Article 13 provides for the principle of non-discrimination,⁴⁸ which outlaws discrimination based on sex and also requires that all laws enacted not to be discriminatory in themselves and also their effect.⁴⁹ It should be noted however that these articles of the Constitution are subject to the provision of article 30(2) which is the general limitation clause.

5 Legislative and policy reform or adoption

Unfortunately, there was no compatibility study of domestic law with the Maputo Protocol that was undertaken before its ratification in Tanzania.⁵⁰ However, there has been the adoption and the amendment of various legislation and policies (explicit and implicit) to give effect to the Maputo Protocol in recent years. These changes have affected five key areas which are poverty alleviation, improvement of access to health services including reproductive health, publishing gender-disaggregated data, ending violence against women and girls and achieving gender parity in education.⁵¹

In poverty alleviation, the government is implementing the Five Year

Development Plan (FYDP) II⁵² which is an overarching national poverty reduction strategy. This is an operational economic framework to operationalise the visions and provide guidance on productive and social sectors such as agriculture, mining, tourism, manufacturing and services.⁵³ It has prioritised the promotion of gender equality with a specific focus on women's economic empowerment, governance and elimination of violence against women and children.⁵⁴ Further, there has been an amendment of Local Government Authorities Financial Act⁵⁵ to require all Local Government Authorities (LGAs) to set aside 10 per cent of their revenue collection for purposes of providing interest free loans to registered groups of women, youth and persons with disabilities.⁵⁶ The Public Procurement Act of 2011 was also amended in 2016 to require all government bodies to procure at least 30 per cent of their services from services owned by women and youth.⁵⁷ Other policies which have been adopted to address poverty against women include the second Financial Inclusion Framework (2018-2022), Food and Nutrition Strategic Plan of 2014-2018, National Skills Development Strategy of 2016-2027, Integrated Industrial Development Strategy of 2011-2025 and the Women Entrepreneurship Development National Action Plan 2016-2020.⁵⁸

To improve access to health services including reproductive health, the Health Sector Strategic Plan III 2013/2014-2018/2019 has been adopted which has resulted in the Integration of

48 Art 13(1).

49 Art 13(2).

50 Mmbando (n 34) 253.

51 URT (n 43) 22.

52 FYDP (2016/2017 - 2021/2022).

53 URT (n 43) 22.

54 URT (n 43) 80.

55 2018; Cap 290 RE 2002 (sec 37A).

56 URT (n 43) 10.

57 URT (n 43) 20.

58 URT (n 43) 10-11.

Reproductive, Maternal, Newborn, Child and Adolescent Health (RMNCAH) services to facilitate the easy provision of these services holistically and efficiently.⁵⁹ The Plan has also led to the institutionalisation of a RMNCAH Technical Committee to monitor the implementation of RMNCAH interventions quarterly. Furthermore, Tanzania made a concerted response to the human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) epidemic, even though it continues to claim the lives of thousands of people.⁶⁰ Some progress has been made towards achieving the UN AIDS 90-90-90 target particularly linked to HIV treatment. Research shows that the HIV prevalence and incidence estimates indicate a stabilising HIV epidemic in Tanzania.⁶¹ In 2018, a four-year cervical cancer screening project for women aged 21 to 65 years was introduced to prevent and control cervical cancer.⁶² Moreover, in 2017, immune *papilloma* vaccine to young girls aged 14 years was also introduced as a routine preventative intervention for cervical cancer.⁶³

To publish gender-disaggregated data Tanzania through the National Bureau of Statistics (NBS) has integrated a Gender Statistics Module in the Tanzanian Statistical Master Plan II.⁶⁴ NBS is further conducting several national surveys, which are gender-sensitive.⁶⁵

To address violence against women and children (VAWC), the government

developed a National Plan of Action to end Violence against Women and Children (NPA-VAWC 2017/2018 – 2021/2022) along with National Integrated Communications and Outreach Strategy to End Violence against Women and Children and Outreach Toolkit (2017/2018–2021/2022) which are currently being implemented.⁶⁶ It further developed NPA-VAWC Coordination Guideline (2018) which decentralised the implementation of NPA-VAWC in Tanzania, Anti-Trafficking in Person Action Plan 2018-2021 and a National Guideline for the establishment and management of shelter/safe houses for victims of trafficking and other forms of violence.⁶⁷ Despite the efforts, VAWC is still a concern in Tanzania, for example in October 2019, the National Head of Police Gender and Children Desk, Deputy Commissioner of Police (DCP) Mary Nzuki, revealed that gender-based violence incidents registered by police gender and children desks in Tanzania increased from 41,416 in 2017 to 43,487 in 2018.⁶⁸ Further, in 2019, police data indicated that by June, a total of 3,709 incidents of rape of women and children were reported to police stations.⁶⁹

Various legislations have been adopted and/or amended such as Legal Aid Act⁷⁰ which has been enacted to facilitate support to indigent people the majority of which are rural women, widows, and persons with disability.⁷¹ Laws amended include the Criminal Procedure Act,⁷² whereby section 151(1) was amended to the effect that anyone accused of VAWC is prevented from qualifying for bail and has

59 As above.

60 Mmbando (n 34) 255.

61 Centre for Disease Control and Prevention and others, 'Tanzania HIV Impact Survey 2016-2017' (2017).

62 URT (n 43) 43.

63 As above.

64 URT (n 43) 12.

65 As above.

66 URT (n 43) 13.

67 URT (n 43) 84.

68 LHRC (n 31) 177.

69 As above.

70 Act 1 of 2017.

71 URT (n 43) 13.

72 Act 7 of 2018.

increased sentences that courts can pass for VAWC related crimes. As a result, domestic regional courts can now give sentences of between 7 and 14 years, with sentences from the High Court ranging between 30 years and life imprisonment.⁷³ The Education Act⁷⁴ was also amended in 2016⁷⁵ to include a provision which penalises any person who impregnates a school girl to a minimum of 30 years imprisonment sentence.⁷⁶ The Penal Code was also amended in 2018⁷⁷ to increase punishment for sexual offences such as rape, sodomy and defilement.⁷⁸ The Chief Justice has also made rules to ensure that courts dispose of VAWC cases in six months.⁷⁹

To achieve gender parity in education, the 2014 Education and Training Policy was adopted which emphasises access and equity to quality education for all. The policy acknowledges, promotes and advocates for deliberate actions aimed at assuring that children, including girls, are not denied the right to access quality education. Further, the government came up with a policy⁸⁰ for the abolition of school fees and contributions in pre-primary up to secondary education which among other things is also a strategy to achieve gender parity in education in Tanzania.⁸¹ The government also developed the National Strategy for Inclusive Education (2018-2021) which promotes gender equality and children development regardless of their gender.⁸²

73 URT (n 43) 63.

74 Cap 353 RE 2002.

75 With the Written Laws Miscellaneous Act 2 of 2016.

76 URT (n 43) 63.

77 Act 6 of 2018.

78 URT (n 43) 63.

79 The Judicature and Application of Laws (Practice and Procedure of Cases Involving Vulnerable Groups) Rule 110 of 2019.

80 Free basic education policy, 2015.

81 URT (n 43) 51.

Unfortunately, despite the progress that has been made regarding the enactment and amendment of legislation and policies, implementation of the same has been slow. This is due to budgetary constraints. The Ministry opines that despite initiatives around Gender Responsive Budgeting, resource allocation for gender programmes and plans has not increased significantly which remains an ongoing challenge.⁸³ In particular, concerns are around annual budgeting processes and ensuring gender priorities are visible in emerging policy changes.⁸⁴ This is reflected in the varying degree to which different sectors articulate gender issues and priorities in their plans and budgets. Development Partners continue to fund the majority of gender initiatives.⁸⁵

6 Impact on the judiciary

There is a general awareness of the rights of women as provided for in international and regional instruments for the judiciary. This general awareness is captured through reference to various international instruments as interpretative sources in their judgments even before Tanzania ratified the Maputo Protocol.⁸⁶

82 URT (n 43) 14.

83 As above.

84 As above.

85 As above.

86 *Ephraim v Pastory* (1990) LRC (Const) 757; *Ndewawiosia d/o Ndeamtzo v Imanuel s/o Malasi HCD 1967-1968*, High Court Digest, vol. 1 & 11, at 461-462; *Bi Hawa Mohamed v Ally Seifu* Court of Appeal (Dar es Salaam), Civil Appeal 9 (1983); *Salome Herman Chitumbi v Mohamedi Iddi Mtandika* PC. Civil Appeal 24 of 2003 (HC 2005); *Ndossi v Ndossi* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 13/2001; *Naftal Joseph Kalalu v Angela Mashirima* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 145/2001; *Leonard Jonadhan v R* (High Court of Tanzania at Dar es Salaam) (unreported) Criminal Appeal 53/2001.

However, the decisions of the judiciary regarding the rights of women have not been consistent. As much as there are positive decisions which have been inspired by international instruments, there are also many decisions which have failed to uphold the rights of women for reasons, for example customary law.⁸⁷

The strategic litigation case of *Rebecca Gyumi v Attorney General*⁸⁸ is an example of a decision that heavily relied on international instruments especially the Maputo Protocol. In this case, the High Court was petitioned to strike out all provisions in the Law of Marriage Act,⁸⁹ which allow a girl under 18 years old to get married with her parent's consent specifically sections 13 and 17.⁹⁰ The petition further contended that the two sections contravened articles 12, 13 and 18 of the Constitution of Tanzania, which give people equal rights before the law and the right not to be discriminated against. In this decision, the Court ruled that the two sections were unconstitutional, hence they did not qualify to be part of the Law of Marriage Act.

In the case, even though the High Court was referred to several international and regional instruments to assist it in the interpretation of the Constitutional provisions on the right to equality and against discrimination, in the decision, the Court relied only on the Mapu-

to Protocol to conclude that the right to equality provided for in the Constitution was violated. The Court stated the following:⁹¹

... the right to equality is negated where there is a differential treatment. The Maputo Protocol formed under the African Charter on Human and Peoples' Rights referred to us by the petitioner's counsel, in its article 6 encourages State parties to ensure that there is equality between men and women and both are regarded as equal partners in marriage. The article provides further that State parties should enact appropriate legislative measures that guarantee that no marriage takes place without the free will and full consent of both parties and that the minimum age of marriage for women should be 18 years. It is in that respect that we agree with the petitioner that Tanzania having ratified the said Regional instrument, it is high time that it takes the appropriate legislative measures to ensure that the rights guaranteed under article 21(2) of the Constitution are realised by all.

Article 21(2) of the Constitution gives all citizens the right and freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.

The judgment was positively received and is being used by practitioners in their advocacy work against child marriage. The government through the Attorney General appealed the decision of the High Court to the Court of Appeal, which, fortunately, upheld the decision of the High Court.⁹²

Apart from *Rebecca's* case, it is important to note that recently, it is not strange to find judges rely on the Maputo Protocol when deciding on issues relevant to the Protocol. There are many cases especially cases on the division of

87 *Elizabeth Stephen and Another v Attorney General*, High Court of Tanzania (Dar es Salaam) Misc. Civ. Cause 82, 408 (2005), (TLR 2006); *Elizabeth A Komakoma v Zephania M Andendekisye* Civil Appeal 171 of 2005 (HC 2008).

88 Misc Civil Cause 5 of 2016 (*Rebecca Gyumi* case).

89 1971 [Cap 29 RE 2002].

90 I Warioba 'Child marriage in Tanzania: A human rights perspective' (2019) *The Journal of Law, Social Justice and Global Development* at 8.

91 *Rebecca Gyumi* case at 20.

92 Civil Appeal 204 of 2017 (2019) TZCA 348; (23 October 2019).

matrimonial property where judges have referred to the Protocol for persuasive purposes to reach decisions on equality in the division of matrimonial property.⁹³ This shows that awareness of the judiciary on the Protocol is satisfactory and that the Protocol has started to make an impact on the rights of women.

7 Awareness and use by civil society

The awareness of the Maputo Protocol among CSOs in Tanzania is significant. There are many CSOs which use the Maputo Protocol in their work explicitly and impliedly. In the first place, considering that the Protocol has not been domesticated in Tanzania, there are several CSOs which do advocacy work to promote the domestication of Maputo Protocol. For example, an organisation working to promote sexual and reproductive health and rights in Tanzania which preferred to remain anonymous stated that they have conducted various training of Members of Parliament (MPs), especially women MPs, on the importance of the Maputo Protocol for the protection of the rights of women. They also have been doing advocacy to motivate women MPs to trigger a dialogue on the domestication of Maputo Protocol in parliamentary sessions.⁹⁴

Further, many CSOs use the Maputo Protocol in their work. The organisation mentioned above, for example, stated that they have explicitly used the

Maputo Protocol in several advocacy sessions to advocate for sexual and reproductive health and rights with policymakers such as MPs, the Ministry of Health, Community Development, Gender, Elderly and Children, the Ministry of Constitutional and Legal Affairs and also media.⁹⁵ They have also used the Protocol to draft and design fact sheets on unsafe abortions practices and complications in Tanzania and develop information, education and communication materials on unsafe abortion for different stakeholders, for example, the media, medical professionals and communities.⁹⁶

Some seven non-governmental organisations (NGOs) working on sexual and reproductive health and rights have formed a coalition called Coalition to Address Maternal Mortality due to Unsafe Abortion and its Complications (CAMMAC) whose main mission is to contribute to the reduction of maternal mortality in Tanzania by reducing the prevalence of unsafe abortion and increasing access to safe abortion and post-abortion care services. Their work is predominantly influenced by article 14 of the Maputo Protocol.⁹⁷

Women's Legal Aid Centre (WLAC)'s work to promote women's rights is largely informed by the Maputo Protocol. For example, they create awareness on women's rights to women and children, magistrates and judges and advocate for law reform by among other things, making sure to give their opinion on bills for the enactment of new laws and/or for amendment of the existing laws to improve the rights of women.⁹⁸ Their work also includes the

93 See for example *Mnyonge Idrissa v Kiumbe Hussein*, Pc Matrimonial Appeal 4 of 2020; *Anna Aloyce v Zacharia Zebedayo Mgeta*, Pc Matrimonial Appeal 1 of 2020; *George Mhando Nyungu v Hadija Rashid*, Civil Appeal 137 of 2017; *Ahmed Abubakar Kahamba v Madina Kihupi*, Civil Appeal 251 of 2016; *Godfrey Edward Malole v Sara Joseph Masaka*, Civil Appeal 184 of 2016.

94 As above.

95 As above.

96 As above.

97 As above.

98 As above.

institution of public interest litigation. So far, they have instituted two public interest litigation cases.⁹⁹ The first one was to challenge discriminatory customary inheritance laws and the other to seek the declaration that widows are entitled to half of the matrimonial property upon the death of the husband.¹⁰⁰ Unfortunately, both cases were struck out on technicalities.

Furthermore, there are also CSOs working on preventing and combating VAWC. Legal and Human Rights Centre (LHRC) and other NGOs such as Msichana Initiative raise awareness about VAWC through different platforms and also work with human rights clubs at schools, as part of their strategy to combat VAWC.¹⁰¹ Other CSOs including Child Dignity Forum (CDF), WLAC, Twaweza, Hakielimu, Tanzania Women Lawyers Association (TAWLA),¹⁰² Tanzania Media Women's Association (TAMWA), Save the Children, and Plan International, work with government and non-government actors to address VAWC, including supporting the work of police gender and children desks.¹⁰³ For instance, in October 2019, a new police gender and children desk was launched at Kawe Police Station in Dar es Salaam, supported by Save the Children.¹⁰⁴ CDF provided training to 270 police officers (118 female and 152 male) in 2019 to boost the capacity of police gender and children desks to address VAWC and provide related services.¹⁰⁵

CDF also supported the work of the police gender and children desk in Tarime by providing working facilities.¹⁰⁶

However, CSOs have not participated in the preparation of state reports to the African Commission on Human and Peoples' Rights (African Commission), because Tanzania has never reported on Maputo Protocol. It follows, therefore, that the four NGOs,¹⁰⁷ which have observer status, have also never submitted shadow reports on the implementation of the Maputo Protocol to the Commission.

8 Awareness and use by lawyers (law societies and other practising lawyers)

The Tanganyika Law Society (TLS) is the bar association for Tanzania mainland founded in 1954.¹⁰⁸ The Tanganyika Law Society is currently governed by the Tanganyika Law Society Act.¹⁰⁹ One of the core components of the TLS statutory mandate outlined in the TLS Act is to assist the government, judiciary, parliament and the public in all matters affecting legislation, and the administration and practice of the law in Tanzania.¹¹⁰ In the implementation of this mandate, TLS in collaboration with its development partners, implement various projects to promote human rights in Tanzania. This is how they have implemented various projects to

99 *Elizabeth Stephen and Salome Charles v The Attorney General*, Civil Appeal 4 of 2007.

100 Misc Civil Appeal 10 of 2016.

101 LHRC (n 31) 190.

102 TAWLA inspired by also Maputo Protocol is implementing various projects to promote gender equality. See <https://www.tawla.or.tz/our-history/> (accessed 4 January 2021).

103 As above.

104 As above.

105 As above.

106 As above.

107 According to <https://www.achpr.org/ngos> (accessed 21 October 2020) the four NGOs are Under the Same Sun Fund, Asylum Access, Tanzania Human Rights Defenders Coalition and PINGO's Forum.

108 The Tanganyika Law Society Ordinance 1954; see also <https://tls.or.tz/> (accessed 20 October 2020).

109 Cap 307 RE 2002.

110 <https://tls.or.tz/2020/03/> (accessed 21 October 2020).

promote the rights of women in Tanzania. Their work is inspired by domestic law, in particular, the BOR but also international instruments that Tanzania has ratified such as the Maputo Protocol.

An example of various projects which they have implemented which have been inspired by the Maputo Protocol includes Legal Empowerment Project whose main objective is to have a holistic approach in addressing various challenges faced by women, for example poverty, access to justice, access to land and labour related challenges.¹¹¹ Another project they have implemented in collaboration with the judiciary is related to timely disposal of probate and administration of estate cases to make sure that beneficiaries particularly women and children are not affected by undue delays and also a project on the impact of the extractive sector for women. TLS has also instituted several public interest litigation cases to promote the rights of women in Tanzania.¹¹²

TLS in collaboration with Pathfinder International has implemented various activities including training of members of parliament and journalists on sexual health and reproductive rights and have conducted advocacy for medical abortion under exceptional circumstances for example in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus to various groups including MPs as inspired by the provisions of the Maputo Protocol.¹¹³ They have also trained

advocates¹¹⁴ on strategic litigation on sexual health and reproductive rights.

Apart from the law society itself, general awareness of the Maputo Protocol for lawyers is low except for those who work for and in collaboration with CSOs. An interview with TLS revealed that when they started their programme for Continuing Legal Education (CLE) for advocates in 2006, this programme was being sponsored by the Canadian Bar and hence through their influence, advocates were being trained on predominantly human rights issues.¹¹⁵ However, in 2013, advocates complained that the topics covered by the CLE programme were irrelevant to their private practice and demanded that they be involved in the designing of CLE topics. Thereafter, topics for CLE predominantly relate to corporate issues.

However, as stated above, there are still advocates who are aware of the Maputo Protocol and use it, for example, the landmark case of *Rebeca Gyumi* was argued by Advocate Jebra Kambole who submitted among other things that provisions in the LMA which allow a girl of 14 and 15 years to get married are discriminatory and invited the High Court to look at some regional and international instruments opposed to discrimination, for example, article 2 of the Maputo Protocol.¹¹⁶

9 Higher education and academic writing

Higher academic institutions have human rights courses in their curricula, for example, the Law School of Tanza-

111 As above.

112 As above.

113 Art 14(2)(c).

114 Lawyers licensed to practice law in Tanzania.

115 As above.

116 The *Rebeca Gyumi* case at 8.

nia, Mzumbe University, University of Dar es Salaam, Tumaini University and Ruaha University College.¹¹⁷ These courses involve the discussion of the African human rights system which includes a discussion on the Maputo Protocol.

Academics, predominantly those specialising in human rights law, women's rights and children's rights, significantly refer to and discuss the Maputo Protocol.¹¹⁸ They discuss the importance of the document to further the rights of women in Tanzania. They discuss how domestic laws fair in comparison with the standards established by Maputo Protocol in different issues covered by the Protocol specifically the gaps of domestic law in relation to the Protocol, they discuss the significant disadvantages of not domesticating the Protocol and finally call for the domestication of the protocol and fulfilment of the obligations acquired by Tanzania by being a party to the Protocol.

10 Impact on independent state institutions

The Commission for Human Rights and Good Governance (CHRAGG) is an independent government institution, established as a national focal point institution for the promotion and protection of human rights and corresponding duties as well as good governance in Tanzania.¹¹⁹ CHRAGG was established under article 129(1) of the Constitution as amended by Act 3 of 2000. The Commission became operational on 1 July 2001 after the coming into force of the Commission of the Human Rights and Good Governance Act¹²⁰ and Government Notice No 311 of 8 June 2001. It is one of the NHRIs in Africa established in accordance with the Paris Principles¹²¹ and granted affiliate status by the African Commission.¹²²

In their role of promotion and protection of human rights, CHRAGG is mandated to conduct various activities including handling of complaints and giving their recommendations, monitoring of human rights situation in the country, research, fact-finding missions and education to the public. Regarding the rights of women, CHRAGG has implemented various activities which have been informed by among other things, the Maputo Protocol. Example of these activities includes

- 117 See <https://www.mzumbe.ac.tz/site/images/MU20192020PROSPECTUS.pdf>; <https://www.lst.ac.tz/index.php/academic-programmes>; https://www.udsm.ac.tz/upload/20200316_102623_UNDERGRADUATE%20PROSPECTUS%20-%202019_2020%20.pdf; https://www.udsm.ac.tz/upload/20200316_110608_POSTGRADUATES%20PROSPECTUS%202019_2020.pdf; https://makumi.ra.ac.tz/docs/tuma_prospectus_2018-2021.pdf (accessed 21 October 2020).
- 118 See for example HO Mwenegoha 'Violence against women in Tanzania: a call for an anti-domestic violence legislation' (2017) 1 *Institute of Judicial Administration Journal* at 38; I Kajiru & JC Mubangizi 'Human rights violations of persons with albinism in Tanzania: the case of children in temporary holding shelter' (2019) 19 *African Human Rights Law Journal* at 246-266, available at <http://dx.doi.org/10.17159/1996-2096/2019/v19n1a12>; I Kajiru & I Warioba 'Access to justice for child victims of sexual violence in Tanzania' (2019) 1 *Journal of Institute of Judicial Administration*; I Kajiru & I Warioba 'Access to justice for persons with disabilities: challenges and barriers to the implementation of the Persons with Disabilities Act of 2010 in Tanzania' (2019) 1 *Journal of Institute of Judicial Administration*;

- I Warioba 'Translation of human rights: a solution against child marriage in Africa?' (2018) 5 *The Journal of Law, Society and Development*; Matinda (n 12) 99-137; Msuya, (n 45) at 1-29; Warioba (n 90).
- 119 <https://www.chragg.go.tz/index.php/who-we-are/78-about-chragg> (accessed 2 November 2020).
- 120 Act 7 of 2001 (as amended).
- 121 Adopted by UNGA Resolution 48/134 of 20 December 1993.
- 122 African Commission Res.31(XXIV) 98 Resolution on granting of Observer Status to NHRI in Africa, 1998.

research on the killings of elderly women in Tanzania, a fact-finding mission on sexual harassment against college students in Tanzania, capacity building of local level officers on the enhancement of access to justice for women.¹²³

CHRAGG is involved in the preparation of state reports to the African Commission and various other international forums, for example, it was involved in the preparation and submission of the combined 2nd-10th report on the African Charter.¹²⁴ CHRAGG also follows up on the implementation of concluding observations of the African Commission by conducting workshops of all relevant stakeholders after receiving concluding observations which include government departments and CSOs to come up with a way forward on how the concluding observations will be implemented. Thereafter, they keep making a follow up with specific departments responsible for the implementation.¹²⁵ CHRAGG acknowledged that their main challenge is budgetary constraints which is why they have not been able to follow up on reporting on the Maputo Protocol.¹²⁶

11 State reporting

Coordination of human rights reporting is the responsibility of a specific department within the Attorney General's Chambers in the MoCLA.¹²⁷ The

123 Local level officers included education officers, social welfare officers, economic and planning officers, legal officers, community development officers of local government authorities as well as ward executive officers (WEOs). In this project, 120 local government officers were trained and 601 WEOs.

124 Kazoba & Mmbando (n 34) 257.

125 As above.

126 As above.

127 The Constitution of the United Republic of Tanzania (n 41) 2.

preparation of reports is coordinated by this office working with the line Ministry on the specific treaty. The preparation of a report involves multi-stakeholder consultations including, among others, other relevant government departments, CSOs, trade unions, professional organisations, the private sector, academia and research institutions.¹²⁸

So far, Tanzania has not reported on the implementation of the Maputo Protocol.¹²⁹ It has only reported on the African Charter twice, the first report in 1992 and a consolidated second to tenth report in 2006.¹³⁰ Reasons for their failure and delays in reporting include a lack of coordination between and amongst stakeholders and government departments, human and financial resources, delays/inefficiency in responding to issues within government departments, lack of prioritisation, and that the reporting period between two reports of two years is too short considering the number of reporting obligations that they have.¹³¹

12 Communications

There have only been seven communications against Tanzania submitted to the African Commission.¹³² These

128 URT (n 43) 7.

129 <https://www.maputoprotocol.up.ac.za/index.php/tanzania> (accessed 4 January 2021).

130 <https://www.achpr.org/states/detail?id=49> (accessed 4 January 2021).

131 URT (n 43) 44.

132 *Southern Africa Human Rights NGO Network and Others v Tanzania* Communication 333/06; *Alberto Capita v Tanzania* Communication 53/91 SAR; *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others; Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC) and Zambia* Communication 157/96; *Women Legal Aid Centre (On behalf of Sophia Moto) v Tanzania* Communication 243/01 & *Lawyers' Committee for Human Rights v Tanzania* Communication 66/92.

communications alleged the violation of the African Charter out of which Tanzania was found in violation of the African Charter in one.¹³³ No communication alleging the violation of the Maputo Protocol has ever been submitted.

NGOs do not seem too eager to take cases to the African Commission. Factors which contribute to their lack of eagerness include the lack of optimism that the decisions will be implemented due to among other things, the lack of a national mechanism for the implementation and follow-up of communications. Further, they have a belief that the government will not take it too kindly if they decide to institute communications against it at the international level especially considering that they have eliminated the avenue for public interest litigation at the domestic level.¹³⁴ One NGO was of the opinion that their strategy is to work with the government towards the realisation of rights of women which in their opinion is a strategy that works and hence instituting communications at the African Commission, even cases in domestic courts will be against this strategy.¹³⁵

13 Special mechanisms and promotional visits of the African Commission

The Commission has conducted two promotional visits to Tanzania, in 2002¹³⁶ and 2008.¹³⁷ Both of these visits intended to promote the African Charter and the activities of the Commission.

During these visits, the African Commission engaged the government on measures it is taking or has taken to implement its international human rights obligations and its obligations under the African Charter; exchanged views with the government on the challenges it faces in fulfilling its international and regional human rights obligations and the extent to which the Commission can assist; and exchanged views with other human rights stakeholders on ways and means of promoting and protecting human rights in the country.¹³⁸

Further, the Working Group on the Rights of Indigenous Peoples/Communities (WGIP) led by Dr Naomi Kapuri made a research and information visit to Tanzania from 21 January to 6 February 2013.¹³⁹ During the visit the delegation engaged with government officials, indigenous peoples' representatives, leaders and communities, CSOs, the media and other stakeholders through meetings, interviews and focused group discussions.¹⁴⁰

The delegation found that while the situation of indigenous communities is generally depressed, that of women and children, especially girl children, is even more so.¹⁴¹ They found out that girl children are faced with a violation of their rights for example being discriminated, negative cultural practices, limited education opportunities and child marriages.¹⁴² Such practices are caused by among other things, traditions and customs, lack of awareness especially in

133 *Women Legal Aid Centre (On behalf of Sophia Moto) v Tanzania* Communication 243/01.

134 As above.

135 As above.

136 <http://www.achpr.org/states/tanzania/mis-sions/promo-2000/> as quoted by Kazoba & Mmbando (n 34) 260.

137 As above.

138 Kazoba & Mmbando (n 34) 260.

139 WGIP 'The research and information visit to the United Republic of Tanzania 21st January to 6th February 2013 Report' (2013) 7.

140 WGIP (n139) 7.

141 WGIP (n 139) 69.

142 As above.

rural areas of the consequences traditional harmful practices, gaps in the law and sometimes vigorous enforcement of the law which drives some practices underground.¹⁴³ The Working Group recommended that the government of Tanzania takes deliberate measures to implement regional instruments to protect and promote the rights of women and children against negative cultural practices.¹⁴⁴

Unfortunately, Tanzania has not adopted legislation on harmful traditional practices in general.¹⁴⁵ Only female genital mutilation (FGM) has been criminalised¹⁴⁶ although its prevalence rate in Tanzania is still 10 per cent of all women aged between 15 and 49 even after the criminalisation.¹⁴⁷ Other harmful traditional practices like child marriage have not been criminalised. Fortunately, child marriage was recently declared unconstitutional by the Court in the *Rebeca Gyumi* case.

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

The implementation of the Maputo Protocol in Tanzania is affected by many factors. Factors which enhance the implementation include the following:

143 As above.

144 As above.

145 Warioba (n 90) 11.

146 Cap 16 RE 2002.

147 Female genital mutilation/cutting: data and trends <http://www.prb.org/pdf17/FGMC%20Poster%202017.pdf> as quoted by A Abdalah 'The violence against women in Tanzania: female genital mutilation' (2019) *Social science* at 29.

Some goodwill of the government

To some extent, the Government of Tanzania shows goodwill towards the implementation of the Maputo Protocol. The first sign of the goodwill of the government was the signing and ratification of the Protocol without any reservations. Even though the Protocol needs to be domesticated to be enforced in Tanzania, the government knows that based on the international law principle of *pacta sunt servanda*,¹⁴⁸ it is obliged to implement the Protocol in good faith and not to do anything that goes against the objective of the Protocol.¹⁴⁹ Also, the Protocol can be used by the judiciary for interpretative purpose which is currently being done. Further, even though the government might have weaknesses in the implementation of the Protocol, for example, the failure to domesticate, failure to amend some legislation as shown earlier which are incompatible with the protocol and the failure to take other measures towards the realisation of women's rights, the government has allowed many CSOs which work on the implementation of the Protocol to operate in Tanzania towards the implementation of the Protocol.

The role of the judiciary

An active bench can be very instrumental in the implementation of the Maputo Protocol in Tanzania. As it has been seen above, even though at the moment the Protocol can only be used for interpretative purposes, some of the judges have actively referred to it and were guided by it to reach decisions. However, some judges are still reluctant to refer

148 Art 26 of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331.

149 Matinda (n 12) 136.

to international instruments which have not been domesticated. More lobbying, training and sensitisation of the Judiciary on the Maputo Protocol is also required.

Awareness creation

Awareness creation of the Maputo Protocol directed at different groups being done by different stakeholders for example CSOs and academics enhance the impact of the Protocol. More sensitisation needs to be done by CSOs focusing on MPs, legal practitioners and academics should enhance awareness creation through conducting various events on the Protocol such as moot courts, seminars and conferences.

The implementation of Maputo Protocol is being impeded by factors such as:

The failure to domesticate the Protocol

The fact that Tanzania has not domesticated the Protocol is a major impediment towards the full implementation of the Protocol. As discussed above, Tanzania is a dualist country and hence for the Protocol to be applicable, it has to be domesticated. Therefore, as much as the government is obligated to not go against the objective of the Protocol, it is not possible to hold the government accountable in a court of law for the failure to fulfil their obligations under the Protocol.¹⁵⁰

Retrogressive measures in the implementation of human rights obligations

Furthermore, recently Tanzania has been taking retrogressive measures in the implementation of their human rights obligations. This can be exemplified by the amendment of the law to eliminate provisions which allowed strategic litigation¹⁵¹ and also their withdrawal of the declaration which allowed individuals and NGOs to directly submit communications to the African Court for Human and Peoples' Rights.¹⁵² The notice of withdrawal of the declaration was made under article 34(6) of the African Court Protocol on 14 November 2019 and sent to the African Union on 21 November 2019. Considering that strategic litigation is an essential tool that was already being used to further the rights of women, this amendment is a significant impediment towards promoting the implementation of the Protocol. Further, the withdrawal of the declaration also eliminates an avenue that could have been used to further the women's rights agenda.

Limited role of media

The media also plays a limited role in the promotion of the implementation of Maputo Protocol and women's rights in general. This is caused by factors such as lack of awareness and technical know-how and a lack of financial resources. Considering the important role that can be played by the media in creating awareness of the Protocol and pushing for the domestication, the fact

151 Section 7 of the Written Laws (Miscellaneous Amendments) (No 3) Act 2020.

152 <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/> (accessed 21 October 2020).

that this role is not realised, impedes the implementation of the Protocol.

The stigma surrounding the Protocol

Another aspect that affects the implementation of Maputo Protocol in Tanzania is the stigma surrounding the Protocol, in particular article 14. CSOs who do advocacy work towards the domestication of the Protocol face major challenges because of the negative perception that policymakers and also communities have towards the Protocol. These negative perceptions are fuelled by article 14 for those who are aware of the Protocol.¹⁵³ They refuse to even entertain the idea of a medical abortion due to strong religious beliefs. Further, negative perceptions are also fuelled by traditions and customs for example patriarchy which is a source of harmful traditional practices such as child marriage and female genital mutilation which are significantly practised in Tanzania.¹⁵⁴

153 As above.

154 B Percy-Smith and others 'Study of drivers of violence against children and positive change in Tanzania Mainland and Zanzibar' (2017) 62, available at <https://www.unicef.org/tanzania/reports/study-drivers-violence-against-children> (accessed 17 July 2020).