

CULTURAL RELATIVISM AND THE ROLE OF RESOCIALISATION IN THE REALISATION OF AFRICAN WOMEN’S RIGHTS TO A POSITIVE CULTURAL CONTEXT (ARTICLE 17)

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Abstract

This chapter explores article 17 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which safeguards the rights of women to a positive cultural context. It considers the vital role that article 2(2) of the Maputo Protocol plays in mandating the modification of harmful socio-cultural behaviours of women and men or resocialisation to give effect to the substantive rights of women. The analysis departs from four key assumptions: 1) the pursuit of the right to a positive cultural context as defined in article 17 of the Maputo Protocol is unattainable if resocialisation is ignored; 2) a comprehensive understanding of what constitutes culture and cultural rights is essential for the realisation of the right to a positive cultural context; 3) the use of cultural relativism has been and remains a tool to undermine women's rights; and 4) achieving women's rights to a positive cultural context requires a deeper comprehension and more appropriate implementation of resocialisation as mandated by articles 2(2) and 17 of the Maputo Protocol. This chapter draws attention to resocialisation as a tool for the realisation of women's rights generally and to the rights of women to a positive cultural context and embarks on an analysis of the international legal framework relating to culture, cultural rights, and the rights of women. Thereafter, this chapter considers the African regional perspective, with the African Charter on Human and Peoples' Rights serving as its point of departure, followed by an analysis of article 17 of the Maputo Protocol and its interconnectedness with several other provisions of the Maputo Protocol. The analysis, then, considers how these provisions are applied in practice by examining state reports to the African Commission on Human and Peoples' Rights (African Commission) and the African Commission's Concluding Observations, as well as its application in regional, sub-regional and domestic case law. This chapter argues that the rights of women to positive cultural contexts imply the modification of socio-cultural norms by way of resocialisation.

Keywords: Gender equality, resocialisation, women, Maputo Protocol, cultural rights

1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is a progressive legal tool protecting the rights and freedoms of women. Of the numerous provisions contained therein, the right to a positive cultural context, as contained in article 17, remains relatively unexplored. What a positive cultural context within the discourse of women's rights means is significant, given the dominant view that culture and the rights of women are at odds with one another.¹ Notwithstanding this, culture and cultural rights are integral to the lives of many individuals, women included. Therefore, the dichotomous view of women's rights and culture as inherently oppositional to one another fails to consider the emancipatory potential to women of culture.

The caution with which culture is engaged with is not, however, unfounded. The frequent use of cultural relativism as a means to undermine the rights of women is not new and continues to serve as a dominating source of oppression.² Both international and African regional human rights law emphasise the importance of safeguarding the rights of women and protecting women from culturally based justifications for violations.³ However, the embeddedness of cultural norms often dictates that women's rights align with such norms, failing

1 A Xanthaki 'When universalism becomes a bully: Revisiting the interplay between cultural rights and women's rights' (2019) 41 *Human Rights Quarterly* 701, 702.

2 J Donnelly 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* 400. At 401, Donnelly notes that '[s]trong cultural relativism holds that culture is the principal source of the validity of a moral rights or rule. In other words, the presumption is that rights (and other social practices, values, and moral rules) are culturally determined.'

3 UN Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 5(a); Maputo Protocol art 2(2). See also, eg, UN Committee on Economic, Social and Cultural Rights 'General Comment 21 on the Right of everyone to take part in cultural life' (21 December 2009) UN Doc E/C.12/GC/21 para 18; UN Office of the High Commissioner for Human Rights (OHCHR) 'CCPR General Comment 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 5; African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage' (2017) para 50.

which culture supersedes women's rights. To subject women's rights to existing cultural dictates, which are often patriarchal in nature, results in diminishing women's rights in favour of cultural rights.⁴ Therefore, the Maputo Protocol's inclusion of women's rights to a positive cultural context provides the necessary foundation for reconsidering the interplay between and interconnectedness of culture and women's rights. Indeed, this provision explicitly safeguards women's rights against cultural relativism by mandating that the cultural contexts in which women find themselves remain positive.

As feminist legal theory asserts, the law often legitimates patriarchal oppression.⁵ It holds that laws are made to address the problems men face, overlooking those relating to women. Indeed, while laws are seen to address human concerns, the default human for which laws are designed is masculine in nature.⁶ This narrow view of humans and the resultant exclusion of women, therefore, has implications for the positioning of select rights, in this case cultural rights, as superior to women's rights. Radical feminism rejects the masculine as the default human and aims to see the realisation of substantive gender equality come to fruition.⁷ Transformative substantive equality targets the very systems that maintain discrimination, ensuring that the sameness approach that relies on the man as a default human is replaced by an approach that centres on altering the lived realities of women.⁸ Resocialisation aids the transformative substantive equality aims that feminist legal theory is intent on addressing.

Further, an intersectional feminist lens is critical to this research as it allows for the scrutiny of current conceptions of culture and cultural

4 See, eg, A Gouws 'Multiculturalism in South Africa: Dislodging the binary between universal human rights and culture/tradition' (2013) *Politikon* 35; F Raday 'Gender and democratic citizenship: The impact of CEDAW' (2012) 10 *International Journal of Constitutional Law* 512, 518. Indeed, the very existence of CEDAW's article 5(a) confirms the influential role that cultural dictates clashing with the rights of women plays in society.

5 MA Fineman 'Gender and law: feminist legal theory's role in new legal realism' (2005) *Wisconsin Law Review* 407.

6 AN Arbuckle 'The condom crisis: An application of feminist legal theory to AIDS prevention in African Women' (1996) 3 *Indiana Journal of Global Legal Studies* 413, 436. See also CA MacKinnon 'Reflections on sex equality under law' (1991) 100 *Yale Law Journal* 1281.

7 AE Blerk *Jurisprudence: An introduction* (1996) 177.

8 AC Scales 'The emergence of feminist jurisprudence: An essay' (1986) 95 *Yale Law Journal* 1373, 1382.

rights in an equality-centric manner, positioning culture as essential to the make-up of women.⁹ Indeed, intersectionality seeks to guard against viewing women's issues in isolation to other interconnected and equally important grounds of oppression.¹⁰ Further, intersectionality allows the notion of womanhood to remain fluid and capable of including the varied experiences and cultural contexts of all women, limiting the potential for essentialising culture and cultural contexts. This chapter suggests that while legislative advances have been made to realise the rights of women generally, when it comes to balancing the rights to culture with those of women, the former often come out ahead. Because patriarchal oppression, in its various manifestations, is often unscrutinised and normalised, the role of resocialisation surfaces as crucial to ensuring that culture and cultural rights are interpreted in a manner cognisant of the equal humanity of women, that they do not operate as justification for the continued discrimination of women, and that the law substantively alters the lived realities of women.¹¹ Lastly, consciousness-raising, a feminist method of ascertaining the exact realities facing specific groups of women for the purposes of developing adequate responses, is an important component of resocialisation. Indeed, the measures developed and employed to ensure that cultural rights are not given preference over the rights of women must be informed by the women directly impacted.¹²

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- 9 Xanthaki (n 1) 714; S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 47, 64.
 - 10 J Wong 'The anti-essentialism v essentialism debate in feminist legal theory: The debate and beyond' (1999) 5 *William & Mary Journal of Women and the Law* 273, 292.
 - 11 A Mahmoudi & A Rudman 'A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice in A Fuentes & A Rudman (eds) *Human rights adjudication in Africa: Challenges and opportunities within the African Union and sub-regional human rights systems* (2024) 144. Resocialisation 'seeks to modify harmful norms and cultural practices underpinning discrimination, looking to all individuals as subjects of change ... [it] seeks to address the root causes of gender inequality, working in tandem with efforts made towards the realisation of substantive and formal gender equality'. See section 2 for more on resocialisation.
 - 12 PA Cain 'Feminist jurisprudence: Grounding the theories' (1989) *Berkeley Women's Law Journal* 191, 195. See also R Holtmaat 'Article 5' in MA Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A commentary* (2011) 156 who notes the emphasis placed by CEDAW Committee in affecting the necessary change mandated by article 5(a) by 'intensify[ing] co-operation [by the state] ... with civil

It is for this reason that this chapter argues for the indispensable role of resocialisation in the realisation of women's rights to a positive cultural context. Indeed, resocialisation is largely an overlooked means of accelerating gender equality. Where resocialisation takes centre stage, harmful cultural norms and practices are modified to reflect international human rights standards. In this context, the realisation of positive cultural contexts becomes unachievable where current harmful cultural norms and practices remain unquestioned and intact. As suggested in this chapter, the right of women to a positive cultural context implies the modification of socio-cultural norms by way of resocialisation.

This research, therefore, analyses culture and cultural rights in relation to women's rights, utilising international law as its point of departure. This, then, is contrasted to the legislative stance of the African regional human rights system with the African Charter on Human and Peoples' Rights (African Charter) as its benchmark. Thereafter, an analysis of article 17 of the Maputo Protocol highlights the necessity of generally safeguarding women's rights against cultural relativism by providing for the rights of women to a positive cultural context. The broader implications of the realisation of this right – its implications for the realisation of other rights – then become more apparent. Crucially, the role of resocialisation in unlocking the potential of this right and other rights relating to women is explored in greater depth.

In light of the above, section 2 briefly revisits the concept of resocialisation to ensure that it remains defined and utilised in the intended manner and to underscore its significance in this context. Further, it explores the notion of culture and cultural rights more generally. Section 3 explores the international legal framework relating to culture, cultural rights, and the rights of women. As no international law provision exists that explicitly protects women's rights to a positive cultural context, several sources are drawn upon to demonstrate that women's right to a positive cultural context is, indeed, safeguarded in international law. Section 4 considers cultural rights from the African regional perspective. The African Charter serves as a point of departure for this discussion, followed by an analysis of article 17 of the Maputo Protocol and its interconnectedness with several other provisions of the

society organizations, women's groups and community leaders, traditional and religious leaders, as well as teachers and the media.'

Maputo Protocol. This is followed by an analysis of state practice by way of state reports to the African Commission on Human and Peoples' Rights (African Commission) and the accompanying concluding observations issued in this regard. It also considers case law from the African Court on Human and Peoples' Rights (African Court), the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) and domestic case law to demonstrate engagement with culture and women's rights.

2 The interconnectedness of resocialisation and culture

2.1 Resocialisation

Socialisation is a process which includes the 'transmission of behavioural norms and models by persons and institutions'.¹³ Given that patriarchal norms relating to the role and value of women have been internalised by society to varying degrees through socialisation, the modification of existing harmful conceptions about women must come about through the process of resocialisation.¹⁴ Thus, resocialisation seeks to undo existing harmful conceptions and practices relating to the inherent dignity and humanity of women and replacing them with conceptions devoid of harmful assumptions, stereotypes and the like and which uphold the rights and freedoms of women as prescribed by international and regional human rights law.¹⁵

Resocialisation is legislatively mandated and finds its roots in both international and African regional law, operating as an obligation, right

13 DA Isom Scott & T Mikell "Gender" and general strain theory: Investigating the impact of gender socialization on young women's criminal outcomes' (2019) 42 *Journal of Criminal Justice* 393, 395.

14 AL Mtenje 'Patriarch and socialization in Chimamanda Ngozi Adichie's *Purple Hibiscus* and Jamaica Kincaid's *Lucy*' (2016) 27 *Patriarchy Socialization Identity Gender* 63-78. See also, Mahmoudi & Rudman (n 11) 144.

15 In this regard, it worth noting that the use of resocialisation in this context implies a modification of harmful socio-cultural norms and practices to reflect international human rights law standards. Indeed, resocialisation is not synonymous with indoctrination, which implies brainwashing as a means to effecting change in behaviour. Indoctrination has negative connotations and is not protected in international law, unlike resocialisation, which is.

and remedy.¹⁶ Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) mandates that states:

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁷

Furthermore, article 5(a), amongst others, is characterised by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) as forming part of the general interpretative framework of all other substantive rights contained therein.¹⁸ To address the state obligation to realise transformative gender equality, modifying the underlying determinants of gender inequality must remain at the forefront of state efforts. Thus, the realisation of the substantive rights of women remains contingent upon the modification of harmful socio-cultural norms and practices by way of resocialisation. Where efforts are made to realise these rights, they must be accompanied by resocialisation measures aimed at modifying the underlying biases, assumptions, stereotypes, and other norms that cast women as inherently inferior to men. When such modification occurs, substantive and transformative equality becomes possible.

The African regional human rights system echoes the value of resocialisation in article 2(2) of the Maputo Protocol, which stipulates that:

State Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

16 A Mahmoudi & A Rudman 'A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice' in Fuentes & Rudman (n 11) 146.

17 CEDAW art 5(a).

18 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004 UN Doc HRI/GEN/1/Rev.1 para 6.

Stereotypes, biases, harmful assumptions, and other socio-cultural norms continue to legitimise societal conceptions of women as inferior to men.¹⁹ This, despite the Universal Declaration of Human Rights (Universal Declaration) confirming that every individual, regardless of distinction, possesses rights and freedoms that are inherent, inalienable, and universal in nature.²⁰ The existence of even the most progressive laws seeking to protect the rights of women will fail to support this goal, where members of society dilute such provisions through their own biases, assumptions, and stereotypes. This is acutely evident in the actions of the judiciary, police officers, and other civil servants mandated to safeguard the rights of women but who, nevertheless, apply their biases, stereotypes, and other harmful assumptions in assessing the veracity of claims made by women.²¹ Similarly, the actions of individuals in society who behave in alignment with these harmful socio-cultural norms often result in the marginalisation of women.²²

19 See United Nations Development Programme 'Breaking down gender biases: Shifting social norms towards gender equality' (June 2023) https://www.undp.org/sites/g/files/zskgke326/files/2023-06/gсни202302pdf_0.pdf 4. Here the report notes that '[g]ender social norms profoundly shape attitudes, social relationships and power dynamics, so they matter a great deal for upholding (or addressing injustice, as well as for shaping agency'.

20 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

21 See Communication 18/2008, *K.T. Vertido v the Philippines* (22 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010) para 8.4; Communication 20/2008, *V.K. v Bulgaria* (21 September 2011) UN Doc CEDAW/C/49/D/20/2008 (2011) para 9.11; Communication 47/2013, *Angela González Carreño v Spain* (15 August 2014) UN Doc CEDAW/58/D/47/2012 (2014) para 9.7; Communication 34/2011, *R.P.B. v The Philippines* (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014) para 8.8.

22 See *Carreño* (n 21); Communication 138/2018; *S.F.M v Spain* CEDAW Committee (28 February 2020) UN Doc CEDAW/C/60/D/48/2013 (2013). In *O.G v Russian Federation* CEDAW Committee (20 November 2017) UN Doc CEDAW/C/68/D/91/2015 (2015) para 7.2; *S.T. v Russia* CEDAW Committee (8 April 2019) UN Doc CEDAW/C/72/D/65/2014 (2014) para 9.5; *S.L. v Bulgaria* CEDAW Committee (10 September 2019) UN Doc CEDAW/C/73/D/99/2016 (2016) para 7.5; *J.I. v Finland* CEDAW Committee (25 April 2018) UN Doc CEDAW/C/69/D/103/2016 (2016) para 8.6; *Jallow v Bulgaria* CEDAW Committee (23 July 2023) UN Doc CEDAW/XC/52/D/32/2011; *Šabide Goecke v Austria* CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007) para 12.2; *Fatma Yildirim v Austria* CEDAW Committee (1 October 2007) UN Doc CEDAW/C/39/D/6/2005 (2007) para 12.2; *A.T. v Hungary* CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005) para 9.4 the CEDAW Committee notes a direct link between traditional attitudes about the subordination of women to men and incidences of domestic violence.

At this juncture, it is worth mentioning that the implementation of resocialisation measures must take place within the broader context of international human rights law, which safeguards all rights and freedoms.²³ As noted above, the Universal Declaration confirms that all individuals inherently possess rights and freedoms. Thus, when considering resocialisation and the measures required to affect the necessary modification that CEDAW and the Maputo Protocol mandate, states must maintain their obligations to protect, respect and fulfil all other rights of individuals, guarding against any risks of indoctrination or coerciveness. This, similarly, guards against the inappropriate use of resocialisation to further ulterior agendas which fall outside the scope of the positive norms international law elucidates. Implicit in a reading of the modification obligations, therefore, is the caution with which states must engage with resocialisation to ensure the respect of the rights of all. To provide further safeguards, the importance of women's voices in curating appropriate responses to the domination experienced is particularly significant. Article 17(2) supports this by mandating the participation of women at all levels in the determination of cultural policies, as noted in section 4.1 below. This gives effect to the importance of including women in the discourse on resocialisation and the measures implemented to create positive cultural contexts in a manner that is mindful of the rights and freedoms of all. The above caution, however, does not allow free reign to employ cultural dictates as shields to the realisation of women's rights. Where harmful conceptions of women exist, attempts at creating positive cultural contexts must include women, failing which cultural contexts will remain subject to existing cultural dictates, which are largely patriarchal in nature.²⁴

23 Note that the objective of article 5(a) is to make the necessary modifications to affect the overall elimination of prejudices and customary practices based on the superiority or inferiority of both women and men. It does not imply a violation of other rights in pursuit of modification.

24 In this regard it is pertinent to note that the Maputo Protocol contains several resocialisation provisions, including articles 4, 5, 8 and 12. It is beyond the scope of this chapter to analyse each of these provisions. See also below under section 4.1 for more on the implications of article 17 on other rights.

2.2 Cultural rights and the rights of women

As mentioned above, cultural rights are often seen to be at odds with the rights of women.²⁵ Cultural relativism regularly serves to justify discriminatory behaviour against women by states and society at large.²⁶ Notwithstanding this, culture often serves as a source of women's empowerment.²⁷ Thus, to hold that culture is inherently anti-women's rights has the potential to further marginalise women.²⁸ Resocialisation is crucial to ensuring that harmful cultural norms and practices are not employed as shields against the realisation of women's rights.

In the context of this research, where reference is made to cultural practices these include discriminatory practices against women in the name of religion. While international and African regional law makes no reference to the modification of harmful patterns of conduct undertaken in the name of religion, this research argues that reference to social and cultural patterns of conduct includes those undertaken in the name of religion. As Raday notes, '[c]ulture ... is a microconcept, definitive of human society, and the concept of 'cultural practices' thus subsumes the religious norms of societies'.²⁹ Furthermore, the Committee on Economic, Social and Cultural Rights (Socio-Economic Rights Committee) includes religion or belief systems as forming part of culture.³⁰ The emphasis placed on the modification of *all practices*, as provided for in international and regional law, supports the position that those practices undertaken in the name of religion are similarly subject to modification by states.³¹

25 Tamale (n 9) 47. See also, UN General Assembly Report of the Special Rapporteur in the field of cultural rights 'Cultural rights' (2012) UN Doc A/67/287 para 3.

26 SM Okin 'Feminism, women's rights and cultural differences' (2018) 13 *Hypatia* 32, 33. See also United Nations General Assembly (n 25) para 3 which notes that 'many practices and norms that discriminate against women are justified by reference to culture, religion and tradition, leading experts to conclude that 'no social group has suffered greater violation of its human rights in the name of culture than women' and that it is 'inconceivable' that a number of such practices 'would be justified if they were predicated upon another protected classification such as race'.

27 United Nations General Assembly (n 25) para 5.

28 Xanthaki (n 1) 701, 702.

29 F Raday 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 663, 678.

30 General Comment 21 (n 3) para 13.

31 Emphasis added.

While the right to culture is codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to freedom of religion and belief (FoRB) in the International Covenant on Civil and Political Rights (ICCPR), overlaps exist. Indeed, as Donders notes,

the fact that a certain right is considered a cultural right does not mean that it cannot also be considered a civil, political, economic and social right. For instance, the rights to freedom of religion and freedom of expression can be seen as cultural rights, but they can also be considered political or civil rights.³²

Thus, it is important to note at the outset that references to culture as a source of discrimination against women include assumptions, biases, and practices in the name of religion.

Furthermore, the positioning of freedom of speech within resocialisation obligations is worth briefly mentioning as it also falls within the scope of cultural practices and the accompanying rights of individuals to culture. As noted above, socialisation processes result in the internalisation of societal norms and standards and ascribe meaning to societal functioning. Speech contributes to the socialisation process and can, indeed, be harmful when derogatory in nature towards women. Derogatory speech has the potential to further embed harmful conceptions about women underpinning gender discrimination. As noted by Donders above, culture includes expression and the freedom of individuals to expression. Similarly, in the report of the Special Rapporteur in the field of cultural rights, culture is defined as including a broad range of issues,

such as expression and creation, including diverse forms of art; language; identity and belonging to multiple, diverse and changing groups; development of specific world visions and the pursuit of specific ways of life; education and training; access, and contribution to and participation in cultural life; and the conduct of cultural practices and access to cultural heritage.³³

Rights and freedoms are not generally absolute and are, therefore, subject to limitation in certain circumstances. Limiting cultural rights and, by implication, freedom of expression with a view to reshaping

32 Y Donders 'Cultural rights in international human rights law: From controversy to celebration' (2020) *Japanese Yearbook of International Law* 63–64.

33 United Nations General Assembly 'Cultural Rights: Tenth Anniversary Report, Report of the Special Rapporteur in the Field of Cultural Rights' (17 January 2019) UN Doc A/HRC/40/53 para 13.

societal conceptions of women as humans possessing inherent dignity through resocialisation then becomes acceptable, just as other rights are sometimes limited. Thus, the right to freedom of expression is similarly implicated and limited where that expression forms part of culturally accepted norms and serves to undermine the rights and freedoms of women.³⁴ For instance, locker-room talk, catcalling, song lyrics, and other forms of expression that contribute to violence against women and other forms of discrimination must also be limited to give way to the rights of women to live lives free from such, and to their rights to a positive cultural context.³⁵ Indeed, those cultural contexts that demean and undermine women are not positive in nature and fall foul of cultural rights and the right of women to positive cultural contexts. As noted in section 4.3 below, resocialisation remains underutilised as a tool to facilitate the creation of positive cultural contexts.

Further, the term 'culture' is one that implies fluidity.³⁶ Thus, by its very nature, culture is ever-changing. Where the right to culture dominates over women's rights, it arguably signals the need for the modification of the culture in question through resocialisation to ensure its alignment with the rights of women.

Culture can be found in every part of the world and is influenced by socialisation processes informing perspectives and practices.³⁷ It is, therefore, crucial to scrutinise all cultures, not only those historically determined to be incompatible with human rights standards, when analysing culture and its implications on women's rights. Colonisation and imperialistic agendas have shaped societal thinking regarding global cultural practices and norms, demonising those from select parts of the world while normalising the rest.³⁸ Notwithstanding such normalisation,

34 A Rudman "Whores, sluts, bitches and retards" – What do we tolerate in the name of freedom of expression? (2012) 26 *Agenda* 72, 73. Here Rudman notes that '[f]rom a legal perspective it is of importance to acknowledge that the rights to equality and dignity should generally hold more weight and trump the clause on freedom of expression when a conflict arises'.

35 See Rudman (n 34) more generally on how freedom of expression through song lyrics entrenches misogynistic conceptions of women in society.

36 Tamale (n 25) 49. See also General Comment 21 (n 3) para 11.

37 Tamale (n 25) 49. Here Tamale notes that 'we are all cultural beings in the sense that we are influenced by an infinite number of social forces that have shaped our mental outlook and perspectives on life. The collectivity of those experiences constitutes the cultural context within which we operate'.

38 See L Volpp 'Feminism versus multiculturalism' (2001) 101 *Columbia Law Review* 1181, 1186 where the author notes that '[p]art of the reason many

cultural practices such as the gender pay gap, the motherhood penalty, street harassment and other such practices seemingly ‘Western’ in nature must similarly withstand scrutiny when balanced against women’s rights. Thus, resocialisation has a part to play in every corner of the world and is applicable to all states and the individuals within its jurisdictions. Furthermore, when considering the cultural rights and the rights of women, an intersectional lens provides a broader understanding and appreciation of culture to the lived realities of women.³⁹ It is with this in mind that the following analysis of cultural rights is informed, with the international and African regional frameworks as providing the legal basis on which a balancing act is to occur.

3 The international human rights framework

The international legal framework does not contain a similar provision to that of article 17 of the Maputo Protocol. Notwithstanding this, the necessity of ensuring that cultural rights do not undermine women’s rights is underscored on several occasions, paving the way for an interpretation of cultural rights as inherently positive in nature. The analysis below considers the position of international law on the rights to culture, informed by general comments and the reports of the Special Rapporteur on Cultural Rights, as well as General Comments by the Human Rights Committee and the Socio-Economic Rights Committee. This is followed by a discussion on the rights of women as contained in CEDAW and the guidance provided by the CEDAW Committee.

3.1 Cultural rights

The Universal Declaration provides for the right to culture in article 27. It provides that ‘[e]veryone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’. Article 18 protects the rights of individuals to FoRB, while article 19 provides for the rights of individuals to freedom of

believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behaviour of a few deviants – rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations’.

39 United Nations General Assembly (n 33) paras 21 and 22.

opinion and expression. These rights are, however, limited by article 30, which provides that '[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

This right to culture is further instilled in article 15 of the ICESCR, recognising the rights of individuals to take part in cultural life. As General Comment 21 notes,

[t]he decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality.⁴⁰

The freedom to choose to participate in any given cultural context, therefore, remains at the heart of this right to culture and herein lies the tension. Where harmful practices are legitimised on the basis of cultural norms, the forced cultural participation of women in such practices falls foul of international norms and standards. Indeed, General Comment 21 on the right of everyone to take part in cultural life confirms this position.⁴¹ General Comment 28, which addresses the equality of rights between women and men notes that,

[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes ... Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.⁴²

Thus, child marriage, female genital mutilation (FGM), honour killings, domestic and gender-based violence (GBV) and any form of discrimination justified on the basis of culture, in the name of religion or as forming part of freedom of expression fall beyond the bounds of international law protections.⁴³ The role of resocialisation in effecting change in current conceptions of culture and cultural rights – and,

40 General Comment 21 (n 3) para 7.

41 General Comment 21 (n 3) para 18 notes that 'no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope'.

42 General Comment 28 (n 3) para 5.

43 In this regard see, African Court in *Association pour le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institution for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380, where the state justified the promulgation of legislation despite its discriminatory

by implication, the creation of positive cultural contexts – is, thus, significant. Indeed, the Special Rapporteur on Cultural Rights notes that cultural rights include the rights of individuals to contribute to cultural creation.⁴⁴ This is underscored by article 17(2) of the Maputo Protocol, which mandates states to ensure that women are able to participate in the determination of cultural policies. As the Special Rapporteur notes, culture creation implies, ‘contestation of dominant norms and values within the communities they choose to belong to as well as those of other communities’.⁴⁵ Such contestation involves resocialisation, which necessarily gives rise to the elimination of harmful dominant norms and the creation of positive cultural contexts. The role of states in ensuring that positive cultural contexts and that appropriate conditions exist for women to exercise their right to contribute to cultural policies, therefore, is underscored by the Special Rapporteur on Cultural Rights, where it is noted that,

[w]omen’s roles as important signifiers of cultural groups stands in sharp contrast to their lack of influence in relevant decision-making processes and their limited opportunities to further develop cultural life. When women do claim their right to not participate in specific customs, to interpret, amend and reshape the contours of their cultural communities, they often confront disproportionate opposition, including different forms of violence, for acts as apparently simple as freely choosing who to marry, how to dress or where to go.⁴⁶

According to the Special Rapporteur, free participation in cultural contexts, as well as the development, creation, revision, embrace or rejection of cultural practices, is protected in international law.⁴⁷ The obligation to respect mandates the adoption of measures that ensure, amongst others, the rights of individuals, most significantly women, to freely choose whether or not to belong and recognise cultural contexts

provisions on the basis of the threat of violence and social disruption at the hands of religiously motivated communities, ie, discrimination in the name of religion.

44 General Comment 28 (n 3) para 10.

45 General Comment 28 (n 3) para 10. In this regard, the Special Rapporteur on Cultural Rights notes in United Nations General Assembly (n 25) para 19 that ‘[t]hose contesting prevailing norms and practices to promote gender equality may be condemned as “cultural traitors”’. The role of resocialisation in modifying mindsets that give rise to such a view is, therefore, underscored.

46 United Nations General Assembly (n 25) para 22.

47 United Nations General Assembly (n 25) para 28.

and to have that choice respected.⁴⁸ Resocialisation ensures the freedom to belong and have choices respected.

As mentioned, rights are not generally absolute. Thus, limitations may occur where the right to culture infringes on women's rights. Indeed, General Comment 21 notes that the application of limitations to cultural life might be necessary 'in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights'.⁴⁹ It falls to the state, therefore, to respect, protect and fulfil the cultural rights of all, while protecting the rights of women from cultural relativism. The right to a positive cultural context, therefore, implicates choice. Similarly, the ICCPR limits the right to FoRB in article 18(3) to 'protect ... the fundamental rights and freedoms of others'. The right to freedom of expression, as noted in article 19(3) of the ICCPR, 'carries with it special duties and responsibilities'. Thus, expressions that result in entrenching harmful stereotypes, assumptions, biases and practices against women similarly fall foul of international law protections. In this regard, the freedom to express oneself is limited where such expression undermines the respect of the rights or reputations of others, women included.⁵⁰

Finally, it is important to note that resocialisation values the role of positive culture and the cultural rights of all. As highlighted in section 4.3 below, the emancipatory potential of culture to women is underscored, notably when women's voices are an inherent component of culture creation and the development of resocialisation measures aimed at harmful cultural practices. Is it not, therefore, the objective of resocialisation to homogenise culture or to erase any important identity markers that the culture in question bestows on women. Its sole aim and target is the elimination of those elements that are harmful in nature and which fuel discrimination against women. The role of consciousness-raising, as noted in section 1 above, surfaces to guard against employing resocialisation as a tool to further oppress the very women it seeks to benefit.

48 General Comment 28 (n 3) para 49. See also United Nations General Assembly 'Report of the Independent Expert in the Field of Cultural Rights, Ms. Farida Shaheed, Submitted Pursuant to Resolution 10/23 of the Human Rights Council' (22 March 2010) UN Doc A/HRC/14/36 para 12.

49 General Comment 28 (n 3) para 19.

50 ICCPR art 19(3)(b).

3.2 Women's rights

As noted above, CEDAW's resocialisation provision is found in article 5(a). Here, states are mandated to modify harmful cultural practices underlying gendered discrimination. Where done through resocialisation, the rights of women to a positive cultural context are necessarily closer to realisation. As noted in section 2.1 above, to give effect to transformative gender equality, states are required to 'address prevailing gender relations and the persistence of gender-based stereotypes that affect women ... in societal structures and institutions'.⁵¹ Further, the CEDAW Committee reiterates the obligation on states to effect the necessary transformation to ensure that 'opportunities, institutions and systems ... are no longer grounded in historically determined male paradigms of power and life patterns'.⁵² Such transformation results in the provision of positive cultural contexts through resocialisation.

CEDAW contains several provisions protecting the rights and freedoms of women. Notable across this convention, however, is the prioritisation of women's substantive rights over cultural dictates. For instance, article 16 refers to the equality of women in matters pertaining to marriage and family relations, including the right of women to choose a partner freely. Given the prevalence of child marriages, which inherently exclude the element of choice, this right trumps the cultural practice of marrying children off at a young age in the name of religion or culture. Similarly, article 11 provides for the elimination of discrimination against women in the field of employment, which necessarily implicates the gender pay gap, a cultural phenomenon that regularly escapes scrutiny due to its normalised nature.

The notion of culture as inherently fluid in nature, as discussed above, is reinforced by the CEDAW Committee, which highlights culture's characteristic as 'a dynamic aspect of the country's life and social fabric and is subject, therefore, to change'.⁵³ This, then, reinforces the

51 General Recommendation 25 (n 18) para 7.

52 General Recommendation 25 (n 18) para 10.

53 UN GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (2004) UN Doc A/59/38 para 147; UN CEDAW Committee 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Mozambique' (11 June 2007) UN Doc CEDAW/C/MOZ/CO/2 para 21; CEDAW Committee Concluding Observations on the Fifth

importance of resocialisation to effect such change in a positive manner and to realise the rights of women to a positive cultural context. Indeed, it is this fluidity that uniquely places culture in a position to regularly assess the appropriateness of practices and behaviours in relation to international norms. The existence of the right of women to contribute to the formulation of cultural policies, as discussed in section 4 below, underscores this fluidity. In this regard, the CEDAW Committee highlights the importance of eliminating culturally based justifications for rights violations in several concluding observations to state reports. For instance, in its Concluding Observations to Belgium, the CEDAW Committee commends the state for implementing legislation combating violence committed 'in the name of culture, customs, religion, tradition or so-called 'honour', including genital mutilation'.⁵⁴ It recommends to the state that perpetrators of GBV in the name of culture, customs, religion, tradition or so-called 'honour' are adequately prosecuted and punished.⁵⁵ Furthermore, it recommends that the state

raise awareness among religious leaders, target communities, legal and health professionals and the general public about the criminal nature of acts of gender-based violence against women committed in the name of so-called 'honour' and that religious and customary rules, as well as notions of so-called 'honour', cannot be invoked to justify such acts.⁵⁶

Several points are noteworthy in this regard. The first is that while this Concluding Observation does not speak directly to the fluidity of culture, the fact that the CEDAW Committee refers to socio-cultural norms and standards as justifications for rights violations and the necessity of the state in ensuring that such cultural relativism is prosecuted and punished implies not only that the culture on which such harms are based must be modified to reflect the equal humanity of women but also that culture is capable of change. Second, the CEDAW Committee underscores the necessity of resocialisation in specific groupings as well as in the generality of the population for the purposes of making the necessary

Periodic Report of Madagascar (7 November 2008) UN Doc CEDAW/C/MDG/CO/5 (2008) para 17.

54 UN Committee on the Elimination of Discrimination against Women 'Concluding Observations on the Eighth Periodic Report of Belgium' (1 November 2022) UN Doc CEDAW/BEL/CO/8 para 4(e).

55 CEDAW Committee Concluding Observations Belgium (n 54) para 30(a).

56 CEDAW Committee Concluding Observations Belgium (n 54) para 30(c).

modifications to existing cultural norms that permit discriminatory treatment. This, again, implies fluidity while also underscoring the crucial role that resocialisation plays in facilitating cultural change. Third, the CEDAW Committee emphasises that cultural relativism may under no circumstance act as justification for the violation of women's rights. The CEDAW Committee, therefore, highlights that cultural change is not only possible but necessary and mandated by law.

Similarly, in its Concluding Observations to Georgia, the CEDAW Committee recommends that the state combat child marriage by 'addressing its root causes'.⁵⁷ These root causes include socio-cultural norms underlying such practices. The CEDAW Committee, therefore, implies the implementation of resocialisation to utilise the fluid nature of culture and modify the cultural norms legitimising child marriage. In its Concluding Observations to Honduras, the CEDAW Committee notes the culture of impunity that exists in the justice system, undermining the rights of women to access to justice.⁵⁸ In this regard, it recommends the implementation of resocialisation to 'eliminate gender bias and stereotyping and on gender-sensitive investigation and interrogation methods'.⁵⁹ Furthermore, in the context of rural and indigenous women, the CEDAW Committee recommends that the state prevent, address, sanction and eradicate GBV, including 'cultural violence'.⁶⁰ This, too, implies resocialisation and the necessity of modifying harmful cultural frameworks legitimising violations of rights. The Concluding Observations to Mauritania similarly notes the prevalence of harmful practices based on cultural dictates, such as FGM.⁶¹ In this regard, it recommends resocialisation and the elimination of 'underlying cultural justifications'.⁶²

57 UN Committee on the Elimination of Discrimination against Women Concluding Observations on the Sixth Periodic Report of Georgia (2 March 2023) UN Doc CEDAW/C/GEO/CO/6 para 44(a).

58 UN Committee on the Elimination of Discrimination against Women Concluding Observations on the Ninth Periodic Report of Honduras (1 November 2022) UN Doc CEDAW/C/HND/CO/9 para 14.

59 CEDAW Committee Concluding Observations Honduras (n 58) para 15(c).

60 CEDAW Committee Concluding Observations Honduras (n 58) para 43(b).

61 UN Committee on the Elimination of Discrimination against Women Concluding Observations on the Fourth Periodic Report of Mauritania (2 March 2023) UN Doc CEDAW/C/MRT/CO/4 para 20.

62 CEDAW Committee Concluding Observations Mauritania (n 61) para 21(a).

While the CEDAW Committee highlights the problematic nature of cultural justifications for discriminatory practices of an egregious nature, for instance, child marriage and FGM, the same is true of culturally based practices considered as 'lesser infringements'. Based on the above, it is clear that within the framework of international law, culturally derived justifications for discrimination against women, regardless of nature, are not protected in law. Thus, the right of women to positive cultural contexts, while not as explicit as article 17 of the Maputo Protocol, is clearly provided for and protected in international law. Resocialisation facilitates the necessary cultural shifts that move away from harmful cultural dictates to those that recognise the equal humanity of women and which similarly value women's contributions to positive cultural development. In working towards the elimination of all forms of discrimination against women, the CEDAW Committee, as noted in the above examples, confirms the necessity of resocialisation as a means to such elimination.

4 The African regional human rights framework

4.1 Concepts and definitions

The African Charter serves as the point of departure for the analysis of culture and the rights of women on the continent in this chapter. Article 17(2) of the African Charter provides for the freedom of every individual to 'take part in the cultural life of his community'. Furthermore, article 17(3) mandates that '[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State'. Article 22 further protects cultural rights by providing that '[a]ll peoples' shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' while article 29(7) refers to the individual duty to

preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

The above provisions frame culture in positive terms. Culture is conceived of as something worthy of protection by individuals and the state, but only insofar as they contribute to the well-being of society.

Discrimination against women does not contribute to the well-being of society. Indeed, the African Commission has emphasised that the 'right to culture protects *positive* African values consistent with international human rights standards and implies an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights'.⁶³ This underscores the necessity of eliminating the cultural elements undermining rights and replacing them with those that give rise to positive cultural contexts. Similarly, it emphasises the importance of positive cultural contexts generally.

As is the norm, rights and freedoms may be limited in certain circumstances. Article 27(2) of the African Charter provides for such limitation by highlighting that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. This gives further credence to the notion that cultural rights are protected only insofar as they exhibit positive traits and do not infringe on the rights of others, women included. By implication, this limitation protects the rights of women to positive cultural contexts where harmful cultural norms and practices dominate. Resocialisation plays a crucial role in modifying those cultural norms and practices that serve as barriers to rights and replacing them with cultural norms and practices that respect rights.

Article 17 of the Maputo Protocol provides:

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
2. State Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

In contrast to international law, article 17 of the Maputo Protocol clearly provides for the rights of women to a positive cultural context. This explicit reference underscores the importance of modifying harmful cultural norms and behaviours underpinning gendered discrimination in an effort to bring about positive cultural contexts within which women can operate. This right arguably counters cultural relativism and entitles women to environments positive in nature, regardless of what those cultures are. The implication, therefore, is cultural change recognising

63 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011) para 75.

the rights of women to contexts free from socio-cultural norms, stereotypes, biases and other harmful conceptions and practices relating to women. This provision, therefore, mandates the implementation of resocialisation to achieve this end.

The realisation of the right to positive cultural contexts, as noted above, has broader implications for the other rights and freedoms contained in the Maputo Protocol. Where cultural contexts are modified through resocialisation to exhibit positive traits, the denial of other substantive rights no longer rests on cultural bases. Indeed, much of the discrimination women face is founded on cultural norms. The realisation of article 17 through resocialisation eliminates those bases, paving the way for the recognition of women as equal in every aspect of societal functioning. As Ssenyonjo highlights, this right is 'intrinsically linked to, and is dependent on the enjoyment of, other human rights'.⁶⁴ Ssenyonjo notes further that article 17 'seeks to encourage the active contribution of all members of society to the progress of society as a whole'.⁶⁵ Thus, those cultural contexts that threaten the right to education, for example, because the girl child is culturally expected to be married at a young age, must be modified to eliminate entirely the discourse and practice of child marriage and to allow girls the freedom to continue with their education.

Similarly, the cultural contexts that entrench stereotypes dictating how a woman ought to behave in instances of sexual and GBV, for example, must also be eliminated to give effect to women's rights to access to justice free from such stereotyped conceptions. The elimination of the underlying cultural determinants of gendered discrimination must take place through resocialisation. As Mahmoudi and Rudman note, 'appeals to cultural rights as justification for discrimination are untenable given that the right to culture protects positive practices and the rights of individuals to choose whether and if they want to participate in such cultures'.⁶⁶ Conversely, where violations of other substantive rights occur, a violation of the right to a positive cultural context is also violated. For instance, where child marriage occurs in violation of article 6(b) of the Maputo Protocol, the creation of a new, harmful cultural context within

64 M Ssenyonjo 'Culture and the human rights of women in Africa: Between light and shadow' (2007) 51 *Journal of African Law* 39, 52.

65 Ssenyonjo (n 64) 52.

66 Mahmoudi & Rudman (n 11) 12.

which the child finds herself (the marriage) triggers state responsibility for the violation of her right to a positive cultural context over and above an article 6(b) violation. Where states fail to actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women, as per article 4(2)(d) of the Maputo Protocol, it leaves the harmful socio-cultural norms contributing to violence intact, violating the right of women to a positive cultural context as well as the right contained in article 4(2)(d). Article 17, therefore, is intimately connected to other substantive rights in the Maputo Protocol.⁶⁷

The second prong of article 17 involves the right of women to participate in the formulation of cultural policies. This recognises the intersectional nature of women's identities by acknowledging the value of culture to women and the important contributions women make to their respective cultural contexts.⁶⁸ Furthermore, it positions women as active participants in society rather than passive recipients of what men have for centuries assumed benefits women.⁶⁹ Failure to include women in cultural creation has the potential to further marginalise women and inevitably results in the maintenance of harmful cultural contexts that legitimise gendered discrimination. Viewed through an intersectional lens, the value of other intersecting identities, such as culture, to the lived realities of women becomes that much more apparent. As Johnson notes, 'a positive cultural context is free of behaviour, attitudes, and practices that negatively affect the fundamental rights of women and girls and are contrary to international standards.'⁷⁰ To achieve this end, resocialisation is required as mandated by article 2(2) of the Maputo Protocol and article 5 of CEDAW.

67 A Johnson 'Article 17: Right to a positive cultural context' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 357, 360.

68 In this regard it is important to note that the participation of women in culture creation ensures that the positive aspects of any given cultural contexts remain, guarding against cultural essentialism.

69 J Geng 'The Maputo Protocol and the reconciliation of gender and culture in Africa' in SH Rimmer & K Off *Research handbook on feminist engagement with international law* (2019) 11. See also Ssenyonjo (n 64) 51.

70 Johnson (n 67) 366.

4.2 State obligations

Generally speaking, the right to a positive cultural context responds to society's over-reliance on socio-cultural norms as justification for violations of women's rights. Similarly, it frames culture as a positive aspect of the lives of individuals, women included, and implicitly expects that women be viewed through an intersectional lens. The emancipatory potential of positive culture to women is, thus, underscored when women are afforded the right to participate in cultural creation. Such cultural contexts and the contribution of women to such must, however, be based on African values, as provided by the preamble of the Maputo Protocol, which includes equality, peace, freedom, dignity, justice, solidarity, and democracy.⁷¹

Resocialisation operates as an obligation, right and remedy.⁷² Resocialisation as an obligation includes the obligation to respect, fulfil and protect the rights of women as contained in international and African regional law.⁷³ Specifically, the obligation to respect article 17 of the Maputo Protocol requires that states refrain from promulgating laws, policies, practices and the like that prioritise cultural rights over the right of women to a positive cultural context. States are also obligated to refrain from entrenching harmful attitudes, assumptions, stereotypes, and other harmful norms that contribute either directly or indirectly to existing harmful cultural contexts or to the creation of new ones. Thus, 'where the state refuses to uphold or enhance practices that have the potential to promote a positive cultural context for women but opts instead for rigid interpretations or applications that erode that potential, the state has failed to respect women's right to live in a positive cultural context.'⁷⁴ The obligation to respect includes ensuring that states refrain from preventing women from participating in the formulation

71 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72, 75. See also the preamble to the Maputo Protocol.

72 Mahmoudi & Rudman (n 11)

73 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28: Core obligations of state parties under article 2 of the Convention on Discrimination against Women (2010) UN Doc CEDAW/C/GC/28 para 9. While this relates to the provisions of CEDAW, the principles are directly applicable to any of the provisions relating to the rights of women, in this case article 17 of the Maputo Protocol.

74 A Johnson (n 70) 367.

of cultural policies. This includes performative inclusion that results in the erasure of women's contributions to cultural policies. Indeed, the African Commission's General Comment 28 notes in relation to state reporting obligations that states must 'pay attention to the contribution made by women to the cultural life of their communities'.⁷⁵ This prong of article 17 is significant given that culture has, as a result of socialisation processes in a largely patriarchal society, been developed by and for the benefit of men.

The obligation to protect implicates the due diligence obligation on states to protect women from harms emanating from private actors. States may not, therefore, justify violations of article 17 on the basis of such violations occurring at the hands of non-state actors. This is of significance in instances of sexual and GBV, which often occur in the private sphere and which have, on that basis, been seen as a 'private matter'. In fact, this is a good example of a negative cultural context created by non-state actors. Resocialisation measures must, therefore, target both state and non-state actors to ensure violations do not occur. Lastly, the obligation to fulfil requires that states implement steps, including temporary special measures, to realise both formal and substantive transformative gender equality.⁷⁶ The obligation to fulfil necessarily implicates resocialisation as it is only through the modification of harmful socio-cultural norms through resocialisation that substantive transformative equality is possible.⁷⁷ Thus, to give effect to the right of women to a positive cultural context, states must put in place resocialisation measures to disturb and modify the underlying determinants of gendered discrimination generally and violations of article 17 in particular.

Not only do states have an obligation to the realisation of article 17, but women also possess the right to positive cultural contexts possible through resocialisation. As noted above, where violations of other substantive rights occur, a violation of the right to a positive cultural context occurs in tandem. Thus, any invocation of violations of other substantive rights

⁷⁵ General Comment 28 (n 3) para 32.

⁷⁶ General Recommendation 28 (n 73) para 9.

⁷⁷ It is important to note that while resocialisation is an essential, legally mandated tool to realising the rights of women to equality, the change that resocialisation seeks to bring about is neither easy nor instant. It is a long, ongoing process but one which must, nevertheless, be implemented to ensure alignment with international and African regional law obligations.

against a state could also include a violation of article 17. This provision also, however, operates as an independent right. Finally, resocialisation as a remedy in the context of article 17 asks of adjudicatory fora, in its prayers for remedies, to enforce the right of women to a positive cultural context. This is done by such fora providing resocialisation remedies such as awareness-raising programmes, educational measures, the use of the media to cultivate alternative, human rights-affirming discourses and other resocialisation strategies that aim to instil the equal humanity of women.

4.3 Practice

This section considers the practice of states in relation to article 17 through state reports to the African Commission, the African Commission's Concluding Observations in response to state reports, the African Court on Human and Peoples' Rights, ECOWAS Court and domestic case law to demonstrate the manner in which this provision is engaged with on the continent.

States generally do not report adequately on this provision. Indeed, most states assess and report on this provision narrowly and predominantly on initiatives relating to the construction of cultural centres, libraries, museums and other cultural spaces and events,⁷⁸ while others simply report that women have equal rights in cultural life without providing any details in this regard.⁷⁹ As noted above, this provision is broader in

78 See, eg, Republic of Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa (2011–2016) (January 2017) para 102–110. See also, Gambia Combined Report on the African Charter (1994 and 2018) and Initial Report under the Maputo Protocol (August 2018) 160 where the only reference it makes to article 17 is this: 'Section 32 of the Constitution guarantees the right to culture in The Gambia. The Government has taken several measures to promote and preserve the cultural heritage of its people. The National Centre for Arts and Culture is tasked with, amongst others, the promotion and development of Gambian arts and culture'. See also, The Republic of Namibia Seventh Periodic Report (2015–2019) on the African Charter on Human and Peoples' Rights and the Second Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) 125.

79 Burkina Faso Periodic Report of Burkina Faso Within the Framework of the Implementation of Article 63 of the African Charter on Human and Peoples' Rights (January 2015) para 349. See also Lesotho Combined Second to Eighth Periodic Report Under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women

scope and includes socio-cultural norms, practices, attitudes, and the like normalising gendered discrimination. The Democratic Republic of Congo's account of actions taken in pursuit of the realisation of this right, however, acknowledges the role that harmful socio-cultural norms play in undermining women's rights in terms of article 17 and notes that 'Congolese culture does not encourage the promotion of women.'⁸⁰ Such an account, while still incomplete, demonstrates a greater awareness of the right of women to a positive cultural context. Malawi, similarly, notes the influence of socio-cultural norms on article 17 rights, highlighting efforts made to enact legislation to enhance 'positive cultural context[s] for women.'⁸¹ South Africa also provides a broader account of this right by noting the right of all to participate in cultural life guaranteed by the Constitution of the Republic of South Africa, 1996 (Constitution). It notes that 'to ensure discriminatory and harmful cultural practices are not practised, the Constitution provides that anyone exercising his or her culture may not do so in a manner inconsistent with any provision of the Bill of Rights.'⁸² In this regard, it notes the legislative guarantees protecting the rights of women but does not stipulate how

in Africa (April 2018) para 489 where it notes that 'the Constitution provides that Lesotho shall endeavour to ensure that every citizen has an opportunity to freely participate in the cultural life of the community'. At para 489 it notes that the Gender and Development Policy of 2003 provides that positive aspects of the Sesotho culture shall be retained and used for protection of previously marginalised groups such as women. As a result, women and girls in Lesotho do not face any major barriers participate in the cultural life of their communities. At para 491 it notes that '[w]hile women have opportunity to share their creativity through artistic cultural items such as "mokorotlo" (Basotho hats), clay pots, tapestry, traditional dresses and others, sex-specific challenges hinder them from accessing specialized technical and entrepreneurial training as well as financial resources which would enable them to benefit fully from their participation in cultural activities'.

- 80 Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights From 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005–2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) (2017) para 292.
- 81 Republic of Malawi Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013) and the Protocol to the African Commission on Human and Peoples' Rights on the Rights of Women (2005–2013) (2015) para 225.
- 82 Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 2003–2014 (2015) para 481.

these guarantees operate in practice and their implications on the lived reality of women. Like other state reports, it also emphasises efforts made to protect cultural heritage,⁸³ to protect cultural and language communities,⁸⁴ and to implement cultural events.⁸⁵ Though broader in scope, it does not effectively report on its article 17 obligations. Lastly, Togo notes that 'women's cultural environment is much more threatened by gender stereotypes.'⁸⁶ Notwithstanding, nothing more is reported, and the report redirects the reader to efforts made in terms of article 4(2)(c) of the Maputo Protocol to combat stereotypes. It is unfortunate that the state does not engage with this provision in more depth beyond stereotypes to address broader socio-cultural norms violating women's right to a positive cultural context.

The African Commission's Concluding Observations to Burkina Faso⁸⁷ is the only one that refers to article 17 in any depth. In reference to the 'right to a favourable cultural environment', the African Commission highlights the equal rights of women and men to 'recreational activities, sports and all aspects of cultural life.'⁸⁸ Unfortunately, the African Commission similarly misconstrues the obligations associated with article 17. The African Commission's own engagement with this provision is, therefore, lacking in substance and misses an opportunity to guide the state on appropriately honouring this obligation.

At an adjudicatory level, the African Court in *Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institution for Human Rights and Development in Africa (IHRDA) v Mali (APDF)*⁸⁹ was tasked with determining whether a new Family Code aligned with Mali's human rights commitments. Several provisions of

83 Combined Report of South Africa (2015) (n 82) para 490.

84 Combined Report of South Africa (2015) (n 82) para 491.

85 Combined Report of South Africa (2015) (n 82) para 486.

86 State of Togo 6th, 7th and 8th Periodic Reports of the State of Togo on the Implementation of the African Charter on Human and Peoples' Rights (August 2017) 174.

87 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights 2011–2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February–4 March 2017).

88 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011–2013), adopted at its 21st extra-ordinary session para 49.

89 *APDF* (n 43).

the Family Code were said to violate the rights of women despite human rights guarantees to which Mali was bound. The state averred that to avoid social upheaval from religious communities it was obligated to maintain discriminatory laws to align them with religious beliefs.⁹⁰ The state prioritised cultural rights, suggesting that ‘established rules must not eclipse social, cultural and religious realities’.⁹¹

While this case does not refer to article 17 of the Maputo Protocol, it is significant in this context for several reasons. The first is that it demonstrates a prioritisation by a state of cultural norms and practices over the rights of women. Second, the African Court found a violation of the two primary resocialisation provisions contained in CEDAW and the Maputo Protocol: article 5 of CEDAW and article 2(2) of the Maputo Protocol. This is significant in that it directly implicates resocialisation and the mandate on states to modify the underlying socio-cultural norms, biases, assumptions, and the like legitimising the enactment of the discriminatory code in question. The African Court, therefore, found that the Family Code violated resocialisation commitments. Third, the remedy the African Court provided for included the implementation of resocialisation in accordance with article 25 of the African Charter, which mandates states to ensure human rights, respect and awareness through education.⁹² Thus, while no allegation of a violation of the right of women to a positive cultural context was made, the negative cultural context that would arise as a result of the promulgation of a Family Code in violation of international and African regional law is evident. Article 17 is, therefore, a core component of this case, even if not explicitly stated. Had reference been made to article 17, it is not inconceivable that the African Court would have found a violation of article 17 and that it would provide the same article 25 remedy to address the root causes of

90 *APDF* (n 43) para 64. Here the state notes that the opposition to this new Family Code resulted in ‘a huge threat of social disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion; that the mobilisation of religious forces attained such a level that no amount of resistance could contain it’.

91 *APDF* (n 43) para 66.

92 African Charter art 25, which provides: States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood. See also Mahmoudi & Rudman (n 11) 19 for more on *APDF*.

discrimination through education, thereby facilitating the realisation of positive cultural contexts. Resocialisation, therefore, plays a crucial role.

The ECOWAS Court provides further insight into how culture and the rights of women are engaged with, though without direct reference to article 17. In *Hadijatou Mani Koraou v The Republic of Niger (Mani)*,⁹³ the ECOWAS Court was faced with a matter involving slavery and gender discrimination, notably the practice of 'Wahiya', which involves the sale of young girls to older men. Similar to *APDF*, this case does not refer to article 17 of the Maputo Protocol. The facts, however, demonstrate an unwillingness on the part of the state to protect women against harmful cultural practices founded on the inferiority of women, implicitly prioritising culture over women's rights and necessarily violating article 17 rights. The ECOWAS Court held that slavery did exist, confirming that 'the defendant becomes responsible under international as well as national law for any form of human rights violations of the applicant founded on slavery because of its tolerance, passivity, inaction and abstention with regard to this practice'. This case, therefore, demonstrates the influence of harmful socio-cultural norms on the rights of women and the accompanying creation of negative cultural contexts as a result. While this case does not refer to article 17 or any Maputo Protocol provision for that matter, it does demonstrate how the right of women to a positive cultural context implicitly arises. The ECOWAS Court, however, fell short of ordering the state to modify this harmful cultural practice in alignment with human rights standards, missing an opportunity to engage with resocialisation.

In *Adama Vandi v State of Sierra Leone*,⁹⁴ the ECOWAS Court was faced with another case involving negative cultural contexts, though without direct reference to article 17. In this regard, it involved a secret society presided over by a masked man named the 'Poro Devil'. This 'Poro Devil' was known for its 'ability' to impact women's fertility and for its ability to make women disappear when caught, ultimately creating a culture of fear surrounding its presence. It is this culture of fear that led to the rape of the applicant and to a general culture of rape and impunity.

93 *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (2008) para 85.

94 *Adama Vandi v State of Sierra Leone* ECW/CCJ/JUD/32/2022 (2022).

The use of culture as a tool for rape implicates resocialisation and the right to a positive cultural context.

The Zimbabwean High Court decision of *S v TB Chirembwe*⁹⁵ directly refers to the right of women to a positive cultural context. Here, the court notes that '[r]ape is a form of gender-based violence that emanates from cultural attitudes towards women that permit the use of sex as an instrument of power and control'.⁹⁶ As noted above regarding the broader implications of article 17 on other substantive rights, this case highlights how cultural norms impact the prevalence of violence against women.

5 Conclusion

Women's rights are regularly overlooked in favour of cultural rights. This chapter demonstrates the unique and crucial role that article 17 plays in tempering cultural relativism as it relates to women's rights. The presence of this provision acknowledges the dominating role that cultural norms play in undermining the rights of women.

Patriarchal oppression will continue to exert itself over women until such time as the dominating narratives, practices, beliefs, assumptions, and stereotypes – the dominant cultural norms – are modified to reflect the equal humanity of women. Indeed, this chapter underscores the importance of understanding the value of positive culture to the lives of women by viewing the rights of women through an intersectional lens. The substantive transformative potential of article 17, as well as the accompanying necessity for resocialisation as per article 2(2) of the Maputo Protocol is, therefore, underscored throughout this chapter.

Culture, as an umbrella term, is employed throughout to encapsulate all assumptions, biases, stereotypes and practices present globally, mindful that culture does not present itself in select pockets of society only. It also includes those harms perpetrated against women in the name of religion and freedom of speech. When viewing the harms meted out to women in the name of culture, it is important that those emanating from the West – normalised cultural practices, which often escape scrutiny and which are considered 'lesser infringements' – remain part of the

95 [2015] ZWHHC 162 (15 February 2015).

96 Chirembwe (n 95) 6.

narrative of what constitutes harmful cultural practices, assumptions and stereotypes. Failing to consider all cultural norms risks overlooking those that often deny women their freedom and autonomy, while entrenching a false narrative that only traditional harms of a more egregious nature are subject to resocialisation.

Article 5 of CEDAW and article 2(2) of the Maputo Protocol, as noted above, anchor resocialisation in international and African regional law. Resocialisation is, therefore, legislatively mandated and operates as an obligation, right and remedy. Thus, state parties are obligated to modify harmful socio-cultural norms and practices underpinning gender discrimination in whatever manner it manifests. Similarly, women have a right to resocialisation, and where cases come before adjudicatory bodies, resocialisation as a remedy surfaces.

In addition to these provisions, several other provisions in the Maputo Protocol mandate resocialisation, including article 17. The ability for negative cultural contexts to change towards positive cultural contexts is contingent upon resocialisation. CEDAW, the ICCPR and the ICESCR provide the point of departure insofar as international protections of cultural rights and women's rights are concerned. The rights of individuals to culture are protected in international law and often are an important part of the lives of women. Thus, viewing women through an intersectional lens, one that recognises that often intersecting forms of discrimination exist allows for a broader understanding and appreciation of culture as it pertains to women. However, as noted, generally, rights are limited, and international law similarly protects the rights of women against cultural relativism. Thus, while no explicit right to a positive cultural context exists in international law as it does in the Maputo Protocol, this research has demonstrated that women's right to a positive cultural context is, indeed, protected in international law.

The Maputo Protocol's provisions are progressive in nature and hold immense potential for the realisation of women's rights on the continent. The inclusion of article 17 is but one example of the importance afforded women's rights. To give effect to article 17 and other provisions of the Maputo Protocol, however, requires resocialisation. The goal of resocialisation is to effect change to the underlying causes of gendered discrimination. By addressing harmful socio-cultural norms, including harmful practices in the name of religion and harmful speech through resocialisation, the equal nature of women becomes the norm,

facilitating societal engagement with women free from discrimination. Resocialisation plays a crucial role in the realisation of all substantive rights, article 17 included. Furthermore, since resocialisation operates as an obligation, right and remedy, as noted above, women can assert their rights to a positive cultural context through resocialisation and pray for resocialisation as a remedy in fulfilment of their rights to a positive cultural context.

Lastly, this research has demonstrated that while article 17 exists as a guard against cultural relativism, a complete understanding of its scope and potential for substantive transformative equality has yet to be fully understood by states and the African regional mechanisms. Similarly, the role that resocialisation plays in giving effect to article 17 is overlooked. As demonstrated by state reports, concluding observations and case law, much scope exists for improvement in this regard. The right of women to a positive cultural context demands resocialisation, and it is only when resocialisation measures are implemented that the realisation of this and other rights, as well as the substantive transformative potential of the Maputo Protocol, becomes visible.

Table of abbreviations

APDF	Association pour le Progrès et la Défense des droits des Femmes Maliennes
CEDAW	Convention on the Elimination of all form of Discrimination against Women
ECOWAS	Economic Community of West African States
FGM	Female genital mutilation
FoRB	Freedom of religion and belief
GBV	Gender-based violence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRDA	Institution for Human Rights and Development in Africa

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