

Exploring the potential of the dominance feminist approach in interpreting socio-economic rights in the Maputo Protocol

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ABSTRACT: Africa's women have continued to be victims of violations of their rights including socio-economic rights simply by being women. The Maputo Protocol entrenches, among other rights, a comprehensive set of socio-economic rights. Though this inclusion is commendable, interpreting these rights plays a significant role in engendering them and eliminating discrimination against women. A general argument has been made for teleological interpretation of the Maputo Protocol, as it is with other human rights instruments. Considering that the Maputo Protocol is a specific treaty for women's rights, this article argues for a teleological interpretation of the socio-economic rights that integrates a gender perspective for effective protection and engendering of these rights. The article explores the potential of the dominance feminist approach for a gendered teleological interpretation. The article shows that the dominance approach is not alien to the Maputo Protocol; it is included in the Protocol's objective and purpose, socio-economic rights provisions, and other related provisions. Moreover, the article shows that the dominance feminist approach gels with substantive equality entrenched in the socio-economic rights provisions. The article also develops a methodological model for the proposed gendered teleological interpretation.

TITRE ET RÉSUMÉ EN FRANÇAIS

Repenser l'interprétation des droits socio-économiques: l'apport d'une approche féministe dans le cadre du Protocole de Maputo

RÉSUMÉ: Les femmes africaines continuent de subir des violations de leurs droits, notamment socio-économiques, en raison de leur statut de femmes. Le Protocole de Maputo garantit un éventail complet de droits socio-économiques, mais leur pleine réalisation dépend largement de l'interprétation qui en est faite. Si une interprétation téléologique est généralement préconisée pour les instruments relatifs aux droits de l'homme, cet article soutient qu'une approche téléologique spécifiquement basée sur le genre est essentielle pour garantir l'effectivité des droits consacrés par le Protocole de Maputo et pour éliminer les discriminations systémiques à l'égard des femmes. Cet article examine le potentiel de l'approche féministe de la dominance comme cadre pour une interprétation téléologique genrée des droits socio-économiques dans le Protocole de Maputo. Il démontre que cette approche est intrinsèquement alignée avec l'objectif et le but du Protocole, notamment en ce qui concerne les dispositions sur les droits socio-économiques et les principes connexes. L'analyse révèle également que l'approche féministe de la dominance concorde avec le concept d'égalité matérielle inscrit dans le Protocole,

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favorisant ainsi une interprétation qui transcende les inégalités structurelles et les formes de domination patriarcale. Enfin, l'article propose un modèle méthodologique pour guider l'application d'une interprétation téléologique genrée dans le cadre des droits socio-économiques.

KEY WORDS: dominance feminist approach; socio-economic rights; Maputo Protocol; teleological interpretation; substantive equality

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1 INTRODUCTION

Equality of access to, and enjoyment of socio-economic rights is vital for socio-economic development and power of both genders in Africa. However, women are culturally marginalised and systematically denied socio-economic power and intellectual recognition.¹ It is a regrettable reality that the mere fact of being a woman implies various degrees of discrimination in these matters essential to life.² Women's ability to access socio-economic rights is also shaped by the gendered nature of social institutions, including legal, cultural, customary, and traditional factors.³

Patriarchal practices and male dominance in Africa have excluded women from effective access to, and enjoyment of their socio-economic rights. Patriarchy in Africa is much embedded and enshrined in the mindset of men starting from childhood through socialisation.⁴ Nigeria, for example, is noted to be a strongly patriarchal society that subjects women to male dominance and female subservience.⁵ Women are seen as belonging to the home and as incapable of making sound decisions.⁶ Patriarchy gives men the power to prevail over women⁷ in the socio-economic sphere. Socio-economic rights field was, and

1 ATO Emordi and others 'Women, marginalisation, and politics in Africa and Asia' (2021) 2 *Integrity Journal of Arts and Humanities* 27-28.

2 MA Moreno 'Women's rights and international dialogue' (1997) 16 *Penn State International Law Review* 193.

3 S Fredman 'Engendering socio-economic rights' (2009) 25 *South African Journal on Human Rights* 415.

4 Emordi (n 1) 29.

5 As above.

6 As above.

continues to be, dominated by men, who only rarely demonstrate an appreciation for women's experiences as they relate to human rights.⁸ The African Commission on Human and Peoples' Rights (Commission)⁹ has also noted this exclusion and stated:¹⁰

Women on the continent find themselves in a vulnerable status in terms of the enjoyment of their socio-economic rights on an equal basis as men. They have limited access to and enjoyment of ... rights. Unequal power dynamics in the relations between the sexes, discriminatory social and cultural structures and practices, and women's lack of economic empowerment, among others, are key factors that affect women's rights ...

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)¹¹ protects, among other rights, socio-economic rights. It aims to improve the reality of women's lives.¹² Though the inclusion of these rights in the Maputo Protocol is commendable, extending socio-economic rights to women is not sufficient. Little is done to address the gendered nature of social institutions and structures.¹³ Interpretation of these rights plays a huge role in the elimination of discrimination against women. A general argument has been made for teleological interpretation of the Maputo Protocol as it is with other human rights instruments. While noting that the teleological interpretation is itself inherently satisfactory, the effective approach to interpreting the Maputo Protocol requires an integration of a feminist perspective in the teleological interpretation. The argument for a gendered teleological interpretation takes into account the understanding that though the Maputo Protocol extensively protects specific rights of women; it still needs to be interpreted in a manner that entrenches a gender perspective for the effective elimination of discrimination against women. Most feminist theories agree on the importance of highlighting the lack of equality for women and viewing international problems and events through women's eyes.¹⁴ Fredman noted that the Maputo Protocol comes a step closer to fully engendering human rights ... but it, too, needs to be

7 G Robbertze & G Muller 'Conceptualising the home in law and gender' (2020) *De Jure Law Journal* 341.

8 L Farha 'Is there a woman in the house – re/conceiving the human right to housing' (2002) 14 *Canadian Journal of Women and the Law* 120.

9 The African Commission was established in terms of art 30 of the African Charter.

10 General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)) (General Comment 6), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 para 1.

11 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 11 July 2003, CAB/LEG/66.6.

12 F Viljoen & M Kamunyu 'The interpretive mandate under the Maputo Protocol' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 569.

13 Fredman (n 3) 410.

14 RC Preston & RZ Ahrens 'United Nations convention documents in light of feminist theory' (2001) 8 *Michigan Journal of Gender & Law* 4.

interpreted to advance the envisaged equality.¹⁵ Considering that the Maputo Protocol in its elimination of the discrimination clause obliges states to integrate a gender perspective in their legislation and other measures taken to combat discrimination against women,¹⁶ it is imperative for interpretation that addresses discrimination and harmful practices against women to also integrate an appropriate gender perspective.

The article explores the potential of the dominance feminist approach (dominance approach) for a gendered teleological interpretation of the socio-economic rights in the Maputo Protocol. However, arguing for the integration of dominance perspective does not necessarily mean that other feminist perspectives are irrelevant. The article only demonstrates that among several feminist approaches, the dominance perspective has the greatest effect. Examining the influence of the feminist theories on the United Nations human rights instruments Preston and Ahrens argue that although UN human rights instruments demonstrate the influence of various feminist theories, the dominance theory has the greatest impact.¹⁷ This gendered teleological interpretation will enable the interpretive organs to interpret the object and purpose of the Maputo Protocol in a manner that identifies, takes into account, and criticises women's socio-economic lived inequality reality exacerbated by discriminatory laws, policies, and societal harmful practices. It will also help them engage in the interpretative process, appropriate approaches, including substantive equality that women employ to end discrimination practices. Arguing in the context of the housing rights for women, Chenwi and McLean note:¹⁸

A gendered, or feminist, perspective on women and housing focuses on the lived reality of poor women and women-headed households, and the survival strategies employed by these women. It also provides a critique of how existing laws, policies, and social practices perpetuate their situation.

Apart from this introductory part, part two provides the context of Africa's women's concrete socio-economic rights reality and theories applied in this article for a gendered interpretation of the socio-economic rights in the Maputo Protocol. The aims of this analysis are four-fold: first, to unpack women's lived reality; second, to analyse the teleological approach, that aims at achieving substantive equality, and demonstrate the need to engender it through the dominance approach; third, to analyse the dominance approach, which has the potential to address the socio-economic lived reality of Africa's women, and to identify the elements of the dominance approach in the provisions of the socio-economic rights in the Maputo Protocol as a proof that this approach is not alien to the Maputo Protocol and in its object and purpose; and, finally, to develop the methodological model for the application of a dominance-oriented teleological approach. Part 3

15 Fredman (n 3) 438.

16 Art 2(1)(c) of the Maputo Protocol.

17 Preston & Ahrens (n 14) 6.

18 L Chenwi & K McLean 'A woman's home is her castle – poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 517.

analyses the socio-economic rights in the Maputo Protocol and the relevant jurisprudence and show how to apply the dominance approach to build on the meaning of substantive equality. Part 4 concludes the article.

2 THEORETICAL FRAMEWORK FOR A THOROUGH UNDERSTANDING OF SOCIO-ECONOMIC RIGHTS LIVED REALITY OF AFRICA'S WOMEN

2.1 Concrete socio-economic rights lived reality of Africa's women

Africa's women have been experiencing discrimination and widespread socio-economic inequality from their male counterparts, simply by being women. Their oppression is caused by social and cultural arrangements, which require women to submit to men because of their sex.¹⁹ As a result of male dominance, Africa's women's socio-economic rights reality is covered with stories of violations, discrimination, exclusion, illiteracy, and deep patterns of poverty.

Male dominance is prevalent in women's rights to marriage and family. It includes child marriage, virginity testing, widowhood practices, witchcraft, extreme dietary restrictions (forced feeding, food taboos- including during pregnancy), binding, breast ironing, beading and son preference and its implications for the status of the girl child.²⁰ While in marriage, women exercise limited or no economic decision-making power in the household. Where much of their contribution comes from their household and reproductive roles, neither these roles are taken as having economic value nor any account is given to the economic values of these roles.²¹

Male dominance is also predominant in women's right to property and related land rights. The Commission noted that some legislation and customary norms as well as patriarchal practices entrench gender inequality in the enjoyment of property rights.²² In many parts of Africa, women's contribution in the acquisition of marital property has been consistently undermined through, among others:

- (a) Gender discriminatory registration laws and practices, which in effect prohibit or discourage women from owning housing, land and property jointly with their spouse, or which give preference for registration of housing, land and property in the name of the male spouse only;
- (b) The

19 K Mahoney 'Theoretical perspectives on women's human rights and strategies for their implementation' (1996) 21 *Brooklyn Journal of International Law* 814.

20 S Nabaneh 'Elimination of harmful practices' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 118-119.

21 General Comment 6 (n 10) para 2.

22 General Comment 6 (n 10) para 4.

application of the concept of marital power, which grants power to only the husband to administer his wife's property and/ or their jointly owned property; (c) Gendered responsibilities dictating that women use their resources for the upkeep of the family and maintaining the home while men use theirs for the acquisition of properties; and (d) The application of negative customary norms and religious practices.²³

Relating to male-oriented dominance of property rights, Banda notes another emerging issue, which is the growth in land leasing where sovereign funds are used to purchase vast tracts of land from which the locals are excluded and removed from arable land. Women are the most affected; they are disproportionately responsible for sourcing and growing food for family consumption. Land is linked to the right to housing. If the land resource base shrinks, women will get even less.²⁴

In Tanzania for example, agriculture is a principal source of livelihood. It provides more than two-thirds of employment and almost half of Tanzania's GDP.²⁵ Women play an essential role in agricultural production. Despite the essential role that women in Tanzania play in smallholder agriculture, and the importance of land ownership to agricultural development, women seldom own the land they cultivate, and they own less land than men when they do own land.²⁶

Women's experience in enjoyment of their right to education is not any better. Girls suffer the highest levels of exclusion from formal education, 'exacerbated by poverty and economic crises, gender stereotyping in curricula, textbooks, and teaching processes, violence against girls and women in and out of school and structural and ideological restrictions to their engagement in male-dominated academic and vocational fields'. These, in turn, reproduce multiple, often intergenerational inequities at individual and societal levels.²⁷ There is evidence pointing to the harmful effects of stereotyping on girls. For example, by promoting images of girls and women as the "weaker" sex, they 'contradict values of gender equality and non-discrimination, and dampen girls' career aspirations and self-esteem'. Further, research has drawn a connection between early socialisation into gender stereotypical roles and careers and 'girls' interest, engagement and achievement in science, technology, engineering, and mathematics (STEM).²⁸

23 General Comment 6 (n 10) para 5.

24 F Banda 'African gender equality' in RJ Cook (ed) *Frontiers of gender equality: transnational legal perspectives* (2023) 274.

25 MK Leavens and others 'Gender and agriculture in Tanzania' EPAR brief No 134 Evans School of Public Affairs, University of Washington April 2011 p 1.

26 Leavens and others (n 25) 2.

27 CP Wamahiu & CN Musembi 'The right to education' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 261.

28 Wamahiu & Musembi (n 27) 267.

In Africa, women also experience a wide range of violations of their economic and social welfare rights in public and private spheres. 'Calculations using the UNDP gender indices indicate notable gender inequality in almost every African country.²⁹ Gender gaps in income and non-income dimensions result in lower human development by females compared to males.'³⁰ There are still sectors of the economy that are largely closed to women.³¹ For instance, the mining industry has historically been seen as a masculine occupational culture, despite technological advances that have redefined the nature of minework.³² There are also fields of education in which women are under-represented, for example, in STEM.³³ This significantly diminishes their earning potential.³⁴ Furthermore, the economic contribution of most African women is not recognised in national statistics because it is largely in the informal agricultural and domestic sectors.³⁵ As such, African women's economic contribution in agriculture, entrepreneurship, and other related economic sectors is not documented.³⁶ Women's work such as subsistence agriculture, household maintenance, voluntary work, and other related unpaid services, are excluded from economic measurement.³⁷ The invisibility of women's work translates into exclusion from social security and control over resources.³⁸

On health and reproductive rights, women experience a wide range of inequalities, including a lack of decision-making power on several children they should have and their spacing. Others include lack of power on the use of contraceptives and self-protection against sexually transmitted infections.

- 29 AA Mnzava 'Economic and social welfare rights' in A Rudman et al (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 287.
- 30 United Nations Development Programme, Africa Human Development Report 2016: Accelerating Gender Equality and Women's Empowerment in Africa 4 https://www.afdb.org/fileadmin/uploads/afdb/Documents/AEC/2016/AfHDR_Summary_highres_EN.pdf (accessed 16 May 2023).
- 31 Mnzava (n 29) 287.
- 32 D Botha 'Women in mining: an assessment of workplace relations struggles' (2016) 46 *Journal of Social Science* 252.
- 33 C Hill and others 'Why so few? Women in science, technology, engineering, and mathematics' 5-9. A report published by AAUW in 2010.
- 34 Mnzava (n 29) 288.
- 35 As above.
- 36 African Union 'African Union set to launch the "What African Women Want" Campaign to rally more action on women's empowerment on International Women's Day' (2022) <https://au.int/en/pressreleases/20220307/african-union-set-launch-what-african-women-want-campaign-rally-more-action#:~:text=The%20%E2%80%9CWhat%20African%20Women%20Want%E2%80%9D%20campaign%20will%20be%20launched%20on,for%20the%20implementation%20of%20programmes> (accessed 23 June 2023).
- 37 M Waring 'The invisibility of women's work: the economics of local and global "bullshit"' (1997) 17 *Canadian Woman Studies* 31.
- 38 J Meeker & D Meekers 'The precarious socio-economic position of women in rural Africa: the case of the Kaguru of Tanzania' (1997) 40 *African Studies Review* 35.

Access to housing is an integral part of an adequate standard of living.³⁹ This right entails access to a 'safe and secure home and community in which to live in peace and dignity'.⁴⁰ In reality, however, many women live in squalor.⁴¹ While inadequate housing affects many people living in poverty, there is a clear gender dimension.⁴²

Harmful cultural and religious practices have resulted in restrictions on women's rights to inheritance, access to health, education, and work. Trends in terms of labour migration, influenced by rapidly changing economic opportunities, have been implicated in new forms of exploitation and risk to women.⁴³

2.2 Dominance feminist approach

Considering the above-analysed Africa's women lived socio-economic reality, it is imperative to analyse theoretical approaches relevant for interpreting socio-economic rights in the Maputo Protocol that aims at eliminating such unequal socio-economic reality. The analysis begins with the dominance approach that uses the notion 'as a woman' to explain women's lived reality of socio-economic inequality and suggest ways of addressing and transforming such reality.

We who work with the law need to be about the business of articulating the theory of women's-practice women's-resistance, visions, consciousness, injuries, notions of community, and experience of inequality.⁴⁴

MacKinnon develops the dominance theory, which takes into account women's socially constructed inequality.⁴⁵ It considers women as victims of a male-dominated system.⁴⁶ It recognises and challenges a pervasive system of gender hierarchy. It critically examines, rather than obtain, the status quo.⁴⁷ It recognises that women's inequality is not theoretical or abstract, but rather real and concrete.⁴⁸ The dominance approach articulates the unrecognised pervasiveness of male domination in many facets of women's lives.⁴⁹ The dominance

39 M Killander 'Right to adequate housing' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 346.

40 Killander (n 39) 346.

41 As above.

42 As above.

43 Report issued by the Association for Women's Rights in Development (AWID) on achieving women's economic and social rights: Strategies and lessons from experience 2006 at p 6.

44 CA MacKinnon 'From practice to theory, or what is a white woman anyway?' (1991) 4 *Yale Journal of Law and Feminism* 14.

45 KRL Rand 'Making a real difference: the dominance approach in the opinions of Justice Beryl J. Levine' (1996) 72 *North Dakota Law Review* 1031-1032.

46 AJ Albert 'The use of MacKinnon's dominance feminism to evaluate and effectuate the advancement of women lawyers as leaders within large law firms' (2006) 35 *Hofstra Law Review* 310.

47 Rand (n 45) 1031.

48 As above.

49 Albert (n 46) 311.

approach argues that women know things from their life experiences. Women are in confrontation with the realities of male dominance. This subordination of women to men is socially institutionalised, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in the community, speech, and power.⁵⁰ As such, dominance theory is a theory of women's practice that identifies and critiques social practices of subordination and makes tools for women's consciousness and resistance that further a practical struggle to end inequality.⁵¹

The dominance approach considers women's subordination to men as exclusively based on their sex 'as women'. It uses the notion 'as a woman' as the practice which makes the concept of discrimination "based on sex" a legal theory. As such, the dominance approach investigates how the realities of women's experiences of sex inequality in the world have shaped some contours of sex discrimination in the law.⁵² It uses 'discrimination based on sex' as a cause of action. Therefore, the ability of women to translate their experiences of sex inequality is of paramount importance.⁵³ It bases its argument on the understanding that women are subordinate to men because of their status as women.⁵⁴ The dominance approach argues that, comprised of all its variations, the group of women can be seen to have a collective social history of disempowerment, exploitation, and subordination extending to the present. To be treated 'as a woman' in this sense is to be disadvantaged in these ways.⁵⁵ To speak of social treatment 'as a woman' is to refer to this diverse and pervasive concrete material reality of social meanings and practices.⁵⁶ To speak of being treated 'as a woman' is to make an empirical statement about reality.⁵⁷ To speak of being treated 'as a woman' is to describe the realities of women's situation.⁵⁸

The dominance approach considers women's experience in a collective form rather than in an individual form. The experience of an individual woman is considered to be the experience of almost all women. It, therefore, takes up the notion 'as a woman' to consider an individual woman's experience as an experience of women in a collective form. It treats women not as uniform or homogeneous, but as interrelated in their common experiences of inequality and powerlessness.⁵⁹ It is a feminist approach based on women's shared suffering; in practice, it therefore aspires to eradicate the validation of

50 MacKinnon (n 44) 15.

51 MacKinnon (n 44) 14.

52 As above.

53 Albert (n 46) 311.

54 Rand (n 45) 1033.

55 MacKinnon (n 44) 15.

56 MacKinnon (n 44) 14.

57 As above.

58 As above.

59 Albert (n 46) 311.

women's subjugation in every culture, society, and institution.⁶⁰ The dominance approach focuses on group experiences because understanding the individual suffering of women in this regard 'does not improve one's ability to analyse hierarchy as socially constructed'.⁶¹ Women's reality outside the courtroom benefits not only the woman named in a particular case caption but all women.⁶² 'Given that women are not situated similarly to men, but rather are socially unequal, looking at women one at a time rather than as women ensures that it is only the exceptional woman who escapes gender inequality enough to be able to claim she is injured by it.'⁶³

Furthermore, the dominance approach centres on the argument that women's subordination to men leaves women with no power [powerless] in all aspects of life, including socio-economic power. It focuses on the differences in power between men and women. It critiques not only physical power, but social, economic, and sexual power as well. It finds that women are oppressed because they are subject to social and sexual mores, which require them to submit to men.⁶⁴ Dominance feminism attributes women's inferior societal position to men's concerted effort to subordinate and control women. It holds that men wield power over women through social, sexual, and physical domination.⁶⁵ Physically, men control women by wielding the threat of violence, or by practicing domestic abuse or other forms of battery. Socially, men control women on a small scale by exerting patriarchal control over them or by objectifying them. On a large scale, men control women by perpetuating a legal system that reinforces gender inequality and wage discrimination, keeping women financially and legally powerless. Men dominate women sexually by wielding the threat of sexual violence over women and by using cat-calls, sexual advances in the workplace, rape, and pimping, to name a few examples. To a dominance feminist, these long-standing practices have resulted in systematic male dominance of any sexually feminine individual.⁶⁶ The dominance approach is an approach of how the erotisation of dominance and submission creates gender and creates women and men in the social form in which we know them. It identifies the problem as not that the sexes have been treated differently, but that one group (men) has dominated the other (women). The recognition that men and women occupy unequal positions of power in society, is the fundamental underpinning of the dominance approach.⁶⁷ Women will never be able to enjoy freedom as long as men's power and sexuality define the basis of women's existence.⁶⁸

60 Albert (n 46) 311.

61 As above.

62 Rand (n 45) 1031.

63 Rand (n 45) 1033.

64 Preston & Ahrens (n 14) 9-10.

65 A Mazingo 'The intersection of dominance feminism and stalking laws' (2014) 9 *Northwestern Journal of Law & Social Policy* 337-338.

66 Mazingo (n 65) 338.

67 Rand (n 45) 1035.

68 Preston & Ahrens (n 14) 9-10.

The dominance approach rejects formal equality feminism, which seeks formal legal equality and equal access to traditionally male privileges for women.⁶⁹ The dominance approach argues that instead of using the male norm to decide discrimination questions, the inquiry should be whether the policy or practice in question integrally contributes to maintaining an underclass or a deprived position because of gender status. The use of this test would require the law to take systematic sex subordination into account and support freedom from it, making it a qualitatively different approach from formal equality, which does not even acknowledge that sex-based subordination exists.⁷⁰ This test requires two things: first, the impact of laws and policies rather than on intention, second, the context of the plaintiff rather than comparison to a male norm.⁷¹

The dominance approach is critical of 'reality' and tries to challenge and change it. That reality is male dominance that sets the standards by which one succeeds (or just survives) in society.⁷² Women's situation combines unequal pay with the allocation of disrespected work, sexual targeting for rape, domestic battering, sexual abuse, and systematic sexual harassment; depersonalisation demeaned physical characteristics, use in denigrating entertainment, deprivation of reproductive control, and forced prostitution.⁷³ The dominance approach would move the law further, in the direction of gender equality.⁷⁴

Preston and Ahrens argue that dominance approach is not concerned with theoretical equality or rights guaranteed on paper. It is not enough for women to have the same potential opportunities as men. Women are not equal unless they can take advantage of those opportunities, define them outside the male paradigm, and thereby obtain real power. Dominance approach demands actual social, legal, and economic equality, not just the vague assurance of equal opportunity. The theory argues women break free of the male-dominated system 'with their knowledge and power'. The dominance approach focuses on reproductive capacity, violence against women, and traditional institutional power structures.⁷⁵

Furthermore, the dominance approach emphasises power imbalance underlying the issues relating to women's sexuality and reproductive capability. Dominance Feminists view female reproductive capacity as a symbol of male domination. Traditional male views of women as sources of childbearing, child-rearing, breastfeeding, and sexual pleasure are oppressive because these viewpoints keep women from achieving equal economic, social, and

69 Mazingo (n 65) 337.

70 Mahoney (n 19) 815.

71 See also: Mahoney (n 17) 816.

72 Rand (n 45) 1035.

73 Rand (n 45) 1036.

74 Rand (n 45) 1039.

75 Preston & Ahrens (n 14) 10.

political power with men'.⁷⁶ The dominance approach rejects the use of women's reproductive capacity to subordinate women to men. It seeks to eliminate the traditional gender stereotypes that bind women to the home and make them the chief caretakers of children because such stereotypes prevent women from gaining power. The dominance approach, therefore, argues that governments should enact laws such as mandatory paid leave and child care which allow women both to have children and to pursue similar activities as men.⁷⁷

Importantly, the dominance approach considers violence and sexual harassment against women as a form of male domination. This is another way in which the dominance approach seeks to raise a new feminist consciousness by critically evaluating violence inflicted upon women. The dominance approach identifies violence against women as a means by which men keep women from attaining power. Pornography, rape, sexual harassment, and physical abuse are all forms of male dominance that, until recently, have been widely accepted. Until violence against women is eliminated, women will never be equal because men are not affected by systematic violence in the same way as women. Dominance theory focuses on each of these issues and can largely take credit for increased social awareness and action taken to remedy them.⁷⁸

Finally, the dominance approach argues for the transformation of the current international legal, cultural, and social systems. Their envisioned transformation will result in women obtaining actual power. In this regard, the dominance approach argues for quotas, affirmative action, and strong government involvement in increasing the opportunities for women to obtain that power.⁷⁹ The dominance theory calls for social protections to guarantee rights protecting women's interests. Dominance feminists believe that the envisioned transformation of society can be achieved by seeking control through current systems.⁸⁰

The dominance approach helps the interpretive machinery to have an in-depth understanding that women's access and enjoyment of their socio-economic rights is hampered by systemic inequality and discrimination practices. This hierarchy of discrimination favours men rather than women. It considers women as inferior compared to their male counterparts.⁸¹ It helps the interpretive machinery to address the inequality in question and develop appropriate ways of encountering it effectively.⁸² Concerning the right to work, for example, the dominance approach offers such institutions an opportunity to recognise the dominance of male-worker norms inherent in the established criteria

76 Preston & Ahrens (n 14) 11.

77 Preston & Ahrens (n 14) 11-12.

78 Preston & Ahrens (n 14) 12.

79 As above.

80 Preston & Ahrens (n 14) 13.

81 See also: Albert (n 46) 291.

82 As above.

for promotion and to rectify the resulting structural impediments that presents to the advancement of women.⁸³

The dominance approach has the potential to address the inequality and patriarchal practices women in Africa experience. Inequality and discriminatory patriarchal practices are experienced in various socio-economic settings including, employment rights, health rights, and property rights. About property rights, the Commission in its General Comment 6 noted:⁸⁴

In particular, the prevalence of discriminatory laws and legal processes resulting in property rights violation during separation, divorce or annulment of marriage in Africa and the impacts thereof on women are a major concern on the African continent. Although a number of legislations in different African States guarantee the right to equality, non-discrimination and property, other legislations and customary norms as well as patriarchal practices entrench gender inequality in this regard.

Dominance approach with its approach of women as a collective is significant in that it has the potential of looking at and addressing the challenges of women in their collective capacity rather than in their individual capacity. Challenges women face in their individual capacity represent challenges many women face in different areas.

The tenet 'as a woman' used in the dominance theory is key in addressing male dominance practices and discrimination practices done to women as a woman and nothing else. They are raped as women, they are denied access to employment as women, they are denied property and land rights as women, they are denied certain job positions as women, they are sexually harassed at work as women, they are denied a promotion at workplaces or paid less as women, they are denied maternity leave as women, they are subjected to early marriages as women, they are denied access to education as women, they are denied carrier development as women, they are denied managerial positions as women, leviratic marriages (the practice of inheriting a wife) i.e. they are forced to marry their late husbands' relatives as women, they are denied inheritance of their husbands or late fathers as women, etc.

2.3 Teleological interpretation⁸⁵

The main argument in this article is to use the dominance approach to engender the teleological approach, which is appropriate for interpreting human rights treaties. The application of the teleological

83 Albert (n 46) 291.

84 General Comment 6 (n 10) para 4.

85 I have analysed the teleological approach and its relevance in interpreting socio-economic rights in various writings: See A Amin 'A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' unpublished LL.D thesis, University of Stellenbosch, 2017 (Amin 2017); A Amin 'Assessing violations of states' socio-economic rights obligations in the African Charter: towards a model of review grounded in the teleological approach (2020) 4 *African Human Rights Yearbook* 16-42 (Amin 2020); A Amin

approach helps interpretive organs to develop the meaning, scope, and content of socio-economic rights in line with the object and purpose of the Maputo Protocol.

The teleological approach, sometimes referred to as purposive interpretation,⁸⁶ considers the object and purpose⁸⁷ of a treaty as the main element in its interpretation.⁸⁸ An inquiry into the object and purpose of a treaty is vital in generating the meaning, scope, and content of the treaty's provisions in question.⁸⁹ The teleological approach and its notion of object and purpose are endorsed in the Vienna Convention on the Law of Treaties (Vienna Convention)⁹⁰ through its single authoritative rule of interpretation in article 31 and 32 respectively. Through article 31, the Vienna Convention requires a treaty to be 'interpreted in good faith, following the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

The object and purpose of a treaty are found through a recourse to a wide range of interpretative tools including the treaty's historical background and its preparatory work, the circumstances at the time of the adoption of the treaty, any change in these circumstances that the parties sought to effect, and the conditions prevailing at the time the treaty is interpreted.⁹¹ It also includes a treaty's preamble at both its interpretive and binding characters,⁹² the subsequent practice of the

'The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 23-50 (Amin 2021a); A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 209 (Amin 2021b); A Amin Teleological interpretation in the emerging socio-economic rights jurisprudence of the African Court: *African Commission on Human and Peoples' Rights v Kenya* (2022) 14 *African Journal of Legal Studies* 45-67 (Amin 2022).

86 TS Bulto 'The emergence of the human right to water in international human rights law: invention or discovery?' (2011) 12 *Melbourne Journal of International Law* 299. See also: Viljoen & Kamunyu (n 12) 549.

87 J Klabbers 'Some problems regarding the object and purpose of treaties' (1999) 8 *Finnish Yearbook of International Law* 138, quoted in SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2013) 45. Klabbers identifies the object and purpose of a treaty as a 'comprehensive blanket term' referring to the 'aims, nature and end' of a treaty. It applies to a treaty 'as a whole rather than to its parts or articles'. In addition to Klabbers's definition, this article considers the 'object and purpose' of a treaty as a single concept (rather than two distinct concepts) that requires a general meaning rather than a specific fixed meaning. For a thorough discussion, see Amin (n 85) 43-49; see also Amin 2021b (n 85) 209.

88 Amin 2017 (n 85); Amin 2022 (n 85) 3.

89 GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British YB of Intl Law* 1, 1-2 (1951 Interpretations).

90 The Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force 27 January 1980, 81 LM 679.

91 'Art 19(a) of the Draft Convention on the Law of Treaties' (1935) 29 *American Journal of International Law* Supp 971.

92 Fitzmaurice '1951 Interpretations' (n 89) 10.

parties to a treaty⁹³ (including, the decisions of the interpretive organs,⁹⁴ and the rules of procedure formulated by these interpretive organs to interpret the treaty);⁹⁵ and the principle of effectiveness,⁹⁶ which is embodied in all tenets of the teleological approach.⁹⁷

The principle of effectiveness posits that provisions of a treaty are formulated to fulfil a specific effect. Accordingly, they should be interpreted to make them effective rather than ineffective.⁹⁸ The principle, in its general dimension, interprets the text in light of the declared or apparent object and purpose of the treaty. The principle of effectiveness gives such a text its effective meaning consistent with the words used to formulate it and with the other provisions of the treaty.⁹⁹ To assign effective meaning to the text, the principle of effectiveness allows the interpretive organs to consider and apply different possibilities of interpretation, which will safeguard the effectiveness of the text.¹⁰⁰ As such, in its substantive dimension, it requires interpretive organs to interpret the rights enshrined in a treaty broadly.¹⁰¹ It also requires the limitations of such rights to be interpreted narrowly.¹⁰² In its temporal dimension,¹⁰³ the principle of effectiveness considers a treaty as a living instrument.¹⁰⁴ The systemic dimension consists of both the internal and external coherence dimensions.¹⁰⁵ The internal coherence dimension emphasises a form of interpretation that reads the treaty as a whole, in a manner that advances internal consistency and harmony among the various provisions of the treaty.¹⁰⁶ Concerning external coherence, the principle of effectiveness focuses on interpreting a treaty through other comparative legal sources.

The overall object and purpose of the Maputo Protocol is articulated in its Preamble, which is to ensure that the rights of women are promoted, realised, and protected.¹⁰⁷ The Preamble elaborates that the Maputo protocol aims to eliminate discrimination, harmful

93 Fitzmaurice, '1951 Interpretations' (n 89) 9.

94 As above.

95 As above.

96 GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1957) 33 *British Yearbook of International Law* 203, 211 (1957 Interpretations).

97 Fitzmaurice, '1957 Interpretations' (n 96).

98 Fitzmaurice, '1951 Interpretations' (n 89) 8.

99 Fitzmaurice, '1957 Interpretations' (n 96) 211.

100 D Rietiker 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*' (2010) 79 *Nordic Journal of International Law* 256.

101 Rietiker (n 100) 259.

102 As above.

103 Rietiker (n 100) 261.

104 As above.

105 Rietiker (n 100) 267-275.

106 Rietiker (n 100) 267.

107 Preamble to the Maputo Protocol para 14.

practices, and gender-based violence against women.¹⁰⁸ The Preamble also emphasises equality between men and women.¹⁰⁹ Imperatively, the Preamble recognises the African values of equality, peace, freedom, dignity, justice, solidarity, and democracy.¹¹⁰ It also recognises the crucial role of women in the preservation of these values.¹¹¹ The Preamble also notes the states' commitment to ensure the full participation of African women as equal partners in Africa's development.¹¹² The Preamble also notes the relevance of other regional and international human rights sources for the protection of women's rights.¹¹³ Significantly, the Preamble recognises the principles of inalienability, interdependence, and indivisibility of rights.¹¹⁴ All these Preamble statements elaborate the object and purpose of the Maputo Protocol. Accordingly, all interpretations of the Protocol must necessarily pursue this objective.¹¹⁵

2.4 Substantive equality

The preceding part has shown that teleological approach, through object and purpose of the Maputo Protocol, emphasises on equality. This sub-part analyses substantive equality as a form of equality envisaged by the teleological approach.

Traditionally, equality has been understood in formal terms, requiring simply that likes be treated alike.¹¹⁶ Formal equality has been of central importance for women, particularly in achieving equality before the law, whether in terms of equal suffrage, equal right to own property, or other similar limitations.¹¹⁷ Formal equality requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as gender.¹¹⁸ The focus on the sameness between women and men is the flaw of formal equality as it fails to consider the male-dominated practices that discriminate against women. Even when women are equal before the law, they lag behind in social and economic terms, and this is the major weakness of formal equality.¹¹⁹ Equality in its formalistic form, arguably does very little to change the position of women in an overwhelmingly patriarchal

108 Preamble to the Maputo Protocol paras 2-3, 9 & 13.

109 Preamble to the Maputo Protocol para 11.

110 Preamble to the Maputo Protocol para 10.

111 As above.

112 Preamble to the Maputo Protocol para 8.

113 Preamble to the Maputo Protocol paras 4-6 & 8-9.

114 Preamble to the Maputo Protocol para 5.

115 Viljoen & Kamunyu (n 12) 550.

116 S Fredman 'Women and poverty – A human rights approach' (2016) *African Journal of International and Comparative Law* 505.

117 As above.

118 A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611; see also Mnzava (n 27) 291.

119 Fredman (n 116) 505.

context.¹²⁰ The CEDAW Committee notes that purely formal equality is not sufficient to achieve equality for women.¹²¹ It is not enough to guarantee women treatment that is identical to that of men. Biological, social, and culturally constructed differences between women and men must be taken into account.¹²² Women must be given an equal start and they should be empowered by an enabling environment to achieve substantive equality.¹²³

Substantive equality was developed to address the limitations of formal equality.¹²⁴ The Commission states that substantive equality:

refers to the form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice, and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law.

Substantive equality is concerned to ensure outcomes that are equal in substance, not just on paper. It refers to 'equality in distribution of economic and social power and of opportunities for people to experience self-realisation'.¹²⁵ Substantive equality takes cognisance of existing patterns of inequality, taking economic and social conditions into account. The aim is to enable women to realise their full potential as equal members and actors in society. This aim is elaborated in Fredman's four features and dimensions of substantive equality.¹²⁶ Substantive equality is asymmetric in that it distinguishes between different treatment that causes detriment and different treatment that redresses past disadvantages to improve the disadvantaged group's position.¹²⁷ It moves away from relative equality – the assumption of conformity to a male norm. Rather, it takes differences into account when difference matters. Substantive equality is inherently transformative; it seeks to change existing structures.¹²⁸ Moreover, it insists on levelling up rather than down.¹²⁹ Finally, it entails a positive

120 A Rudman 'Access to justice and equal protection before the law' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 183.

121 CEDAW General Recommendation 25, on art 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (CEDAW GR 25) para 8.

122 As above.

123 As above.

124 Fredman (n 116) 505.

125 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 153-154; see also Mnzava (n 27) 291.

126 Fredman (n 116) 505-506. See also R Holtmaat 'The CEDAW: a holistic approach to women's equality and freedom' in A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional and national law* (2013) 106; see also Mnzava (n 27) 291.

127 As above.

128 As above.

129 As above.

responsibility to bring about change, regardless of whether individual culpability or violation has been established.¹³⁰

The dimensions of substantive equality are four-fold. First, it concentrates on remedying disadvantage rather than achieving gender neutrality. It redresses the gendered context, including women's subordinate position in areas such as the workplace. Second, it aims to redress stigma, stereotyping, humiliation, and violence on grounds of gender. The third-dimension entails recognition of how the structures of society entrench women's disadvantage. Instead of requiring women to conform to male norms, substantive equality requires the transformation of existing male-oriented institutions and structures. The final dimension of substantive equality is that it attaches importance to women's agency and voice in engendering the socio-economic rights necessary for women's empowerment.¹³¹ These dimensions are vital in understanding the socio-economic provisions of the Maputo Protocol.

2.5 Application of the dominance-oriented teleological interpretation: methodological model

2.5.1 Introduction

The methodological model for the application of a dominance-oriented teleological approach in interpreting the socio-economic rights does not just require reference to the tenets of the teleological approach but also it requires the engagement of dominance approach, to build on substantive equality, in interpreting socio-economic rights in the Maputo Protocol. It should be noted that in *Social and Economic Rights Action Centre (SERAC) v Nigeria (SERAC)*¹³² the Commission did apply the teleological approach but it did not address effectively gender implications on violations of a myriad of socio-economic rights including, the right to property, health, food, water, housing, and dignity. Though commended for its application of the teleological approach in interpreting these rights, the Commission's legally neutral gender analyses were an opportunity missed. The Commission did not pay attention to the gendered impact of the oil spills, which included ill health and the depletion of food reserves because of the inability to fish, which impacted women disproportionately.¹³³ The Commission could have further elaborated on the impact of the violations by noting that economic violence against a community impacts psychological health and can lead to physical violence, with women being disproportionately

130 As above.

131 As above.

132 *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication no 155/96 (2001) AHRLR 60 (ACHPR 2001).

133 F Banda 'African gender equality' in RJ Cook (ed) *Frontiers of gender equality: transnational legal perspectives* (2023) 274.

impacted. As dignity is rooted in equality, the failure to address the discriminatory impacts of socio-economic violations leads to a pervasive form of gendered discrimination and violence against women.¹³⁴

Therefore, the methodology that integrates the dominance approach in the teleological approach is significant in five ways. First, it can guide the interpretive organs to apply the teleological approach and infuse in it the dominance approach to engender the interpretation. Second, it can help the interpretive organs to interrogate issues of women's lived reality and analyse them appropriately. Third, the methodology will help the interpretive machinery to critique legal, socio-economic, traditional, and sexual discriminatory practices against women. Fourth, the methodology will enable the interpretive machinery to practically reform inequality. Fifth, the methodology can help the interpretive organs to justify their decisions. As Tobin rightly observes, the appropriate application of the interpretive approach renders the interpretative process legitimate.¹³⁵ As such the article adopts a methodology of application that is in four interrelated stages as elaborated in the ensuing sub-parts.

2.5.2 Reference to the object and purpose of the Maputo Protocol

To interpret socio-economic rights through a teleological interpretation requires firstly, the interpretive organs to start with an inquiry into the object and purpose of the Maputo Protocol in relation to the socio-economic rights in question. The object and purpose of a treaty are established through a wide range of other significant intrinsic and extrinsic elements of the treaty in question.¹³⁶ Secondly, the interpretive organs must constantly engage the elements of the dominance approach in the inquiry of the object and purpose through all these tenets of the teleological approach. Women's narrative of their experience is vital to help interpretive organs identify and criticise the legal, social, economic, traditional, and sexual practices that violate women's socio-economic rights. The infusion of the tenets of the dominance approach is justified with the teleological approach that interprets a treaty in its context.

2.5.3 Principle of effectiveness

The principle of effectiveness as elaborated upon should be integrated throughout the interpretative process. This engagement is useful in ensuring that all interpretive aids referred to by interpretive organs assist in attaining the practical and effective meaning of the provisions

134 Banda (n 133) 274-275.

135 J Tobin 'Seeking to persuade: a constructive approach to human rights treaty interpretation' (2010) 23 *Harvard Human Rights Journal* 3-4.

136 For a methodology for the application of the teleological approach see generally: Amin 2017 (n 85).

being interpreted. Constant engagement of the principle of effectiveness ensures the effectiveness of treaty provisions. The effectiveness of the provisions implies that the rights are broadly interpreted, and their restrictions are interpreted narrowly. Moreover, the principle of effectiveness ensures consistency and uniformity in the interpretation of the treaty. This principle also guarantees an interpretation of a treaty that addresses the conditions prevalent at the time of interpretation. In this regard, all four dimensions of this principle should be engaged in the entire interpretative process.¹³⁷

2.5.4 Substantive equality

The interpretive organs should engage the notion of substantive equality and its all dimensions should be engaged throughout the interpretative process. Engagement of substantive equality ensures four key elements. First, remedy disadvantage in question; second, redress stigma, stereotyping, humiliation, and violence on grounds of gender; third, identify the manner in which societal structures embody women's disadvantage; finally, advance women's participation in engendering socio-economic rights in question.

2.5.5 Dominance approach

Like the principle of effectiveness, the dominance approach as elaborated upon should be integrated throughout the above-mentioned interpretative process. The inquiry should be: What is women's lived reality to the socio-economic rights in question?; does the law, policy, or practice discriminate against women; Do these sources keep and strengthen women's exclusion from accessing and enjoying their socio-economic rights? As such, the interpretative process should be guided with above-mentioned guiding key informative questions. The interpretive organs should be mindful of the fact that the victims are women or on behalf of women, as such women victims should be provided with an opportunity to narrate their lived reality concerning socio-economic rights in question.

3 ANALYSIS OF SELECTED SOCIO-ECONOMIC RIGHTS IN THE MAPUTO PROTOCOL IN LIGHT OF THE DOMINANCE-ORIENTED TELEOLOGICAL INTERPRETATION

The analysis in this part aims at showing how the dominance approach can build on the teleological interpretation and substantive equality to develop the envisaged meaning of the socio-economic rights in the Maputo Protocol. The analysis focuses on selected socio-economic rights in the Maputo Protocol and relevant jurisprudence. The selected

137 Amin 2021b (n 85) 232.

rights are: right to marriage, right to education, and the right to health and reproductive health. The reasons for this selection are two-fold: first, these rights contain a wide range of concepts that are explicitly or implicitly relevant in other socio-economic provisions. As such the analysis will be useful for the interpretation of other socio-economic rights not covered in this part. Second, there is available jurisprudence by the African Court on Human and Peoples' Rights (African Court),¹³⁸ and Commission relating to these rights that is potential to demonstrate how the dominance approach can be applied by the interpretive organs.

3.1 Right to marriage

Marriage is a formal and informal union between men and women¹³⁹ recognised under any system of law, custom, society or religion.¹⁴⁰ The article dealing with marriage in the Maputo Protocol is article 6. The main paragraph of article 6 sets the equality standard and the rest of the paragraphs establish the content to the right. The right to marriage obliges states to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. These provisions give an impression that they are framed within the concept of formal equality. The dominance approach becomes useful as it rejects formal equality, which requires equal rights between women and men in marriage. Dominance approach helps the interpretive machinery to inquire whether equality in article 6 integrally contributes to maintaining women's inequality in marriage. The inquiry will help to understand the impact of article 6 on women, and the context of a woman in marriage rather than comparison to a male counterpart.

Furthermore, the right to marriage imposes upon states an obligation to ensure that no marriage takes place without 'free and full consent' of both parties.¹⁴¹ The concept of 'free and full consent' entails a non-coercive agreement to the marriage with full understanding of the consequences of giving consent.¹⁴² The dominance approach through the notion 'as a woman' is relevant to elaborate on discriminatory practices and prevalent male-domination that render women powerless and unable to give a free and full consent to marriage. Free and full consent is negated by practices such as arranged marriage (betrothal), forced marriage or forced remarriage, and when women

138 The African Court is established by art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc.OAU/LEG/EXP/AFCHPR/PROT (II), adopted on 9 June 1998 and entered into force on 25 January 2004.

139 Art 1(k) of the Maputo Protocol defines 'women' to include girls.

140 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage (Joint General Comment), adopted at the 29th session of the African Committee on the Rights and Welfare of the Child 2-9 May 2017 in Maseru, Lesotho para 6.

141 Art 6(a) of the Maputo Protocol.

142 Joint General Comment (n 140) para 6.

subject themselves to marriage in search of financial security.¹⁴³ In *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali (IHRDA)*,¹⁴⁴ the African Court regarding article 6 of the Maputo Protocol,¹⁴⁵ noted that the manner in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards that define conditions regarding age of marriage and consent of parties in marriage.¹⁴⁶ Practices that allow application of religious and customary laws on the consent to marriage were held to be inconsistent with article 6 of the Maputo Protocol.¹⁴⁷ While the decision is commendable, application of the dominance approach through “as a woman” tenet would have helped the African Court to engender its reasoning by considering that free and full consent was denied to women by simply being women. Significantly, the Maputo Protocol stipulates 18 years as the minimum age of marriage for women.¹⁴⁸ These provisions are instrumental in ensuring that the rights of girls are protected from the practice of child marriage.¹⁴⁹ Child marriage is a marriage in which either one of the parties, or both, is or was a child under the age of 18 at the time of union.¹⁵⁰ In *IHRDA* the African Court held that article 6(b) of the Maputo Protocol imposes upon states the obligation to take all appropriate measures to abolish negative practices customs, and practices discriminatory to children born out of wedlock for reasons of their gender, especially measures to guarantee the minimum age for marriage at 18 years.¹⁵¹ This reasoning resonates with the dominance approach through its emphasis for transformation of the international legal, cultural, and social systems that do not address women’s inequality lived reality effectively. This way the dominance approach gels with substantive equality dimension on transformation.

In the *Attorney General v Rebeca Z. Gyumi (Gyumi)*,¹⁵² the Court of Appeal of Tanzania had an opportunity to address equality of a girl-child in relation to child marriage and the concept of free and full consent. *Gyumi* was an appeal from the decision of the High Court regarding the constitutionality of sections 13 and 17 of the Tanzania’s Law of Marriage Act (LMA) respectively. At the High Court the

143 CN Musembi ‘Marriage’ in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: a commentary* (2023) 139.

144 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali*, Application 46 of 2016.

145 *APDF* (n 144) para 90.

146 *APDF* (n 144) para 94.

147 *APDF* (n 144) para 95.

148 Art 6(b) of the Maputo Protocol.

149 RD Nanima ‘The ACHPR and ACERWC on ending child marriage: revisiting the prohibition as a legislative measure’ (2019) 20 *ESR Review* 11.

150 Joint General Comment (n 140) para 6.

151 *APDF* (n 144) para 75.

152 *The Attorney General v Rebeca Z. Gyumi*, civil appeal no 204 of 2017.

respondent challenged the constitutionality of sections 13 and 17 of the LMA. The challenged provisions require consent of parents or courts for girls below 18 years before marriage. At the same time section 13(1-2) of the LMA allows a girl to get married only upon 15 years and a male person to get married only upon attaining the age of 18 years. The respondent asked the High Court to declare the said provisions null and void and be expunged from the LMA, and 18 years should remain the minimum age of marriage until the Government amends the law.¹⁵³ The High Court was satisfied that the provisions are discriminatory as they uphold different treatment to persons of similar situations hence offending the constitutional principle of equality in articles 12(1) and 13(1) of Tanzania's Constitution. The High Court directed the Government to amend the law within one year and put 18 years as the eligible age for marriage for both boys and girls. The applicant appealed to the Court of Appeal.¹⁵⁴ Referring to article 6 of the Maputo Protocol, the Court of Appeal held that this provision only allows men and women of 18 years to marry. Persons below 18 years lack the capacity to enjoy the right to marriage. It held further that persons who enter into marriage must pass the test of free and full consent.¹⁵⁵

Furthermore, article 6(c) obliges states to promote and protect the rights of women in marriage and family, including polygamous marital relationships.¹⁵⁶ Polygamous marriage is a form of marriage that allows a man to have more than one wife.¹⁵⁷ Considering the non-recognition of the rights of women in a polygamous marriage, these provisions of article 6(c) cannot be overstated. Dominance approach that is critical of reality and tries to change can be applied to transform the discriminatory practices facing women in polygamous marriage. Article 6(c) has potential to be protective of women who willingly or unwillingly find themselves in a polygamous marriage.¹⁵⁸ The right to marriage also includes a woman's right to choose a matrimonial regime and place of residence.¹⁵⁹ Other rights include a woman's right to retain and use her maiden name;¹⁶⁰ the right to retain her nationality. Article 6 also protects the right of a woman to acquire her property during her marriage.¹⁶¹ This clause was necessitated by the reality of formal and

153 *Gyumi* (n 152) 1-2.

154 *Gyumi* (n 152) 3-5.

155 *Gyumi* (n 152) 30-31.

156 Art 6(c) of the Maputo Protocol.

157 EM Baloyi 'Critical reflections on polygamy in the African Christian context' (2013) 41 *Missionalia* 165. It should be noted that neither the Maputo Protocol nor any other African regional human rights in Africa has defined polygamous marriage.

158 Banda (133) 264.

159 Art 6(e) of the Maputo Protocol.

160 Art 6(f) of the Maputo Protocol.

161 Art 6(j) of the Maputo Protocol.

informal restrictions on women's legal capacity to enter into transactions.¹⁶² Article 6(d) requires all marriages to be recorded in law and registered to acquire legal status. However, only civil and religious marriages respectively are registered, customary marriages are not registered.¹⁶³ Unregistered marriages pose challenges in the distribution of matrimonial property during separation, divorce, or annulment of marriage.¹⁶⁴ Since the dominance approach takes into account structural inequalities such as omission of the existing laws to address registration of customary marriage, which many women in Africa are in. Application of the dominance approach will give recognition of customary marriage a gender perspective. As such, non-recognition will be considered a violation of women's right to marriage and related rights such as right to property, inheritance etc.

3.2 Right to education and training

Article 12 of the Maputo Protocol protects the right to education and training. Education plays a pivotal transformative and women's empowerment role.¹⁶⁵ Education entails all types and levels of education and includes access to education, the standard and quality of education, and the conditions under which it is given.¹⁶⁶ Types and levels of education include pre-school, primary, secondary, tertiary, and adult education, and vocational training.¹⁶⁷ Significantly the right to education encompasses three dimensions namely: access to education, rights within education, and rights through education.¹⁶⁸ Access to education refers to participation, particularly the extent to which girls/boys, and women/men are equally represented, as well as adequate infrastructure.¹⁶⁹ Rights within education refer to substantive gender equality in education.¹⁷⁰ Rights through education define ways in which schooling shapes gender equality in other spheres of life.¹⁷¹ These three dimensions are embedded in the 4As framework: availability, accessibility, adaptability, and affordability.¹⁷²

162 CN Musembi 'Marriage' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 146.

163 General Comment 6 (n 10) para 19.

164 As above.

165 Committee on the Elimination of Discrimination against Women General recommendation 36 on girls' and women's right to education (CEDAW GR 36), CEDAW/C/CG/36, adopted on 16 November 2017 para 1.

166 Article 2 of Convention against Discrimination in Education (CADE), adopted by the General Conference at its eleventh session, Paris, 14 December 1960. It should be noted that the Maputo Protocol does not provide the definition of education.

167 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24 October 2011 (Principles and Guidelines) para 70.

168 CEDAW GR 36 (n 165) para 14.

169 CEDAW GR 36 (n 165) para 15.

170 CEDAW GR 36 (n 165) para 16.

171 CEDAW GR 36 (n 165) para 17.

172 CEDAW GR 36 (n 165) para 14.

Importantly, the right to education requires states to eliminate all forms of discrimination against women, and guarantee equal opportunity and access in the sphere of education and training.¹⁷³ Dominance approach is relevant here as it emphasises on the elimination of direct and indirect discriminatory practices in all spheres of life including the public and private sphere under the definition of discrimination in article 1(f) of the Maputo Protocol, and article 1(1) of the Convention against Discrimination in Education (CADE).¹⁷⁴ States should also eliminate stereotypes in textbooks, syllabuses, and the media, which perpetuate discrimination.¹⁷⁵ Stereotypes operate to attribute generalised behaviours, abilities, interests, values, and roles to a person or group of persons on the basis of their sex, gender, ethnicity, religion, social class, disability, or the intersection of these, or roles to people based on their membership in an identified group.¹⁷⁶ These provisions entrench the language of dominance approach in the right to education and training. The application of dominance approach that uses women's experience of stereotypes and exclusion in education can be applied to help a better understanding of the right to education and training in relation to these matters. Moreover, the dominance approach that strives to transform women's inequality into reality in education becomes useful to engender the right to education and advance its object and purpose to women.

Furthermore, states are obliged to protect women and girls from all forms of abuse, including sexual harassment in schools and other educational institutions, and provide for sanctions against the perpetrators of such practices. The Maputo Protocol does not explicitly define the phrase sexual harassment.¹⁷⁷ However, the meaning of sexual harassment can broadly be construed through the provisions of article 1(j) on violence against women¹⁷⁸ that define violence against women to mean

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or war.¹⁷⁹

The prohibition of sexual harassment must be observed from the enrolment of students until the completion of education and training. It is also vital that women victims of sexual harassment are provided

173 Art 12(a), Maputo Protocol.

174 Convention against Discrimination in Education, adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

175 Art 12(1)(b), Maputo Protocol.

176 Wamahiu & Musembi (n 27) 267.

177 Mnzava (n 29) 296.

178 As above.

179 Art 1(j), Maputo Protocol. See also: African Commission on Human and Peoples' Rights, 'Guidelines on Combating Sexual Violence and Its Consequences in Africa' (Guidelines), adopted on 22 May 2017 para 3.1. See also CEDAW General Recommendation 19.

with access to counselling and rehabilitation services.¹⁸⁰ States should also integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.¹⁸¹

The application of the dominance approach that considers violence and sexual harassment against women as a form of male domination can help the interpretive organs to evaluate sexual harassment and violence inflicted on women and girls in schools. It can be applied to elaborate, through women and girls experience on sexual harassment in schools, how men use sexual harassment to keep women from attaining power and therefore render them powerless socially, economically, and politically.

Aspects of sexual harassment and gender-based violence appeared in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (Egyptian)*,¹⁸² whereby the Commission found it imperative to define discrimination and its relationship with gender-based violence.¹⁸³ It referred to the provisions of article 1(f) and 1(j) of the Maputo Protocol, article 1 of CEDAW, and paragraph 6 of the General Recommendation 19 of CEDAW.¹⁸⁴ The Commission found that verbal assault used against the victims such as ‘slut’, and ‘whore’ is not usually used against men. They are generally meant to degrade and rip off the integrity of women who refuse to abide by traditional religious, and even social norms.¹⁸⁵ The Commission found that the physical assaults against the victims in this case are gender-specific in the sense that the victims were subjected to acts of sexual harassment and physical violence, including breast fondling, and touching or attempting to touch private and sensitive parts, that can only be directed to women.¹⁸⁶ It also held that threats against some of the victims who were accused of practicing prostitution when they refused to withdraw their complaints could also be classified as being gender specific.¹⁸⁷ The Commission held that incidents alleged took place in the form of a systematic sexual violence targeted at the women participating or present in the scene of the demonstration. It therefore held that the type of violence used during the demonstrations was perpetrated based solely on the sex of the persons at the scene of the demonstration. In other words, the violence was gender-specific and discriminatory by extension.¹⁸⁸ Although the Commission did not state it explicitly, it applied the tenet ‘as a woman’ to determine the *Egyptian* case.

180 Art 12(d), Maputo Protocol.

181 Art 12(e), Maputo Protocol.

182 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication 323/06.

183 *Egyptian* (n 182) para 120.

184 *Egyptian* (n 182) para 120-123.

185 *Egyptian* (n 182) para 143.

186 *Egyptian* (n 182) para 144.

187 *Egyptian* (n 182) para 145.

188 *Egyptian* (n 182) paras 152-153.

3.3 Right to health including sexual and reproductive health

The Maputo Protocol covers the right to health including sexual and reproductive health in article 14. States are obliged to ensure the right to health of women, including sexual and reproductive health is respected and promoted. The right therefore entails obligations to respect, protect and fulfil women's health including sexual and reproductive health. This main clause of article 14 is framed within the principle of substantive equality. As such, substantive equality is embedded in all provisions of article 14 including the right to control fertility; the right to decide whether to have children, the number of children and spacing of children; the right to choose any method of contraception; right to self-protection and to be protected against sexually transmitted infections including HIV; right to be informed on one's health status and on the health status of one's partner; and right to have family planning education.¹⁸⁹ The General Comment 2 on article 14(1)(a), (b), (c), and (f) and article 14(2)(a) and (c) of the Maputo Protocol (General Comment 2) explains that these rights are inextricably linked, interdependent and indivisible.¹⁹⁰ They are also interlinked with the rights to dignity, non-discrimination, and life.¹⁹¹ The right to family planning education incorporates in it an obligation upon states to provide complete and accurate information necessary for enjoyment of health, including the choice of contraceptive methods.¹⁹² The African Commission's Principles and Guidelines on the Implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights demonstrate that access to health-related education and information, control over one's own body and health, including sexual and reproductive freedom are the vital components of the right to health.¹⁹³

Despite the above promising analysis that gives hope regarding the protection of the right to health and reproductive health the Commission issued a regressive decision recently in *Community Law Centre and three Others (on behalf of the Five Victims) v Nigeria (Community Law Centre)*.¹⁹⁴ In this communication the complainants submitted to the African Commission on Human and Peoples' Rights complaints on behalf of five (5) women in Nigeria (the victims) who suffer from lifelong injuries such as obstetric fistulas, haemorrhage, and those who have died as a result of complications related to

189 Art 14(1)(a)-(e) of the Maputo Protocol.

190 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) & art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia, 22 October-5 November 2013 para 23 (African Commission General Comment 2).

191 African Commission General Comment 2 (n 189) paras 24-27.

192 African Commission General Comment 2 (n 189) para 28.

193 Principles and guidelines (n 167) para 64.

194 *Community Law Centre and three Others (on behalf of the Five Victims) v The Federal Republic of Nigeria*, Communication 564/15.

pregnancy or childbirth.¹⁹⁵ The Complainants argued that the Respondent State failed to provide adequate access to maternal healthcare services. They alleged the violation of the right to health and reproductive health in article 14, and the right to life in article 4 respectively.¹⁹⁶

The Commission noted that though the complainants identified the violation of certain provisions of the Maputo Protocol they failed to elaborate on or show what the violation was.¹⁹⁷ It held that it could not find a basis for a decision on whether the said provisions have been violated or not.¹⁹⁸ On the right to life, it held that the right is a significant component of the right to sexual and reproductive health but the complainant's submissions did not show how maternal deaths were the result of a failure by the respondent state to take necessary measures to prevent such deaths. The Commission further stated that in particular, the respondent state has sufficient resources to prevent maternal deaths and, more importantly, that despite the existence of resources, it has failed to take necessary steps to ensure the continuous and sustainable improvement of the right to maternal health. Surprisingly, it stated that the complainants failed to demonstrate that the respondent state has promoted or adopted measures that undermine access to healthcare or social security benefits, including laws, policies or practices that have discriminatory effects. The Commission concluded that due to the absence of such explanation, the right to life in article 4 was not violated.¹⁹⁹

Regarding the violation of the right to health, and sexual and reproductive health in article 14(1)(a), (b), (c), (f), and 2(a) and (c), the Commission held that the complainants had failed to demonstrate the causal link between the facts described and the mentioned provisions of article 14 on how the facts impeded the victims' personal decision-making of the right to exercise control over their fertility, on the right to decide on the number of children and the spacing of births, or on family planning in general. The Commission concluded therefore, that article 14 of the Maputo Protocol was not violated.²⁰⁰

Concerning the right to equality and non-discrimination relating to the right to health and reproductive health, the Commission held that article 2 of the Maputo Protocol exclusively focuses on non-discrimination on the basis of sex through the phrase 'discrimination against women'.²⁰¹ As such, in the context of article 2 of the Maputo Protocol differential treatment must be based on the sole ground of sex. In particular, law must guarantee the equality of women and men.²⁰² While noting the complainants' argument that the patriarchal system

195 *Community Law Centre* (n 194) para 1.

196 *Community Law Centre* (n 194) paras 10, 13, 57-58 & 60-88.

197 *Community Law Centre* (n 194) para 91.

198 *Community Law Centre* (n 194) para 92.

199 *Community Law Centre* (n 194) paras 104-105.

200 *Community Law Centre* (n 194) paras 117-118, and 121.

201 *Community Law Centre* (n 194) para 133.

202 *Community Law Centre* (n 194) para 135.

and adherence to cultural practices subject women to daily discriminatory practices concerning maternal health, the Commission held that the Complainants failed to show the kind of discriminatory treatment the victims had been subjected to. It further held that the Complainants failed to demonstrate how the patriarchal system and cultural practices had caused differential treatment of the victims compared to the treatment accorded to other similar categories in the same situation as the victims.²⁰³

Regarding the right to information as a component of the right to health and reproductive health in article 14(1) the Commission noted that the right to information is a gateway to all other human rights, including the right to health and reproductive health.²⁰⁴ The Commission noted further that the right to health and reproductive health impose upon states an obligation to provide complete and accurate information necessary for the respect, protection, and enjoyment of health, including contraceptive methods.²⁰⁵ However, the Commission held that the Complainants had failed to demonstrate how the ignorance of Nigerian women about contraception had contributed to maternal mortality and, more importantly, how the respondent state had played a passive role in providing family planning education. The Commission was of the view that the Complainants failed to establish a causal link between family planning education and maternal mortality.²⁰⁶ Based on this reasoning, the Commission found that there was no violation of the right to information in article 14(1)(f) of the Maputo Protocol.²⁰⁷

The Commission could have benefited from the application of the dominance approach and avoid the regressive decision it arrived at. This is a good decision where the Commission applied the teleological approach but missed an opportunity to engender it. The application of the dominance approach would have allowed the Commission to use the argument that women are denied their right to health including sexual and reproductive health based on their sex 'as women'. The Commission could also apply the tenet 'as a woman' to find that women's experiences of sex inequality have shaped contours of sex discrimination. This line of reasoning would have helped the Commission to establish the violation of the right to equality and non-discrimination relating to the right to health and reproductive health.

The Commission could use the dominance approach argument that emphasises power imbalance underlying issues relating women's sexuality and reproductive health. This power imbalance tenet would have enriched the Commission's reasoning by considering that male-dominated practices view women's reproductive capacity as a symbol of male domination. This discriminatory practice is oppressive, as it perceives women as sources of childbearing, child rearing, breast-

203 *Community Law Centre* (n 194) para 136.

204 *Community Law Centre* (n 194) para 146.

205 *Community Law Centre* (n 194) para 148.

206 *Community Law Centre* (n 194) para 149.

207 *Community Law Centre* (n 194) para 150.

feeding, and sexual pleasure. As a result women's health and life is put in danger. This reasoning would have helped the Commission avoid the regressive decision it arrived at in relation to the relationship between health and reproductive rights and right to life.

The Commission could apply the argument of the dominance approach that men dominate women socially by perpetuating a legal system that reinforces gender inequality. The application of this tenet would help to show the respondent state's promotion or adoption of measures that undermine access to healthcare or social security benefits, including laws, policies or practices that have discriminatory effects.

Moreover, the Commission could have applied the dominance approach's argument that women's subordination to men leaves women powerless. This could be applied by the Commission as a causal link between the facts of this case and their implication on women's decision-making regarding rights in article 14. Generally, male domination affects women's personal decision-making of the right to exercise control over fertility, the right to decide on the number of children and the spacing of births, or on family planning. This reasoning could have assisted the Commission to establish the violation of article 14 on the right to health including sexual and reproductive health.

4 CONCLUSION

This article has shown that in Africa women have continued to be the victims of socio-economic rights by simply being women. The research carried out in this article has shown that male dominance is prevalent in all socio-economic rights. Women's socio-economic rights experience is the experience of inequality and male dominance. Importantly, the article has illustrated that the Maputo Protocol protects socio-economic rights extensively, but the interpretation that addresses women's experience is required. The article has also demonstrated that the teleological approach is relevant for the interpretation of socio-economic rights in the Maputo Protocol, however, it needs to integrate a feminist gender perspective. The article has also shown that the teleological interpretation that engages a gender perspective enables the interpretive organs to inquire into the object and purpose of the Maputo Protocol as well as women's socio-economic lived reality. Importantly, the research conducted in this article has demonstrated that the dominance approach can be integrated into the teleological approach and substantive equality for effective interpretation of socio-economic rights. Importantly, the article has developed the methodological model to guide the interpretive organs in the application of the developed gendered teleological interpretation. Finally, the article has analysed selected socio-economic rights and analysed the relevant jurisprudence to show how application of the dominance approach could help engender the

socio-economic rights in question and its implication on all socio-economic rights.