

Article 17

Right to a positive cultural context

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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. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

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1 Introduction

Cultural rights are a fundamental and integral component of human rights for individuals and communities in two ways. First, cultural rights provide the context for living a life of human dignity.¹ Second, cultural rights are vital for positive social interaction between individuals and across groups in multicultural communities.² Yet, despite its importance, culture is often portrayed as being at odds with human rights. Indeed, culture is considered contentious and complicated, especially concerning women’s rights.³ Right at the outset, therefore, how cultural rights are to be protected and how they are to be balanced with other human rights, especially women’s rights, calls for serious reflection.⁴

Cultural rights, or the right to participate in cultural life, are enshrined in several international and regional human rights instruments. For example, at the international level, article 27(1) of the Universal Declaration of Human Rights (Universal Declaration) recognises the right of everyone

1 United Nations General Assembly Report of the Special Rapporteur in the field of cultural rights ‘Universality, cultural diversity, and cultural rights’ (2018) A/73/227 para 13.

2 Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 21 (right of everyone to take part in cultural life (art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights 2-20 November 2009 E/C.12/GC/21.

3 S Tamale ‘The right to culture and the culture of rights: critical perspective on women’s sexual rights in Africa’ (2008) 16(1) *Feminist Legal Studies* 49.

4 JO Onyango ‘Who’s watching ‘Big Brother’? Globalisation and the protection of cultural rights in present-day’ (2005) 5 *African Human Rights Law Journal* 16.

to participate in their community's cultural life freely.⁵ In addition, article 15(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides that individuals have the right to participate in cultural life.⁶ Furthermore, other international human rights instruments emphasise the equal participation of all persons in cultural activities.⁷ Notably, special attention is given to cultural minorities and indigenous peoples.⁸ Concerning the latter, cultural rights extend to their distinct cultural institutions, ancestral lands, natural resources and traditional knowledge.⁹

The United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the leading international treaty on women's rights, does not contain such a right.¹⁰ Culture in CEDAW has a negative connotation despite providing for women's right to 'participate in all aspects of cultural life'.¹¹ It has been suggested that the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee's) approach to interacting with states on the matter of culture proceeds from a counterproductive perception of culture as a hindrance to the realisation of women's human rights.¹²

At the regional level, the African Charter on Human and Peoples' Rights (African Charter) recognises cultural rights and elaborates on their protection. For example, article 17(2) identifies the right to participate in cultural life freely. Article 17(3) upholds promoting and protecting morals and traditional values. Article 29(7) takes these rights further and provides a duty on every person to 'preserve and strengthen positive African cultural values in *his* relations with other members of the society'.¹³ These provisions have been criticised for at least three reasons.¹⁴ First, because they emphasised African culture more than protecting women's rights.¹⁵ Second, because they offer little clarity on the nature, scope, and content of promoting positive and traditional values.¹⁶ Third, as has been pointed out, a blanket reference to African values can be used to justify infringing on human rights in general and women's in particular.¹⁷

Article 17 on the right to a positive cultural context is integral to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa's (Maputo Protocol) overall goal to 'promote, realise and protect the rights of African women'.¹⁸ Such articulation confirms that African culture can be positive and allows for a balance to be struck between women's rights and culture. This balance ensures that African women do not necessarily have to choose between their valued cultural identity and their rights.¹⁹ Additionally, guaranteeing this right restores women's agency as

5 Universal Declaration art 27(1)

6 ICESCR art 15(1).

7 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art 5(e)(vi). CEDAW art 13(c). Convention on the Rights of the Child (CRC) art 31(2). International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art 43(1)(g). Convention on the Rights of Persons with Disabilities (CRPD) art 30(1).

8 ICCPR art 27.

9 As above.

10 CEDAW GA Res 54/180 UN GAOR 34th session Supp 46 UN Doc A/34/46 1980.

11 CEDAW art 13(c).

12 CN Musembi 'Pulling apart? Treatment of pluralism in CEDAW and Maputo Protocol' in A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional, and national law* (2013) 187.

13 Emphasis added to show the male preferences in the articulation of art 29(7).

14 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 449-454.

15 JE Bond 'Gender discourse and customary law in Africa' (2010) 83 *Southern California Law Review* 512.

16 F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 75.

17 Murray (n 14) 451.

18 Preamble para 14.

19 Tamale (n 3) 55.

active participants in determining cultural policies and emphasises the threefold obligation of states to protect, promote and fulfil all human rights.²⁰

This chapter aims to provide a commentary on article 17 and proceeds as follows. First, this section introduces article 17. Section 2 maps article 17's drafting history. This history is followed by section 3, which discusses article 17's linkages to other treaty provisions. Thereafter, section 4 identifies the key concepts in the article and offers definitions. This examination lays the foundation for section 5, which explores article 17's implementation in African countries. Finally, section 6 offers conclusive arguments.

2 Drafting history

The idea of an article dedicated to the right to a positive cultural context was first mentioned in the Nouakchott Draft. Initially articulated in article 18, this draft provided:

All women have the right as human beings to enjoy life in a positive cultural environment and to participate at all levels in the determination of cultural policies. State Parties shall take all measures to protect women and society from the harmful effects of fundamentalism and of cultural and religious practices which oppose this right.²¹

The drafters understood the enjoyment of life for 'all women as human beings' to be tied to a positive cultural environment. However, the drafters seemed to acknowledge that the opposite is also true: a lack of enjoyment of life occurs where negative culture thrives. Moreover, the language concedes that certain cultural and religious practices restrict women from enjoying life in a positive cultural context. Nevertheless, the phrase 'the harmful effects of fundamentalism' used in this draft is ambiguous and could explain why it was not included in the final draft.

Significantly, an amended Kigali Draft proposed the inclusion of article 19 on cultural practices, which reads:

1. Women shall have the right to live in a positive cultural environment and to participate at all levels in the determination of cultural policies.
2. States Parties to this Protocol shall take all appropriate measures to:
 - (a) Favour the participation of women in the conception of cultural policies at all levels;
 - (b) Protect women and society from all forms of intolerance and repugnant cultural and religious practices.²²

Notably, the enjoyment of life for 'all women as human beings' in the Nouakchott Draft did not make it to the Kigali Draft. Moreover, the sub-articles that appeared in the Kigali Draft were not included in the final text. Interestingly, the word 'favour' used in the Kigali Draft was not included in the final draft. The omission could be because it is vague and less persuasive, as it is unclear what exactly a state would be expected to do that would constitute 'favour'. However, the Kigali Draft undoubtedly informed the current article 17(2) mandate to States Parties to 'take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.'

20 Maputo Protocol art 17(2).

21 See Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft) art 18.

22 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft) art 19.

In November 2001, a Meeting of Experts was convened. As a result, further amendments to strengthen the text and make it more comprehensive were made, including the following revisions to the draft article on cultural rights:²³

1. Women shall have the right to live in a positive *and non-discriminatory* cultural context *without degrading portrayals of women* and to participate at all levels in the determination of cultural policies
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation *and implementation* of cultural policies at all levels.

However, these proposed changes (in italics) in subsections 1 and 2 were removed from the final version. The vagueness and unwieldiness of these suggestions as well as the difficulties in determining what acts would, for example, constitute *degrading portrayals of women*, could explain its exclusion in the final draft.

3 Linkages to other treaty provisions

The recognition of cultural rights can be traced to article 27(1) of the Universal Declaration, which guarantees the right to participate freely in cultural activities. The right of women to live in a positive cultural context is further linked to article 2(f) of CEDAW, which mandates state parties to take all ‘necessary steps, including legislation, to modify or abolish existing customs and practices which constitute discrimination against women’. This mandate is elaborated in article 5(a), which requires state parties to ‘modify the social and cultural patterns of conduct of men and women, to eliminate prejudices and customary and all other practices’.

Article 17 is the first legally binding instrument to recognise women’s right to live in a positive cultural context. It is therefore linked to the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions (Convention), the first legally binding international instrument on culture.²⁴ The Convention recognises the cultural and economic nature of cultural expressions and has been regarded as a landmark in international cultural policy.²⁵ Like the Convention, which pays attention to the situation of minorities,²⁶ article 17(1) explicitly recognises African women’s right to positive cultural expression.

In addition, the Convention recognises the cultural and creative industries as pivotal in efforts to achieve ‘inclusive economic growth, reduce inequalities including realising the goals set out in the 2030 Sustainable Development Goals (SDG) Agenda’.²⁷ This recognition is similar to women’s right to live in a positive cultural context viewed as integral to achieving gender equality, also set out in SDG Goal 5.

Moreover, like article 17(2), which recognises women’s right to be consulted and participate in the formulation of cultural policies, the Convention calls for citizens’ full participation in the creation,

23 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

24 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted 20 October 2005. M Burri ‘The UNESCO Convention on Cultural Diversity: an appraisal five years after its entry into force’ (2013) 20 *International Journal of Cultural Property* 357.

25 UNESCO Website, <https://en.unesco.org/creativity/convention> (accessed 15 May 2023).

26 UNESCO ‘Basic texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions’ (2013) Preamble para 15.

27 As above art 13 General Considerations 6.3.

production, dissemination and distribution of cultural expressions.²⁸ It provides a 'framework for informed, transparent and participatory systems of governance for culture'.²⁹

The right to a positive cultural context under the Maputo Protocol builds onto the right to culture enshrined in the African Charter. For instance, the African Charter provides for the right to freely participate in the community's cultural life, promoting and protecting community-recognised morals and traditional values and preserving and strengthening positive cultural values at the individual level.³⁰

Article 17's drafting history reveals its close interconnection with other critical rights in the Maputo Protocol. For example, the link between article 2 on ending discrimination against women with article 17 is clear. In article 2(2), the drafters acknowledge that human rights violations are not just the consequences of law but are a result of culture and social practice. Therefore, it asks member states to modify the social and cultural patterns of conduct and include the principle of equality in their constitutions, not just at the formal but substantive and transformative levels.

The Maputo Protocol prohibits violence against women both in private and public.³¹ To achieve this, States Parties must employ peace education and social communication strategies to end traditional and cultural beliefs, practices and stereotypes that rationalise and worsen violence against women. These strategies illustrate the importance of ending violence against women and allowing women to live in a positive cultural context.³²

The correlation between article 5 and article 17 is evident.³³ By requiring member states to forbid all harmful practices that infringe on women's human rights, including practices rationalised by culture, such as female genital mutilation (FGM) encapsulated in article 5, a significant aspect of the right to live in a positive cultural context is realised. This point is valid, considering these harmful practices affect women's equal rights, denying them the right 'to live in a positive cultural context and participate at all levels in determining cultural policies that affect their lives.' Moreover, the inclusion of 'positive' in article 17 suggests that harmful traditional practices should be ended.³⁴ However, although the Maputo Protocol specifically mentions FGM and child marriage as harmful practices, this obligation is held to extend to other practices that entrench discrimination.³⁵

Further, the connection between article 17 and article 14 is clear, as the right to live in a positive cultural context would depend on abolishing harmful practices predisposing women to HIV infection.³⁶ Article 17 also relates to the special protection extended to some categories of women listed in articles 20 to 24. For example, guaranteeing widows' right to inherit and remain in the marital home, including maintaining custody and guardianship rights of their children, is attentive to the discrimination and inhumane widowhood practices legitimised by sub-Saharan African cultures.

Likewise, the right of older women to live in a positive cultural context is crucial, considering distinct forms of violence, including witchcraft accusations usually targeted at older women, contrary

28 As above art 13 General Consideration 6.3.

29 UNESCO Website (n 25)

30 African Charter arts 17(2), 17(3) & 29(7).

31 Maputo Protocol art 4(2)(e).

32 F Kabata 'Evening out the divide between rights and culture: a case for mobilising positive culture in state responses to gender-based violence in Kenya' (2022) 33 *Stellenbosch Law Review* 141.

33 MB Berna 'The cultural factor and women's rights within the African Charter on Human and Peoples' Rights and Its Protocol' (2015) 2 *Law Annals from Titu Maiorescu University* 14.

34 Murray (n 14) 451.

35 As above.

36 As above.

to the culture of respect for older people in Africa. Finally, the right of women with disabilities to live in a positive cultural context is imperative, given their increased susceptibility to discrimination and violence often rationalised by cultural and religious misconceptions about disability.³⁷

4 Concepts and definitions

4.1 Definition of culture

Defining culture is essential to unpacking the phrase ‘positive cultural context’. However, the multifaceted nature of culture makes it difficult to define.³⁸ Unsurprisingly, arriving at a globally agreed and acceptable meaning for culture has been challenging.

Anthropologists have studied different definitions of culture without consensus on its meaning.³⁹ For anthropologists, culture is defined as a way of life.⁴⁰ It connotes a society or group in which many or all individuals live and think in similar ways.⁴¹ This definition captures culture’s two components: social culture, which relates to people’s interaction and organisation;⁴² and ideological culture, which is linked to people’s thinking, belief and value system.⁴³

Similarly, for sociologists, culture has two interconnected dimensions, namely the material and nonmaterial aspects of culture.⁴⁴ Material culture denotes the physical objects, resources, and spaces people use to define their culture – these physical aspects of culture help to explain behaviours and perceptions. In contrast, nonmaterial culture refers to people’s nonphysical ideas about their culture, including beliefs, values, rules, norms, morals, language, organisations, institutions, ideas, and attitudes.

Culture has been variously defined. For example, in the 2001 Universal Declaration on Cultural Diversity, culture is defined as

the set of distinctive spiritual, material, intellectual and emotional features of society or a social group that encompass, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.⁴⁵

Building on this definition, the African Commission on Human and Peoples’ Rights (African Commission) defines culture as a concept that

encompasses a complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a

37 Article 11 and 27 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (Protocol on the Rights of Persons with Disabilities) adopted 30 January 2018.

38 D Ngira ‘The implication of an African conception of human rights on the women rights movement: a bottom-up approach to women’s human rights protection’ (2018) *East African Law Journal* 140, 142.

39 NH Msuya ‘Advocating positive traditional culture to eradicate harmful aspects of traditional culture for gender equality in Africa’ (2020) *Obiter* 48-49.

40 F Raday ‘Culture, religion, and gender’ (2003) 1 *International Journal of Constitutional Law* 665-666.

41 Raday (n 40) 665-666.

42 As above.

43 As above.

44 W Little *Introduction to sociology* (2014) 56-57.

45 Preamble to the 2001 UNESCO Universal Declaration on Cultural Diversity para 5.

member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.⁴⁶

This definition lays out certain generally accepted features and aspects of culture. Culture is usually associated with the way of life of a particular group or society, manifested in identifiable ideas, customs, symbols, language, rituals, dress codes, knowledge, and shared moral and value systems.⁴⁷ It also encompasses a group's religion, language, and other defining characteristics. However, anthropologists caution against treating culture as a timeless bounded entity defined by antiquity and homogeneity.⁴⁸

Notably, General Comment 21, adopted by the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), resolves some difficulties with defining culture and makes up for the insufficient attention that had previously been accorded to cultural rights especially compared to other rights.⁴⁹ The Committee on ESCR defines culture as an 'inclusive term encompassing all aspects of human life.' It is associated with values, morals and ethical codes of conduct and behaviour that potentially distinguish people of a society or ethnic group from other people of another society.⁵⁰ The UN Independent Expert on Cultural Rights reiterates how culture can be understood as a process, way of life, and product encompassing more than religion, ethnicity, and language.⁵¹

Cultural rights are linked to culture as captured in the Universal Declaration and the ICESCR but have not been explicitly defined or have no official definition.⁵² The UN Special Rapporteur on Cultural Rights clarifies that cultural rights are not synonymous with cultural relativism and must be consistent with international human rights standards. Therefore, cultural rights cannot be invoked to infringe on women's rights.⁵³ For her, cultural rights are the 'rights in the field of culture'.⁵⁴ This definition suggests that cultural rights possess a cultural character and are directly connected to culture.⁵⁵

In making their decisions, African courts have given some insight into how culture is understood. For example, in *State v TB Chirembwe (Chirembwe)*, the Court cites how the prevalent 'rape culture' deprives women of the right to live in a positive cultural context.⁵⁶ The Court's use of 'rape culture' suggests a nonmaterial definition that means that the society's patriarchal ideas, attitudes, and beliefs condone rape. Additionally, in *MEC for Education: KwaZulu-Natal v Pillay*,⁵⁷ the Constitutional Court held that a school policy that forbids wearing a small nose stud, worn as a religious and cultural expression, is discriminatory and unconstitutional. This decision is consistent with the African Commission's reasoning that freedom of (religious and cultural) expression is essential to culture.⁵⁸

46 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 114.

47 Murray (n 14) 449, 450.

48 C Brumann 'Writing for culture: why a successful concept should not be discarded' (1999) 40 *Current Anthropology* S1.

49 ESCR Committee General Comment 21 (n 2) paras 10, 11.

50 As above para 11.

51 Report of the Independent Expert in the Field of Cultural Rights" (2010) UN Doc A/HRC/14/36 para 5.

52 As above para 4.

53 United Nations General Assembly Report of the Special Rapporteur in the field of cultural rights (2017) A/72/155 para 50.

54 Human Rights Council 'Report of the Special Rapporteur in the Field of Cultural Rights' (2016) UN Doc A/HRC/31/59 para 7.

55 Y Donders & A Laaksonen *Finding ways to measure the cultural dimension of human rights and development* (2009).

56 *The State v Chirembwe* <https://media.zimlil.org/files/judgments/zwhhc/2015/162/2015-zwhhc-162.pdf> (accessed 15 May 2023).

57 *MEC for KwaZulu Natal, School Liaison Officer v Pillay* 2008 1 SA 474 (CC).

58 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' (2010) <https://www.escr-net.org/>.

Moreover, in the Kenyan case of *Kamau*, although the concept of culture is used several times, there is no explicit definition.⁵⁹ However, the case provides some implicit insights into how culture is viewed. For instance, in laying out their claim, the petitioners object to the imprisonment of women circumcisers who are believed to be ‘practising the African way of life’.⁶⁰

Also, the right to culture is recognised in some constitutions in Africa. However, there are usually no definitions of what culture means. For example, section 11(1) of the Kenyan Constitution recognises culture as the ‘foundation of the nation and the cumulative civilisation of the Kenyan people and nation’.⁶¹ However, there is no explicit definition of culture in this document. This failure to define culture could mean an assumption that there is consensus on the definition of culture, which is not necessarily the case. It could also mean a recognition of the contestations around the conceptualisation of culture that is avoided.

4.2 Article 17(1): women shall have the right to live in a positive cultural context

Reference to a positive cultural context implies the existence of a negative cultural context. Article 2(2) and 5 of the Maputo Protocol address this negative cultural context. States Parties are called upon to ‘modify the social and cultural patterns of conduct of men and women and to eliminate harmful traditional practices based on the idea of the inferiority or superiority of either of the sexes or stereotyped roles for men and women.’ This language borrows heavily from articles 2(f) and 5(a) of CEDAW. Article 2(f) of CEDAW mandates states parties’ to take all necessary steps, including legislation, to modify or abolish existing customs and practices which constitute discrimination against women’. This mandate is elaborated in article 5(a), which requires States Parties’ to modify the social and cultural patterns of conduct of men and women, to eliminate prejudices and customary and all other practices.’

Again, the CEDAW Committee reiterates in article 2(f), read together with article 5(a), that legislation alone cannot tackle discriminatory and harmful cultural practices and requires other holistic measures.⁶² Central to these provisions is the requirement for States Parties to enact legislation to forbid harmful practices rationalised as custom. This mandate arguably goes beyond a call to enact legal sanctions to requiring positive action toward transformative cultural change to tackle discrimination concretely.

Unfortunately, in several instances, the CEDAW Committee’s stance does not seem to follow its recommended transformative cultural approach, favouring a narrow approach emphasising legislative action. This point is illustrated in documented observations of the CEDAW Committee’s approach to interacting with some African states concerning cultural practices. The approach predominantly favours immediate prohibition through legislation within a framework that presumes from the outset that women’s rights are inherently incompatible with culture.⁶³ Thus, culture’s potentially positive and transformative role in achieving CEDAW’s objective through women’s agency in engaging with and formulating cultural policy is underestimated.⁶⁴

resources/principles-and-guidelines-implementation-economic-social-cultural-rights-african-charter para 74 (accessed 15 May 2023).

59 *Dr Tatu Kamau v the Attorney General* (2019) High Court Constitutional Petition 244 [2019] eKLR.

60 *Dr Tatu Kamau* (n 59) para 18.

61 Constitution of Kenya, 2010 art 11(1).

62 CEDAW Committee General Recommendation 21 Equality in marriage and family relations UN Doc. A/47/38, (1994) paras 14, 15 & 17.

63 Musembi (n 12) 188-189.

64 J Geng ‘The Maputo Protocol and the reconciliation of gender and culture in Africa’ in S Harris-Rimmer & K Ogg (eds) (2019) *Research handbook on feminist engagement with international Law* 7. See also Bond (n 15) 525.

As argued above, as far as the CEDAW Committee is concerned, culture is rarely positive.⁶⁵ Thus, the possibility that African women value their cultural identity and still desire to realise their rights is underestimated.⁶⁶ However, the Maputo Protocol does not adopt a negative framing of culture. On the contrary, it goes beyond ending negative cultural expression to requiring that a positive cultural context is established and ensured. In this sense, the Maputo Protocol transcends CEDAW's static and essentialist view of culture.⁶⁷

The reference to a positive cultural context in the Maputo Protocol draws inspiration from article 29(7) of the African Charter, which calls on individuals to 'preserve and strengthen positive African cultural values.'⁶⁸ Similarly, states must promote and protect morals and traditional values recognised by communities.⁶⁹ Positive cultural values have been defined as values consistent with international human rights standards.⁷⁰ Furthermore, the African Commission has emphasised that only 'positive' values are to be upheld, thus mandating state parties to end harmful traditional practices that negatively affect human rights. This obligation also ensures participation at all levels in determining cultural policies and cultural and artistic activities.⁷¹ Thus, positive African values refer to values that do not tolerate discriminatory acts against women, are consistent with international human rights standards, and work to eliminate harmful traditional practices that negatively affect human rights.⁷²

Despite this clarification, residual ambiguity surrounds the phrase 'positive African values'.⁷³ The term 'African' values leave room for confusion, indicating that some cultural practices are considered African while others are not.⁷⁴ Aside from portraying a fixed perception of culture, it is also unclear what criteria determine the 'Africanness' of a value.⁷⁵ For example, as far as the African Union is concerned, homosexuality is a colonial import contrary to African values.⁷⁶ However, this argument has been debunked.⁷⁷ Ngwena demonstrates that the term 'African values' has been invoked to prescribe homogenised African sexuality.⁷⁸ The term's ambiguity leaves it open to selective deployment by a powerful, more often than not, male political and cultural elite to suit their interests, especially regarding culturally sensitive issues.

The same ambiguity besets the term 'positive cultural context' in article 17 of the Maputo Protocol.⁷⁹ However, the Preamble to the Maputo Protocol goes some way toward mitigating the ambiguity. In the Preamble to the Protocol, African values are listed as 'equality, peace, freedom, dignity, justice, solidarity and democracy.'⁸⁰ Moreover, article 1(g) defines 'harmful practices' as 'all aspects of culture

65 Musembi (n 12) 197-198.

66 Bond (n 15) 519.

67 Geng (n 64) 17.

68 African Charter art 29(7).

69 African Charter art 17(3).

70 African Commission 'Pretoria Declaration on Economic Social Cultural Rights' (2004) Available at https://www.achpr.org/public/Document/file/English/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf (accessed 5 May 2022) para 9.

71 African Commission (n 70) para 9.

72 African Commission (n 70) para 9.

73 Murray (n 14) 594.

74 Murray (n 14) 594.

75 As above.

76 As above. See also C Ngwena *'What is Africanness? Contesting nativism in race, culture, and sexualities'* (2018) 15.

77 Murray (n 14) 594.

78 Ngwena (n 76) 15.

79 DM Chirwa 'Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 85.

80 Maputo Protocol Preamble para 10.

including all behaviour, attitudes and practices which negatively affect the fundamental rights of women and girls.’ This definition is complemented by article 5, which adds the dimension of such practices being contrary to international standards. These provisions combined mean that 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. Additionally, as per article 17(2), it is a context in which women are free and able to participate in the formulation of cultural policies in all spheres of society.

Unsurprisingly, positive culture has been associated with the African principle of ‘ubuntu’ equated with humanism.⁸¹ However, this principle is also ambiguous, with limited usage by the African Commission.⁸²

Lastly, in the *Chirembwe* case (cited above), heard by the High Court of Zimbabwe in 2015, the Court’s reference to women’s right to live in a positive cultural context is insightful.⁸³ In the case, the High Court was confronted with a scenario where a convicted thief entered homes unlawfully and raped female victims. The Court highlights how the prevalent ‘rape culture’ deprives women of the right to live in a positive cultural context.

4.3 Article 17(1): women’s right to participate at all levels in the determination of cultural policies

It is instructive to explore how the Committee on ESCR has elaborated on the treaty’s scope and content in defining women’s right to participate.⁸⁴ Borrowing from the Committee on ESCR’s reasoning, women’s right to participate has a twofold connotation, as outlined in article 17(1): a right to participate in determining and formulating cultural policies and a collective right as a member of a community or society to define and formulate cultural policies jointly.

Women’s right to participate implies three fundamental components: participation, access and contribution.⁸⁵ Guidance from the African Commission suggests that women have the right to “participate in the definition, preparation and implementation of policies on culture and the enjoyment of other rights, especially the freedom of expression necessary for the enjoyment of the right to participate in cultural life.”⁸⁶ Moreover, it is crucial to explore what meaning is conveyed by ‘cultural policies’ as referred to in article 17(1) and (2). Cultural policies are policies on culture.⁸⁷ UNESCO has defined national cultural policies as ‘a body of operational, administrative and budgetary principles, practices and procedures that provide a basis for cultural action by member-states.’⁸⁸ In general, ‘cultural policies’ are not necessarily only framed at the national level in the sense of a formal state policy. Indeed, the reference to ‘at all levels’, borrowed from CEDAW, indicates that women at the

81 Ngira (n 38) 139, 140.

82 Murray (n 14) 451.

83 *The State v TB Chirembwe* (n 56).

84 ESCR Committee General Comment 21 (n 2) paras 14, 15.

85 As above paras 14, 15, 16(a)-(e). First, participation: a basic tenet of participation is choice, emphasising, for instance, women’s ability to freely choose their cultural identity. Secondly, access: women’s right to know and understand their culture, to express and disseminate their culture through education, training, and information. Thirdly, contribution: the right of women to engage in the definition, elaboration and implementation of cultural policies and expressions of their community.

86 African Commission (n 58) para 73-74.

87 African Commission (n 58) para 74.

88 UNESCO ‘Cultural policy: A preliminary study’ (1969) <https://unesdoc.unesco.org/ark:/48223/pf0000001173> (accessed 15 May 2023) p 10.

community and clan levels should be involved in creating cultural policies.⁸⁹ Additionally, it is worth noting that there cannot be a homogenised African cultural policy. Each African society determines and develops its cultural policies according to its ideas and values.⁹⁰

However, what ‘cultural policies to be formulated’ as envisaged under article 17(2) is unclear. Therefore, there might be a need to clarify whether it is the cultural policies that are contained in the colonial and state conception of customary law. This clarification is important as it is difficult to imagine culture’s transformative power when drafted as policies.

4.4 Article 17(2): nature and scope of state obligations

As with all human rights treaties, member states hold a threefold obligation under article 17(2) of the Maputo Protocol. The guidance from the Committee on ESCR about this triple obligation is instructive.⁹¹

The obligation to ‘respect’ requires state parties to desist from interfering, directly or indirectly, with the enjoyment of the right to live in a positive cultural context.⁹² A state’s failure to respect women’s right to live in a positive cultural context could manifest where discriminatory laws and practices against women continue to exist or where official interpretations of customary law endorse harmful rigid norms over flexible practices.⁹³ Where the state refuses to uphold or enhance practices that can 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.

According to the Committee on ESCR, the obligation to ‘protect’ requires state parties to take all necessary steps to protect women from violations in the public or private sphere and to take positive steps to fulfil their rights to live in a positive cultural context.⁹⁴ This obligation also encompasses a commitment that prevents private individuals, entities and third parties from interfering or meddling with the enjoyment of the right to live in a positive cultural context. The obligation to protect has a preventative and remedial dimension, including taking measures to ensure women’s participation at all levels in determining cultural policies and in cultural and artistic activities. This includes steps for safeguarding, protecting, and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems. The obligation to protect is evident in the *Chirembwe* case discussed above, where the Court emphasised that the state’s duty is ‘not just to protect women against any abuses which infringe their fundamental rights, but to also prosecute and punish appropriately as part of the due diligence obligation.’⁹⁵

Article 17 of the Maputo Protocol goes further than the African Charter to obligate states to ensure women’s active participation and contribution in formulating cultural policies at all levels. The obligation is essential, considering African women do not necessarily have the same access or influence as powerful men in culture’s creation.⁹⁶ The reality, according to scholarship, is that what is most often considered culture as presented by powerful, influential male elites is hardly representative. Moreover,

89 LR Pruitt ‘Deconstructing CEDAW’s Article 14: naming and explaining rural difference’ (2011) 17 *William & Mary Journal of Women and the Law* 363.

90 UNESCO (n 88) 10.

91 ESCR Committee General Comment 21 (n 2) paras 48-54.

92 ESCR Committee General Comment 21 (n 2) paras 49(a)-(e)

93 JE Stewart ‘Why I can’t teach customary law’ (1997) 14 *The Zimbabwe Law Review* 20, 21.

94 ESCR Committee General Comment 21 (n 2) para 50.

95 *The State v Chirembwe* (n 56) 5.

96 B Nayak ‘Challenges of cultural relativism and the future of feminist universalism’ (2013) 6 *Journal of Politics and Law* 85.

if there were an option for women to determine what is important to them, they would most likely discard the male version of several cultural practices.⁹⁷

Lastly, the obligation ‘to fulfil’ requires States Parties to take appropriate legislative, administrative, judicial, budgetary, and promotional measures to fully realise the right to a positive cultural context.⁹⁸ For example, the commitment to fulfilling the right to a positive cultural context obligates member states to establish the appropriate legal, economic and social enabling conditions that positively influence African women’s lives.

Significantly, for women’s right to live in a positive cultural context to be fulfilled, member states are mandated to include and involve women and do away with marginalising conditions that prevent women from participating in the determination of cultural policies. This calls for an inclusive plan which should also be intersectional, allowing the voices of, for example, rural women – considered the most marginalised – to be heard at every stage of determining and formulating cultural policies.

Additionally, the African Commission expounded on states’ obligations on cultural rights to include two dimensions.⁹⁹ First, states are urged to enact policies targeted at “the conservation, development and diffusion of culture and the promotion of cultural identity.”¹⁰⁰ These policies should be implemented through available funds and the establishment of institutional infrastructure for implementing policies.¹⁰¹ Second, states must ensure the equality and non-discrimination of vulnerable groups.¹⁰² This obligation involves ending harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and captures three aspects:¹⁰³ 1. customs and practices that threaten the health or life of the child; and 2. customs and practices that are discriminatory to the child on the grounds of sex/gender or other status. 3. Forbids child marriage and the betrothal of girls and boys.

5 Implementation

5.1 Constitutional jurisprudence

As shown above, the enshrinement of the right to a positive cultural context in the Maputo Protocol attempts to strike a balance between guaranteeing positive culture that is expected to strengthen and complement women’s human rights while simultaneously confronting and prohibiting harmful cultural practices that are detrimental to women’s rights. This approach sees culture as a helpful resource that enhances claiming rights and possibly expanding the rights domain.

A few African constitutions that recognise the right to practice culture and prohibit harmful cultural practices have been documented. For instance, while article 37 of the 1995 Ugandan Constitution grants the right to practise culture, article 33 explicitly provides for women’s rights and forbids cultures, customs and traditions undermining women’s status.¹⁰⁴ Similarly, article 11 of the 2010 Kenyan Constitution recognises ‘culture as the foundation of the nation ... and grants women and men the

97 Nayak (n 96) 85.

98 ESCR Committee General Comment 21 (n 2) paras 51-54.

99 African Commission (n 58) para 76.

100 African Commission (n 58) para 76(d).

101 African Commission (n 58) paras 76(d) 1, 2.

102 African Commission (n 58) para 76(e).

103 African Commission (n 58) paras 76(e), (f), (g), (h).

104 Constitution of Uganda, 2005 art 33(6).

right to equal treatment and opportunities in cultural spheres'.¹⁰⁵ However, it protects every child and youth from harmful cultural practices and exploitation.¹⁰⁶

Another example is section 30 of the South African Constitution, which recognises everyone's right to participate in the cultural life of their choice. Despite this recognition, exercising this right to culture is subject to the Bill of Rights.¹⁰⁷ In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) defines unfair discrimination based on gender to include 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men.'¹⁰⁸

Likewise, section 252(2) and 252(3) of the 2005 Constitution of Eswatini recognises Eswatini's customary law principles but requires that these principles are not inconsistent with the Constitution. For instance, section 20(1) provides for the equality of all persons in all spheres of cultural life but mandates that 'a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.'¹⁰⁹ Interestingly, section 35 of the 1993 Constitution of Lesotho grants every citizen, including women, the right to participate freely in the community's cultural life. However, it appears to limit this right due to section 10 of the 1968 Chieftainship Act, which restricts chieftainship succession to men.

The Government of the Kingdom of Lesotho's reservations to article 2 of CEDAW is also worth mentioning. Lesotho entered a reservation to article 2 of CEDAW, declaring that it does not consider itself obligated by the provision to the extent that it clashes with Lesotho's constitutional laws on traditional leadership and chieftainship successions.¹¹⁰ Nonetheless, section 17 of the Children's Protection and Welfare Act 2011 mandates Lesotho to protect all children from harmful traditional practices.

Apart from the African constitutions discussed above, assessing case law jurisprudence on article 17 at the national level is pivotal in understanding how the right to a positive cultural context is implemented in African countries. Article 17 of the Maputo Protocol is explicitly invoked in the *Chirembwe* case discussed above.¹¹¹ The Court held that the 'accused' raped as a form of adventure to exert power and control over the victims. The Court cited how the pervasive nature of sexual violence and 'rape culture' that views women as inferior allows sex to be weaponised as a tool of power and control, subjecting women to constant fear and hindering the right to live in a positive cultural context.¹¹²

Similarly, although the right to live in a positive cultural context is not explicitly mentioned in the outcome of *Bhe v Magistrate Khayelitsha (Bhe)*, the spirit of the provision is invoked in the ruling.¹¹³ The *Bhe* case involved two minor daughters disallowed from inheriting from their father's intestate estate under the customary law of succession and the principle of male primogeniture. In *Bhe*, the

105 Constitution of Kenya, 2010 art 27(3).

106 Constitution of Kenya, 2010 arts 53(1)(d) & 55(d).

107 Constitution of the Republic of South Africa, 1996 secs 30, 31.

108 2000 Equality Act sec 8(d).

109 The Constitution of Eswatini 2005 sec 28(3).

110 Concluding Observations on the Combined initial to fourth Periodic Reports of Lesotho, Committee on the Elimination of Discrimination against Women (8 November 2011) UN Doc (CEDAW/C/LO/CO/1-4) (2011) para 14.

111 *The State v Chirembwe* (n 56) 1. See also S Omondi et al *Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls* (2018) <https://www.equalitynow.org/resource/breathing-life-into-the-maputo-protocol-case-digest-jurisprudence-on-the-rights-of-women-and-girls-in-africa/> (accessed 15 May 2023).

112 As above 84, 85.

113 *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) para 10.

South African Constitutional Court ruled that the law establishing the customary law's principle of male primogeniture into statutory law is unconstitutional.¹¹⁴ In this case, the Constitutional Court held that customary law is protected and subject to the Constitution – the supreme law of the land. Since women's rights and equality are enshrined in the Constitution, customary law cannot be invoked to deny women's rights. The Constitutional Court had offered similar reasoning in other cases after the *Bhe* case.¹¹⁵

Another example is the *Shilubana v Nwamitwa* case.¹¹⁶ The case involved a woman's right to succeed her father as chief, although she was initially considered ineligible based on her gender. The outcome of the case echoes the *Bhe* case in two ways. First, the Constitutional Court, in deciding the case, upheld the plaintiff's right to succeed her father as the chief and not to be discriminated against because of her gender. Second, the Constitutional Court emphasised that customary law is subject to the Constitution.

In light of these progressive Constitutional Court decisions, it could be suggested that a positive cultural context is defined as one that is consistent with the constitutional principle of equality. The examples mentioned above illustrate how the harmful aspects of culture that are detrimental to women's rights are challenged. In this way, human rights standards of equality and non-discrimination are applied without discarding culture wholesale. Thus, the outcomes of these cases are proof of the possibility of culture being progressive and adaptable in a way that upholds human rights principles of equality and non-discrimination.¹¹⁷

From the above examples, it is evident that the male primogeniture principle as a harmful cultural practice has been challenged in African courts. However, the outcome of *Monica Jesang Katam v Jackson Chepkwony (Katam)* is perhaps an example of how custom can be implemented positively.¹¹⁸ The case involved a dispute questioning whether a young mother of two sons had the right to inherit the property of an 85-year-old deceased unmarried woman against the claims of her relatives. The two women had engaged in an arrangement colloquially known as a 'woman-to-woman marriage',¹¹⁹ under which she had the same customary rights as any widow. In its decision, the Court applied the constitutionally recognised 'right to culture' in article 11 of the Kenyan Constitution to uphold the young mother's inheritance claim. This example illustrates how the young mother exercised agency in claiming her cultural rights and how it can be argued that custom was applied positively in this scenario.

Despite these examples of progressive jurisprudence on the right to a positive cultural context, the reality suggests a fluid and fragile balance between gender equality and culture in Africa. For example, the outcome of *Senate Gabasheane Masupha v The Senior Resident Magistrate for Subordinate Court of Berea (Senate case)* demonstrates how African women are still discriminated against and prevented from holding leadership positions in Lesotho.¹²⁰ Such outcomes stem from the cultural beliefs that it is against culture for a woman to be a chief.¹²¹ Such cases exemplify that achieving the delicate balance

114 *Bhe* (n 113) para 10.

115 The other cases are *Bhe* (n 113) para 7. Additionally in a separate case, *Hassam v Jacobs* 2009 (5) SA 572 (CC), the South African Constitutional Court invalidated provisions of the Intestate Succession Act that excluded widows of polygynous marriages from inheritance.

116 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

117 M Ssenyonjo 'Culture and the human rights of women in Africa: between light and shadow' (2007) 51 *Journal of African Law* 66.

118 High Court of Kenya at Mombasa, Succession Cause 212 of 2010 [2011] eKLR.

119 Musembi (n 12) 197-198.

120 *Senate Gabasheane Masupha v The Senior Resident Magistrate for Subordinate Court of Berea* (2013) Court of Appeal (CIV) 29/2013 [2014] LSCA 22.

121 BO Oyetola 'A deadly blow for women's rights in Lesotho' (2014) <https://africlaw.com/2014/06/19/a-deadly-blow-for-womens-rights-in-lesotho/> (accessed 15 May 2023).

between guaranteeing positive culture that promotes women's rights while simultaneously confronting a negative culture that is detrimental to women's rights is no easy feat in Africa.

5.2 State reporting before the African Commission

A review of the states' reports shows that states have taken different approaches in reporting on article 17 of the Maputo Protocol. For example, in its state report, the Angolan Government mentions several activities and programmes to guarantee the right to a positive cultural environment.¹²² The report lists several steps taken to respect, encourage and protect national cultural diversity in the country.¹²³ According to the report, research has been initiated on cases of 'initiations and rituals such as girls and male circumcision through programmes focused on traditional medicine.'¹²⁴ The report mentions how women's participation in these cultural events is encouraged but does not provide further information on how this is done.

The Government of Cameroon, when reporting on the article, begins by listing efforts taken to promote a favourable socio-cultural environment with respect to women's rights.¹²⁵ These efforts include criminalising cultural practices that harm women's rights, such as FGM and degrading widowhood rites. Other efforts documented in the report include awareness-raising actions.¹²⁶

The Democratic Republic of Congo (DRC) report documents efforts to guarantee the right to a positive cultural environment.¹²⁷ According to the report, the government has formulated and adopted several policies and strategies to ensure the right to a positive cultural environment.¹²⁸ These efforts include promulgating laws prohibiting discrimination against women and protecting and promoting their rights. In addition, the report emphasises the revised Family Code to create a positive cultural environment for women in the DRC.

In reporting on this article, the government of the Gambia states, 'The Gambia has taken several measures to promote and preserve the cultural heritage of its people.'¹²⁹ However, these specific measures are not mentioned. Still, the report gives insight into the National Centre for Arts and Culture function: 'to promote and develop Gambian arts and culture'. Also, it does not provide additional information on how this Centre guarantees the right to a positive cultural context.¹³⁰

Notably, although the Government of Kenya reports on the right to take part in cultural life under the African Charter, the report does not contain specific information on measures undertaken

122 The 6th and 7th Combined Periodic Reports of the Republic of Angola on the African Charter on Human and Peoples' Rights and the Initial Report of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2011-2016.

123 As above paras 102-109. Some of these steps listed in the report include: the construction of cultural centres, financing package, adoption of the artistic and cultural scholarship programmes, art schools and multimedia libraries.

124 As above para 103.

125 The single report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention 2015-2019 para 892.

126 As above para 892.

127 The Democratic Republic of Congo's 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 To 2015 (Initial Report and 1st, 2nd and 3rd periodic Reports) paras 287-294.

128 As above paras 287-294.

129 The Republic of the Gambia's Combined Report on The African Charter on Human and Peoples' Rights for the period 1994 and 2018 and initial report under the Protocol to The African Charter on The Rights of Women in Africa (2018) 160.

130 As above 160.

to guarantee women's right to live in a positive cultural context.¹³¹ This omission is made despite recognising a right to culture under the Kenyan Constitution.¹³² However, the Kenyan report mentions several efforts undertaken to eliminate harmful cultural practices against women in other articles.¹³³

On its part, Lesotho's state report cites section 35 of the 1993 Constitution of Lesotho as granting every citizen, including women, the right to participate freely in the community's cultural life.¹³⁴ It admits that section 10 of the 1968 Chieftainship Act restricts traditional leadership and chieftaincy succession to men. However, it explains that this law is not entirely exclusionary to women as it allows women to act as chiefs in at least three scenarios.¹³⁵ This explanation is offered despite Lesotho's reservations under article 2 of CEDAW, declaring that it does not consider itself obligated to forbid discrimination against women to the extent that it clashes with Lesotho's constitutional laws on traditional leadership and chieftainship successions.¹³⁶

Further, the report mentions the 2003 Gender and Development Policy stipulating that 'positive aspects of the Sesotho culture shall be retained and used to protect previously marginalised groups such as women'.¹³⁷ It is not explicit about how the Sesotho culture's positive aspects would be used to protect women but then concludes that women and girls in Lesotho do not encounter significant challenges to their participation in cultural life. The report mentions how women show creativity through artistic and cultural items such as '*mokorotlo*' (Basotho hats) and traditional dresses.¹³⁸ However, the report discusses challenges to women's participation in cultural activities, including limited access to specialised technical and entrepreneurial training and financial resources to fully benefit from participation in cultural activities.¹³⁹

In reporting on article 17 of the Maputo Protocol, the South African government comprehensively lists constitutional provisions and measures to guarantee the right to a positive cultural context.¹⁴⁰ The report cites case law to illustrate efforts to guarantee the right. For example, the report cited the case of *MEC for Education: KwaZulu-Natal v Pillay*.¹⁴¹ In the case, the Constitutional Court held that a school policy forbidding wearing a small nose stud as a religious and cultural expression is discriminatory and unconstitutional. A similar decision was taken in *Antonie v Governing Body, Settlers High School*.¹⁴² According to the state report, a student had been accused of violating school policy by coming to school with dreadlocks and a cap – 'something which was considered part of the Rastafarian religion'.¹⁴³

131 Kenya's Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2015-2020 paras 122, 123.

132 As above paras 122, 123.

133 The Constitution of Kenya, 2010 art 11.

134 Kenya's Combined report (n 131) paras 242, 252, 254, 262.

135 The Kingdom of Lesotho Combined 2nd to 8th 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 2001-2017 para 487. The three scenarios mentioned in the report include: first, women can be chiefs when men are unable to act as chiefs; second, women can act as regents for their male children; third, women can be chiefs if they do not have male children.

136 CEDAW Committee Concluding Observations Lesotho 2011 (n 110) para 14.

137 Combined Report of Lesotho (n 135) para 489.

138 As above para 491.

139 As above.

140 The Republic of South Africa's 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 paras 481-483.

141 As above para 497.

142 As above para 498.

143 As above.

However, the Cape High Court recognised constitutional values, which include the student's freedom of expression.

Similarly, Eswatini, in its report, cites how infringements of women's right to live in a positive cultural context have been remedied through several progressive decisions.¹⁴⁴ The report documents how women's right to a positive cultural context has led to women assuming traditional leadership and chieftaincy positions. Nevertheless, the report documents how the practice of male primogeniture is 'still problematic in some communities due to the complexity with the non-codification of Swazi Law and custom resulting in a lack of consistency in its application on the enjoyment of women's rights.'¹⁴⁵

In its report, the government of Seychelles mentions activities undertaken to promote cultural rights, including laws enshrined in its Constitution. However, it provides minimal information on how the article is implemented domestically.¹⁴⁶

Furthermore, several observations may be made in examining the African Commission's Concluding Observations with regard to article 17 of the Maputo Protocol. For instance, in its Concluding Observations to Burkina Faso, the African Commission gives some insight into the measures it considers when examining whether states have fulfilled their obligation under 'the right to a favourable cultural environment'.¹⁴⁷ The African Commission commends efforts undertaken to guarantee equality between men and women in participation in all aspects of cultural life. Some aspects of cultural life include recreational activities, sports and scientific progress and its applications, and protection of intellectual property for scientific, literary and artistic productions. The commission also commends Burkina Faso for establishing structures that support the exercise of cultural rights by establishing the National Observatory for Religious Affairs, which is responsible for monitoring the implementation of regulations on cultural practices.

The Gambia is similarly praised for its legislative efforts to recognise intellectual property rights for cultural expressions, the establishment of the National Council of Arts, cultural festivals to showcase Gambian culture and measures to guarantee the right to culture. Still, it is unclear how this information links to women's right to live in a positive cultural context.¹⁴⁸ On its part, Namibia is commended for its recognition of women as traditional leaders in their communities and their participation in government decision-making processes, including determining cultural policies.¹⁴⁹

One common feature in the Concluding Observations reviewed above is the fact that the African Commission consistently draws attention to 'sociological and cultural challenges, the persistence of customary practices and deep-rooted prejudice, particularly against women, which continue to restrict women's full realisation of their rights in accordance with the principles guaranteed in the

144 The Kingdom of Eswatini's Combined 1st to 9th Periodic Report on 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 2001-2020 paras 582-593.

145 As above para 593.

146 Seychelles 3rd Periodic Report 2006-2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa.

147 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) para 49.

148 Concluding Observations and Recommendations on the Combined Report of the Gambia, African Commission Human and Peoples' Rights, adopted at the 64th ordinary session (24 April-19 May 2019).

149 Concluding Observations and Recommendations on the 6th Periodic Report of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013), African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016).

Maputo Protocol'.¹⁵⁰ For example, in its Concluding Observations to Nigeria and to Senegal, the African Commission does not mention the right to a positive cultural context.¹⁵¹ However, the African Commission reiterates factors hindering the African Charter's realisation. It reinforces the need to eradicate harmful cultural practices, highlighting deeply-rooted prejudices embedded in religious and traditional norms and practices and how they hamper women's and children's enjoyment of their rights.

This same concern is expressed in its Concluding Observations to Gabon.¹⁵² Again, the African Commission uses the same language of 'sociological and cultural factors and deeply-rooted prejudices' against women that prevent them from fully participating in the public affairs of their country. The African Commission replicated this language in its Concluding Observations to Kenya, Gambia and Ethiopia.¹⁵³

From the above review of the state reports and Concluding Observations, the commission's engagement with states lacks depth on the issue of how women's right to live in a positive cultural context is to be guaranteed concretely. This situation might be due to a lack of clarity on content and what the fulfilment of state obligation with regard to article 17 entails.¹⁵⁴ However, it could also be explained by the fact that only a minority of states have taken up the practice of reporting on the Maputo Protocol article by article.

The African Commission's practice points to the need to move away from rote replication of recommendations to active engagement with each specific state. This is a much-needed investment if the practice is to match the advance made in the text of the Maputo Protocol from the dismissal of culture as a purely negative factor to engagement with culture as a potential force for positive transformation.

6 Conclusion

The right to live in a positive cultural context represents a transformative and innovative approach to cultural rights that goes beyond CEDAW and the African Charter in setting out the parameters for 'positive cultural' values. Its articulation recognises that legal sanction to 'modify' culture may be insufficient, ineffective or time-consuming. This is because certain 'cultural' practices have eaten deep into the fabric of African societies. Hence, as the emerging jurisprudence in article 17 in African courts indicates, culture is gradually seen as a powerful resource for realising women's rights.

However, the state of jurisprudence also shows that despite the progressive and innovative nature of article 17, which enshrines women's right to live in a positive cultural context, it has been unable to reconcile the tensions between culture and women's human rights in Africa. Moreover, despite

150 Concluding Observations and Recommendations on the 5th and 6th Periodic Report of Ethiopia, African Commission on Human and Peoples' Rights, adopted at the 56th ordinary session (21 April -7 May 2015). See also Kenya's Combined Report (n 131).

151 African Commission Concluding Observations and Recommendations on: the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights 2011=2014, adopted at the 57th ordinary session (4-18 November 2015); the Combined Periodic Report of the Republic of Senegal on implementation of the African Charter on Human and Peoples' Rights 2004-2013, adopted at the 18th extraordinary session (29 July-7 August 2015).

152 Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights 1986-2012, African Commission on Human and Peoples' Rights, adopted at 15th extraordinary session (7-12 March 2014).

153 Concluding Observations and Recommendations Ethiopia 2015 (n 150); Kenya's Combined Report (n 131).

154 Chirwa (n 79) 85.

scholarship's attempts to interpret the phrase 'positive cultural context', it is still ambiguous.¹⁵⁵ The challenge with such ambiguity is that it leaves room for (mis)interpretations. Therefore, clarifying what positive cultural context entails would enhance the prospects for realising this right in Africa.

Domestic implementation of treaty provisions significantly determines the relevance and efficacy of the treaty. Yet the practical realisation of women's right to live in a positive cultural context depends greatly on clarity about the concept and the resulting state obligations emerging from this right. There is a need for a General Comment from the African Commission to define and clarify the positive cultural context, elaborate on its normative content, and the scope of state obligations.

Finally, as the article requires, there is a need for significant conversations and engagement with women at various levels, particularly at the grassroots level, to deepen understanding of this right. Engagement with civil society in African countries at multiple levels of governance is essential to ensure that women's right to live in a positive cultural context becomes a reality in Africa.

155 Chirwa (n 79) 85.