

# MAPUTO PROTOCOL

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*Promise versus Reality*

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# INTRODUCTION

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The context of gender equality in Africa is shaped by patriarchal societies that believe women and girls are inferior to men and boys. Traditions, cultures, and religions are factors used to legitimize and justify misogynistic agendas, which have been so prevalent for considerable long periods to the extent of becoming customary laws and informing statutory laws. The consequence is an unendingly widening inequality gap between men and women, necessitating transnational laws that set new norms and standards to right the wrongs and correct the anomalies.

At the international level, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) leveraged on the provisions of the United Nations Charter and the Universal Declaration on Human Rights (UDHR) to affirm the equal rights of men and women. Despite these international legal instruments protecting human rights generally and the rights of women more specifically, women in Africa continue to grapple with unique and intersecting oppressions. Besides, the CEDAW is believed to be too westernized in context, content, and approach to addressing the peculiar nature of the intersectional discriminations that women and girls in Africa face. Hence, while the MP aims to bridge the gaps in the CEDAW, it has fallen short of this intention, albeit not so fatally.

The reality of the widening gender inequality gap, coupled with international human and women's rights laws that seem far detached from the unique realities of African women, formed the basis for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (otherwise known as the "Maputo Protocol"). The Maputo Protocol was adopted by the African Union in July 2003, but became effective in November 2005, as an international human rights instrument aimed at advancing the "civil, political, socio-economic, and cultural rights" of women in Africa. By ratifying the Maputo Protocol, States Parties are obligated to emplace appropriate "legislative, institutional, and other measures" in combating all forms of discrimination against women, as well as in ensuring the elimination of harmful cultural and traditional practices by modifying the "social and cultural patterns of conduct of women and men" through strategic educational and communication strategies.

This paper provides a vigorous and critical examination of the significance and worth of the Maputo Protocol as a regional treaty. In assessing the contradictions between what is apparently promised in the Maputo Protocol and the actual position enjoyed by women in



Africa, the paper considers three key indicators, namely: ratifications and reservations, contents and compatibility, and interpretation and enforcement. It posits that achieving the utopian vision of gender equal African societies is hindered by religious and cultural factors which are antithetical to the texts and aim of the Maputo Protocol.

### **The Maputo Protocol Through the Lens of Religion and Culture**

A key feature of the Maputo Protocol (hereinafter referred to as “MP”) is its cultural sensitivity. In this light, the MP obligate States Parties to advance societies where women live in “positive cultural context.” To achieve this, the MP not only recognizes “the crucial role of women in the preservation of African values,” it also lays out certain principles - equality, peace, freedom, dignity, justice, solidarity, and democracy - which, if protected, will create a positive cultural society for women and aid rights enjoyment.

The MP further takes cognizance of the reality that discrimination against women is rooted in religious, cultural, and traditional stereotypes peculiar to women in Africa. It is no wonder that States Parties that resisted the MP based their arguments, predominantly, on the perceived contradiction that the notion of equal rights of men and women negate cultural norms and religious injunctions, hence the need for differential treatment, which, clearly, furthers the notion of supremacy of one gender over the other.

Considering Africa's deeply ingrained religious and cultural context, there continue to be a plethora of cultural practices and religious tenets that impede women’s rights as guaranteed by international human rights instruments such as the CEDAW and regional instruments such as the MP. Despite this, the MP, in articles 2 - 24, covers a wide range of women’s rights, some of which directly challenges religious and cultural practices within the African context. Some examples are:

- **Marriages**

In article 6, the MP states that the minimum age of marriage for both men and women is 18 years. States Parties are enjoined to enact municipal laws to give effect to this provision, thus addressing the menace of early marriage in Africa where young girls - often for economic, cultural, and religious reasons - are married off once they start showing slight signs of puberty. Also, in article 4(1)(a), the MP prohibited marital rape, which is prevalent in Africa because patriarchal-minded men believe that once a woman’s bride price is paid, they have unfettered access to their bodies, and that seeking consent insults their sense of ownership and headship.



- **Women's Sexual and Reproductive Health and Rights (SRHR)**

The sexual and reproductive health and rights (SRHR) of women, as copiously covered under article 14 of the MP relates to the rights of women to decide on their preferred method of contraception and to control their fertility, as well as their right to self-protection. The MP also made allowance for "medical abortion," which is permissible when a woman experiences "sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." Yet, women's SRHR is threatened when juxtaposed with certain religious and cultural norms in Africa as abortion is believed to be akin to murder.

- **Gender-based violence**

Gender-based violence (GBV) takes three main forms - physical, mental, and sexual. Though not as popular, there are other forms of GBV, like economic and cyber. The MP defines "violence against women" as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts..." While sexual violence advanced to become a "shadow pandemic" at the height of the COVID-19 pandemic, mental violence is largely unrecognized and underreported in Africa.

One of the ways mental violence is perpetrated is through verbal abuse which, commendably, is specifically recognized in the MP. Physical violence, such as domestic violence, is as rife in Africa as other forms of GBV. In a recent survey conducted by Invictus Africa (yet-to-be-released report), women in a south-eastern State of Nigeria reported a very high prevalence of physical violence. One sad example is a recent situation in Nigeria where the repeated domestic violence endured by one Mrs. Osinachi Nwachukwu, a popular gospel singer, led to her untimely death, sparking a national call for justice and declaration of a State of Emergency on domestic violence.

- **Harmful practices**

The MP defines harmful practices as "all behaviour, attitudes and or/practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity." The MP expatiated on this right by prohibiting "all forms of harmful practices [that] negatively affect the human rights of women." Female Genital Mutilation (FGM) is one of such prevalent harmful practices in many African countries, often justified by culture and religion, and which the MP criminalized in article 5(b), making it the first transnational human rights instrument to do so.



Another harmful practice is the widowhood and inheritance rights of women. States Parties to the MP are required to “take appropriate legal measures to protect widows against inhuman and degrading treatments, or any denial of inheritance of their husbands' properties.” This right is against the backdrop that women in Africa continue to suffer the many effects of being edged out during the sharing or re-allocation of their divorced or deceased spouses' properties.

Furthermore, the MP criminalizes a prevalent harmful widowhood practice in Africa whereby widows are forced to spend days with their spouses' corpse and drink the water used in bathing the deceased in order to prove their innocence of the deaths. The MP calls such practice “inhuman, humiliating or degrading treatment.” The provision further protects and guarantees the rights of a widow to remain the guardian of her children as well as her right to remarry a person of her choosing without being forced to marry her deceased husband's relatives. The MP further guarantees the right of a widow to “equitable share in the inheritance of the property of her husband” while adding that a widow has the right to continue to live in the matrimonial house of her deceased husband and, in case of remarriage, can retain the house if it belongs to her or if she has inherited it.

- **Food security**

The MP aptly puts a gender lens to the menace of food insecurity – a situation that has become so prevalent in many African countries in view of, but not limited to, stunted economic growth, criminalities, and protracted armed conflicts. These crises and conflicts have resulted in mass displacements and migration, with women and children constituting the highest numbers even as existing inequalities are exacerbated. In this vein, the MP enjoins States Parties to “provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.”

This is particularly pivotal in a continent where over 70% of its women live in rural communities, many of whom are often disproportionately affected during such conflicts and crises, and who are often eventually saddled with the responsibilities of taking care of the family. The MP also recognizes the right of women to “peaceful existence” by adopting the UN Security Council Resolution 1325 in enjoining States Parties to take all appropriate measures to ensure increased participation of women in the promotion and maintenance of peace. This is crucial in Africa where women are prevented from tasks deemed to be the exclusive preserve of men, such as peacebuilding.

### **Does the Maputo Protocol Truly Advance Women's Rights?**

Three key indicators will be used in assessing whether, or the degree to



which, the MP advances women's rights: ratification and reservations, contents and compatibility, and interpretation and enforcement.

## **1. Ratification and reservations**

Of the 55 countries that should adopt the MP for it to attain universal ratification, only 42 have done so. The fact that the African Union was unable to achieve this goal by the 2020 timeline means women in the remaining 13 countries are not protected by the unique provisions of the MP. For countries that have ratified, some placed reservations that affects and/or limits the full realization of the MP. Notably, Kenya reserved article 14(2)(c) on women's SRHR especially their right to medical abortion. Mauritius did same, adding that the right will only be enjoyed if victims of sexual assault, rape, or incest report to the Police or if a pregnancy that results therefrom has exceeded fourteen weeks.

Namibia reserved article 6(d) of the MP which permits the registration and legal recognition of customary marriages, holding that the enjoyment of this right will only be after the country enacts a national legislation to this effect. This reservation is also one of the many placed by South Africa, adding the condition that a domestic law to that effect must first be enacted. Tunisia and Sudan reserved article 4(1)(d), saying it contradicts their cultural practice and the religious injunctions that support underage marriage.

What these limited ratification and many reservations translate to is that only women in the 42 countries that have ratified the MP can enjoy these rights, and only to the extent to which reservations were not made. The effect of leaving countries and clauses behind is that the MP cannot be said to truly advance women's rights if only a fraction of the women it seeks to protect are indeed protected, and if certain rights cannot be enjoyed by women in the other fraction due to reservations. The true measure of whether the MP advances the rights of women is if all countries in Africa ratify it without reservations.

## **2. Contents and compatibility**

The degree of compatibility with African culture and religion is another way to determine if the MP truly advances women's rights. This way, one can deduce buy-in, commitment, and adherence. An example is the MP's provision on polygamy whereby, rather than outright abolishment, being a practice that is disadvantageous to women as it affects their sense of dignity and self-worth, drafters of the MP succumbed to the narrative that certain Islamic injunctions (Shari'a Law), as well as customary practices in Africa, supports polygamy. This led to article 6(c) of the MP where "monogamy is encouraged as the preferred form of marriage."



By this compromise, States Parties are not specifically prohibited from legalizing polygamy, thus contradicting CEDAW's outright position in its General Recommendation 21 where it states that polygamous marriage should be "discouraged and prohibited" as it "contravenes a woman's right to equality with men, can have such serious emotional and financial consequences for her and her dependants, and could potentially have negative impacts on other rights of women." This, and other inconsistencies, are why Fareda Banda rightly posited that the MP is arguably "more radical than its progenitor" - the CEDAW.

There is also the disparity between the MP's provision on the validity of marriages and the practice of customary marriages in Africa. Article 6(d) obligates States Parties to enact laws that ensures every marriage is recorded in writing and registered in order for such marriages to be valid and legally recognised. On the one hand, this provision is beneficial in confirming that a marriage is based on consent and not coercion, that both parties (especially the females) are not underaged, and that with proper documentation of a marriage a women can show proof of the marriage contract alongside its beneficial clauses.

Disadvantageously, however, pinning the validity of a marriage to its registration and documentation is unhelpful, as most marriages in Africa, especially in rural areas, are conducted through customary rites, which often lacks formalization. Consequently, perhaps inadvertently, this provision advances the narrative that customary marriages are invalid and the women who are married customarily are not *real* wives and should not be entitled to any marital benefits arising therefrom.

### **3. Interpretation and enforcement**

Interpretation and enforcement of the MP is another indicator for determining whether the MP truly advances the rights of women. There is plethora of cases across Africa where the MP have been relied upon in protecting women's rights. For instance, in *APDF and IHRDA vs Republic of Mali*, the plaintiffs instituted an action against the Malian government at the African Court on Human and People's Rights (AfCHPR), challenging the compatibility of Mali's Persons and Family Code with the MP. The AfCHPR found disparities and ruled that certain provisions of the Code contradict international human rights standard on the minimum age of marriage for girls; right of women to consent to marriage; inheritance rights of women and natural children; and harmful social, traditional, and cultural practices that affects girls, women, and children born out of wedlock.

In 2021, a medical doctor filed a Petition before Kenya's Constitutional Court asking that the court to invalidates Kenya's Female Genital Mutilation (FGM) Act on the premise that it discriminated against the



Kenyan women who subscribe to and consent to the culture of FGM. The court ruled in favour of the FGM Act, and held that the Act should, in fact, be strengthened. A similar judgment was given in Uganda, in which the judges stressed the need to respect culture yet emphasized that such culture must not perpetuate any form of torture or degrading treatment. In 2019, Tanzania's Court of Appeal ruled that the provision in Tanzania's Marriage Act that sets age of marriage to 15 and 18 for boys and girls, respectively, contradicts article 6 of the MP. Also, South Africa's Constitutional Court pronounced as discriminatory and a violation, the exclusion of women and denial of their inheritance rights.

Unencouragingly, while positive decisions have been made by regional and municipal courts, the challenge remains that of enforcement. For instance, in *Dorothy Njemanze & 3 Ors. vs. Federal Republic of Nigeria*, the ECOWAS Court pronounced against the violent, cruel, inhuman, degrading, and discriminatory treatments of four women who suffered at the hands of Nigerian law enforcement agents. Till date, the Nigerian government is yet to comply with the judgment, which includes paying compensation to the victims. Understandably, the problem of enforcement is worsened by the principle of non-interference in international law whereby sovereign States are to conduct their affairs without external meddling.

### **Conclusion**

The MP is a critical and copious regional instrument that advances women's rights in Africa. To tackle the impediments caused by culture and religion in fully realizing its objective, the MP enjoins States Parties to "commit themselves to modify the social and cultural patterns of conduct of women and men... with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men." However, being a continent where religion and culture are deeply entrenched, these factors have been the basis for which laws - domestic, regional, and international - are enacted, domesticated, interpreted, and implemented.

Assessing whether the MP truly advances women's rights is, above, gleaned through a three-pronged lens of ratification and reservations, contents and compatibility, and interpretation and enforcement. Evidently, decisions of regional and municipal courts that affirm the provisions of the MP are often unenforced by national governments. Hence, while the MP is well worded, to a large extent, in protecting the peculiar rights of women in Africa, the force of religion and culture strongly contend with its full realization and enjoyment.

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