

# Litigating the Maputo Protocol

A Compendium of Strategies and  
Approaches for Defending the Rights  
of Women and Girls in Africa

Edited by:  
K. Kanyali Mwikya  
Carole Osero-Ageng'o  
Esther Waweru



**Equality Now**

A just world for women and girls.



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When we embarked on a series of training for African lawyers we were cognizant of the fact they were a critical stakeholder in giving life to the Maputo Protocol by virtue of their profession to ensure justice for women and girls. And this Compendium was conceived with a view to capturing their experiences in applying the Maputo Protocol in their legal actions in the pursuit of justice for women and girls. We hope others will find this rich experience useful and applicable in their contexts.

We recognize the great contribution and work of Equality Now staff and consultants for conceptualizing, reviewing and editing the papers that form this Compendium. In particular, we acknowledge the contribution of K Kanyali Mwikya, Esther Waweru and Carole Osero-Ageng'o, who conceptualized, coordinated and oversaw the implementation of this project and provided editorial support for the Compendium. We also appreciate the input from Antonia Kirkland, Caroline Lagat, Flavia Mwangovya and Joy Awich who reviewed abstracts and first drafts of the papers submitted in French.

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We would also like to acknowledge our academic peer reviewers who worked tirelessly to ensure that the papers accepted as part of the Compendium adhered to a high level of research and editorial standards and integrity.

Equality Now is grateful to our long term anonymous donor and the Sigrid Rausing Trust for their support towards the publication of this Compendium, as well as supporting the audit on the impact of the lawyers' training exercises carried out by Equality Now, the SOAWR Coalition and its partners over the past 11 years.

**Faiza Jama Mohamed**

*Director, Africa Office*

*Equality Now*



## Foreword

As the immediate former Special Rapporteur on the Rights of Women in Africa, the full ratification, domestication and implementation of the Maputo Protocol is foremost on my mind as I write this foreword. The adoption and coming into effect of the Maputo Protocol was almost entirely to the credit of African women's rights activists and organisations that worked tirelessly to lobby the African Union to draft the Protocol as well as their own countries to sign and ratify the treaty. Today, organisations such as Equality Now and the Solidarity for African Women's Rights (SOAWR) Coalition, continue this continent wide struggle for the full ratification, domestication and implementation of the Maputo Protocol, advocating that no African woman or girl is left behind or denied their rights.

"Litigating the Maputo Protocol: A Compendium of Strategies and Approaches for Defending the Rights of Women and Girls in Africa" is a testament to the continuation of the work of advocates for the rights of women and girls in Africa and their innovative approaches when it comes to the implementation of this treaty at the national level. The papers contained in this Compendium highlight the rightful place of litigation in holding states accountable for the commitments they made under the Maputo Protocol, as well as other regional, continental and international human rights treaties with provisions aimed at promoting and protecting the rights of women and girls in Africa. Although the Maputo Protocol was one of the fastest African human rights treaties to ever come into force, its domestication and implementation has been plagued by a set of challenges, including the lack of political will by governments to make good on their commitments under the treaty, such as legislative reforms and executive action.

Strategic and public interest litigation at the national, regional and continental levels have been instrumental in pushing for the most urgent reforms aimed at protecting the rights of women and girls in Africa. Activists and advocates who fought so hard for the passing of this treaty have been keen to see the standards contained in the Maputo Protocol become a lived reality for women and girls. Drafted by some of the leading experts on the intersection of scholarly work and advocacy for the rights of women and girls in Africa, this compendium is a wonderful resource for students, scholars, litigators, legislative actors, policymakers and judicial actors.

Now, as ever, the moment of turning words into reality for women and girls by implementing the Protocol through law, policy and progressive jurisprudence is upon us. I would like to thank the contributing authors to this compendium, and everyone who worked on it to make this publication a success, for their addition to research and scholarship on such an important issue.

**Honourable Lucy Asuagbor,**

Retired Judge of the Supreme Court of Cameroon and Special Rapporteur on the Rights of Women in Africa (2015 to 2020)

# Chapter 1

## Litigating the Maputo Protocol: An Introduction

K Kanyali Mwikya

### Background

The coming into force in 2005 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol, was the culmination of years of advocacy by women's rights organisations across the continent, including Solidarity for African Women Rights (SOAWR), a coalition of women's and girls' rights organisations pushing for the treaty's development and adoption. Since the Maputo Protocol's coming into force, the SOAWR Coalition, of which Equality Now is a founding member and serves as its Secretariat, has advocated for the universal ratification, domestication, and implementation of the treaty.

Although most African countries have either signed or ratified the Maputo Protocol, its implementation and application in national, regional and continental litigation is far from becoming a reality. The latter was of notable concern as many women's and girls' rights litigators, civil society organisations and other actors, were missing a crucial opportunity to reference provisions of the Maputo Protocol in cases designed for the treaty's intervention. This knowledge gap, the fact that legal sector actors such as judges, prosecutors, litigators and litigants had little awareness of the Maputo Protocol or its provisions prompted Equality Now, the SOAWR Coalition, and like-minded organisations to establish a training programme aimed at building the capacities of legal practitioners to utilise and apply international human rights norms and standards reflected in the Maputo Protocol as an important avenue for advancing the rights of women and girls in Africa.

Between 2019 to 2020, Equality Now undertook an impact assessment of all of the lawyers' training exercises it conducted between 2011 and 2018. The assessment endeavoured to establish the utility of the training exercises and the

effectiveness and extent to which the trained lawyers have or are contributing to the application of the Maputo Protocol in legal proceedings, as well as increasing and enhancing the level and nature of jurisprudence coming from the courts. The application of the Maputo Protocol in national, regional and continental legal proceedings is crucial in efforts aimed at achieving the full ratification, domestication and implementation of the treaty. This assessment exercise involved the commissioning of an audit of the trainings held and a symposium of trained lawyers that sought to elicit high quality and peer reviewed research papers on the theoretical and practical aspects of applying the Maputo Protocol in national, regional and continental women and girls' rights litigation.

## About the Compendium

*Litigating the Maputo Protocol: A Compendium of Strategies and Approaches for Defending the Rights of Women and Girls in Africa* is part of a multi-year assessment of the impact of the training exercises undertaken by Equality Now and its partners to equip lawyers with the necessary knowledge, skills and expertise to apply the Maputo Protocol in litigating the rights of women and girls in national, regional and continental courts. This publication exemplifies the effectiveness of litigation as a strategy to ensure that the rights enshrined in the Maputo Protocol translate to actual benefit for women and girls in Africa. Additionally, it demonstrates the increased capacity of the lawyers trained to analyse the status of women and girls' rights in their countries through the lens of the Maputo Protocol. The contributors to this publication are, thus, scholar-activists in their own right, who have used their experiences from women's rights protection to provide critical analysis on the law.

The topics and themes covered in *Litigating the Maputo Protocol: A Compendium of Strategies and Approaches for Defending the Rights of Women and Girls in Africa* lay bare the disparities in approaches and standpoints taken by governments when it comes to implementing the Maputo Protocol, as well as the ingenuity and innovation of civil society and legal actors keen to ensure that the Maputo Protocol is adhered to by states who ratify it. Alfred Majamanda speculates on the effectiveness of strategic litigation to reform Malawi's abortion laws. Majamanda begins by providing an analysis of how the national legislative framework in Malawi squares with the provisions of the Maputo Protocol, arguing that,

although the criminalization of abortion in the country has carve-outs that put Malawi in partial conformity with the Maputo Protocol, more needs to be done in reforming the laws. Majamanda also provides a roadmap for lawyers in Malawi to bring litigation challenging the restrictive legal framework on abortion in the country, by analysing recent strategic litigation wins and providing an analysis of how the principle of *locus standi* can hamper efforts to institute such litigation in Malawian courts.

Article 14 2 (c) of the Maputo Protocol and the reservations that numerous countries have placed on this provision has been the object of much strategizing and advocacy, including strategic litigation, across the continent. In their chapter, Evelyn Opondo and Martin Onyango, analyse a case challenging the withdrawal of standards and guidelines for reducing morbidity and mortality from unsafe abortions in Kenya that rendered moot the country's reservation to Article 14 (2) (c) of the Maputo Protocol. They analyze a range of continental and international treaties, as well as constitutional provisions on rights to life, health, dignity, and access to information and the rights of medical providers.

In Cameroon, the question of *locus standi* is one of many challenges that litigants face when instituting suits, and the judiciary is openly hostile towards strategic litigation of any kind. In her chapter, Gladys Mbuyah uses her experience in attempting to file a sexual harassment strategic litigation case in her analysis of the legal regime governing sexual harassment in the country. Like many countries, Cameroon has adopted a non-expansive definition of sexual harassment, restricting its criminalization to schools and workplaces, and between a perpetrator and a victim with more formally identifiable differentials of power. The difficulty in instituting civil proceedings for sexual harassment is almost at the level of attempting to file strategic litigation suits in the country. Ironically, Cameroon's unwillingness to implement the Maputo Protocol, particularly the court's unwillingness to make full use of the treaty's provisions, is within the context of a constitutional regime that automatically adopts treaties duly signed by the executive and allows for such treaty provisions to override national laws. Cameroon presents one of the greatest opportunities on the continent for the full implementation of the Maputo Protocol, among other international and continental rights treaties. Seizing on the opportunity that the Cameroonian Constitution affords, Mbuyah calls for reforms aimed at bolstering judicial independence and the capability of judicial officers to apply treaty

laws. In her recommendations she also makes the case for increased awareness by lawyers on the importance of strategic litigation as an advocacy tool as this would then lead to the increased use of strategic litigation.

Osai Ojigho's paper on the strategizing and coordination among civil society groups and litigants in the lead up to the *Dorothy Njemanze* suit at the ECOWAS Court of Justice (ECOWAS Court) demonstrates the difficulty of securing the outcomes of strategic litigation, through the implementation of court decisions and leveraging these decisions in advocacy and subsequent litigation. Although the Nigerian government is yet to implement the decision in *Dorothy Njemanze*, the case continues to be cited as judicial precedent and has evidently spurred other litigants to bring similar cases on violence against women in national courts. Additionally, media engagement and other strategies that were used in the advocacy around this case have been important in advancing the discussion on topics such as violence against women in general, and violence meted out by law enforcement against women in particular. Lastly, Ojigho's paper provides one of the most comprehensive accounts of what it is like to litigate in an African regional judicial organ. The chapter provides key insights into strategic litigation in general, and the practical and theoretical aspects of litigating at the ECOWAS Court in particular.

However, the developing jurisprudence at the ECOWAS Court on the rights of women and girls has not been without its challenges. In his chapter, Oludayo Fagbemi provides a critique of the ECOWAS Court's failure to apply the provisions of the Maputo Protocol in deciding cases on the rights of women and girls. The ECOWAS Court has also been unwilling to grant structural reliefs, which are defined as orders directing changes in laws, policy and executive action in line with treaty law aimed at addressing the structural causes of rights violations. The court's unwillingness to apply the Maputo Protocol at all, or to grant structural reliefs, Fagbemi argues, has led to lost opportunities for the development of jurisprudence on women's and girls' rights in a mechanism that has become important in the adjudication of such cases. Fagbemi's paper provides a unique perspective not only into the reasoning of the ECOWAS Court by relying on the pleadings and arguments by litigators in the cases, but also provides an insightful look into how these actors craft and present their cases before the ECOWAS Court.

Strategic litigation is an important tool given the far-reaching effect of decisions that come out of the process. Its incorporation of advocacy and coordination

between petitioners, interested parties and *amici curiae* creates opportunities for lawyers and civil society organisations to pool resources and expertise to bolster their cases. Indeed, media advocacy and close coordination among like minded civil society organisations was integral to the victory in the *Dorothy Njemanze* case. In their chapter, Dr Ruth Nekura and Sibongile Ndashe analyze the African Commission's interpretation of Article 59 of the African Charter on Human and Peoples' Rights and its effects on advocacy regarding pending cases, the filing of amicus briefs and the African Commission's independence. Considering that civil society organisations and other litigants institute proceedings at the African Commission and other forums as part of a wider range of tactics and approaches aimed at bringing light to a particular issue, and the fact that the African Commission takes years before handing its decisions, its restrictive interpretation of Article 59 hampers efforts to incorporate litigation at this forum into wider advocacy efforts. Additionally, the paper argues that the African Commission's restrictive interpretation of Article 59 became the weapon of choice in the African Union Executive Council's efforts to undermine the independence of the African Commission and delegitimize it. Article 59 risks relegating the African Commission's importance in adjudicating continental human rights issues, as litigants and other actors move away from it in favour of forums that will accommodate the strategic litigation process in its entirety.

National courts also have their own challenges in the application of international and continental women's treaty provisions in women's and girl's rights cases. In her chapter, Janet Sallah Njie discusses how women's gains under a new political dispensation in The Gambia have been a mixed bag, focusing on adjudicated cases on matrimonial property and marriage in general. Njie's analysis notes how pluralistic legal regimes such as that of The Gambia negatively affect the rights of women in key areas including marriage, matrimonial property and succession. According to Njie, the unwillingness of the judiciary to fully apply the legal tools – statute and treaty law – at its disposal in determining women's and girls' rights cases, even in the face of substantive reforms aimed at this very effect, calls for even more legislative reform, innovativeness by litigators and civil society and judicial activism on the parts of the courts.

On her part, Josephine Chandiru Drama delves into failures from the legislative, policy and governance perspectives and how these have failed South Sudanese women and girls. She links the need for a more expansive governance structure in the country (exemplified by the availability of formal courts across the

country), as one of the most effective ways of guaranteeing access to justice for women and girls. Although South Sudan is yet to ratify the Maputo Protocol, Drama proposes how Article 6 of the Protocol could be applied in bolstering access to justice for women and girl victims of sexual and gender-based violence, a crime which is mostly dealt with by traditional courts. These courts adjudicate cases using communalist and patriarchal models that do not have the rights of the victims to justice and other forms of remedial action, at their core.

In some respects, African countries have led the wave of innovation in imagining how to expand the set of rights articulated in treaties such as the Maputo Protocol. In her analysis of international human rights treaty provisions on the right to menstrual health and hygiene, Gicuku Karugu notes that Kenya has some of the most progressive laws and policies on the provision of menstrual products geared towards guaranteeing menstrual justice for Kenyan girls. Noting the dearth of treaty provisions, national legislation and policies on menstrual health and hygiene around the world, Karugu nonetheless goes ahead to imagine how the confluence of soft law – in the form of observations and reports by special mandate holders at the continental and international level, general comments and other guiding documents by treaty bodies – national legislation and movements by women's and girls' rights activists in this regard can propel reforms aimed at ensuring that women and girls do not lose out on opportunities to fulfil their potential on account of menstruation. Karugu's chapter is a handy manual for any legal practitioner interested in using strategic litigation, as well as other advocacy approaches, to expand the right to menstrual health and hygiene.

Ugandan courts have been among the most active sites of strategic litigation, especially on women's and girls' rights issues that have either faced hostility or apathy from the executive and legislative arms of government. In her chapter, Specioza Avako discusses the advocacy that led to the filing of the *Sexuality Education Case (CEHURD v Attorney General & Family Life Network)* which challenged the Ugandan government's decision to ban the teaching of comprehensive sexuality education (CSE) across the country. The decision in this case is pending. Avako argues that the advocacy and awareness raising on comprehensive sexuality education that gave rise to the case has already moved the needle in terms of the issuance of a National Sexuality Education Framework for Uganda in 2018. Not only does Avako lay out the law and policy regarding comprehensive sexuality education in the country, she also delves into how litigants in this case, specifically civil society organisations involved in



the championing of CSE in Uganda, were key stakeholders in the development of the National Sexuality Education Framework in the country as a direct result to their enhanced legitimacy from their advocacy and litigation on the issue. However, Avako also describes the reticence by many civil society organisations to fully engage in this case out of fear of losing donor support, especially from the United States government. Strategic litigation, as exemplified by this case, is “strategic” in many regards, compelling civil society actors and litigants to apply a range of strategic approaches within and outside the courtroom, with both the bigger picture and more practical considerations in mind.

Susan Murungi looks into the case of *CEHURD & Others v Attorney General (2011)* as a flashpoint for a range of treaty law, constitutional, statutory and policy contestations on the right to maternal health in Uganda. Murungi’s chapter provides an in-depth analysis of the case, whose adjudication traversed the Court of Appeal and the Supreme Court around the “political question doctrine” which has in the past been used as a pretext to shield actions by the executive and legislative branches of government from judicial scrutiny. The Supreme Court’s landmark ruling that the political question doctrine had limited application as long as judicial scrutiny did not encroach on the duly vested constitutional powers and mandates of the executive and legislature removed the shackles on the Court of Appeal (which is also Uganda’s Constitutional Court) to provide a wide range of reliefs, including damages and, most notably, structural remedies that ordered an increase in budgetary allocations for maternal health. *CEHURD & Others v Attorney General (2011)* provides one of the clearest examples of the role national courts play in the provision of structural remedies in the interpretation of both local legislation and continental as well as international legislation. It remains to be seen, however, how the implementation of this decision will play out.

Anita Nyanjong’s chapter on the failure by the Kenyan government to take active steps to address the scourge of sex trafficking in the country notes the crucial role that the judiciary plays in bridging the gap between policy and practice on this issue. Nyanjong argues that, despite the existence of legislation and policy that creates conformity between the Kenyan legal system and international best practices on the prevention, suppression and punishment of the trafficking of persons for sex, the Kenyan government has failed to put in place the systems set up by this regime. This lack of implementation has put the lives of victims and survivors of sex trafficking in Kenya at risk of further harm and marginalisation.

Nyanjong's chapter reminds us that courts have a variety of tools to address structural forms of violence and injustice, including the application of criminal law and its attendant consolidation of norms and practices through judicial precedent. The paper's analysis charts a new course on how women's and girls' rights activists in Africa may consider addressing sex trafficking, through a range of continental and international human rights treaties implemented in their municipal jurisdictions.

Claire-Lise Henry's contribution, the only paper in the compendium whose original is in French, discusses work by civil society actors such as the Association of Women Lawyers of Benin (AFAB) to establish the use of strategic litigation as an effective tool for bolstering efforts to implement existing treaty laws and statute, as a way of addressing systemic lack of access to justice in the country. Benin's adoption and ratification of the Maputo Protocol in 2003 and 2005 respectively paved way for the incorporation of the treaty's provisions into national laws governing everything from marriage, custody and succession to the prohibition of sexual violence and sexual rights. Henry's paper provides a narrative that maps the effects of the ratification of the Maputo Protocol with an increase in prosecutions for sexual violence as well as decisions in civil courts that have been more favourable to the matrimonial property and succession rights of women in the Country. Henry's paper is testament to the institutional and systemic factors, such as the passing of national laws to implement treaty provisions, and the role they play in promoting new sets of tactics and strategies on the part of women's rights lawyers and activists.

From this rich resource and analysis presented above, several key themes emerge in this compendium. First, African legal practitioners and civil society actors are constantly innovating in their approaches, especially in the application of continental and international treaty provisions at all levels of litigation. However, strategic litigation does not take place in a vacuum: the papers in this compendium bring to the fore the fact that both legal and governance structures, such as independence of judicial and quasi-judicial bodies, and the awareness of human rights treaty provisions, are key in spurring on the desired change that strategic litigation seeks to effect. It is hoped that the chapters in this compendium are useful to a wide range of audiences - indeed, they have been written and compiled with this in mind - including lawyers and legal practitioners in general, defenders of the human rights of women and girls, students, civil society actors and the general public.

## Chapter 2

# Litigating Gender-Based Violence and Discrimination – The Dorothy Njemanze Case

Osai Ojigho

### Executive Summary

Litigating gender-based violence and discrimination in regional courts such as the Economic Community of West African States (ECOWAS) Court is relatively under-explored. In the history of the ECOWAS Court, for example, there have been only three cases where the court has pronounced itself on gender-based discrimination. One of those cases is *Dorothy Njemanze & 3 Ors. v Nigeria*, the first case in any regional court to interpret the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). On 12 October 2017, the ECOWAS Court held that Nigeria had failed to protect women in Nigeria from gender-based violence and the actions of its state agents amounted to gender-based discrimination.

The *Dorothy Njemanze's case* was a joint strategic litigation intervention by Alliances for Africa (AfA), IHRDA (Institute for Human Rights and Development in Africa), Nigerian Women Trust Fund (NWTF), and the private law firm of SPA Ajibade & Co, with support from Open Society Initiative for West Africa (OSIWA).

The paper assesses the situation of gender-based violence at the time the case was filed and the processes that led to the filing and final decision in the case. The paper evaluates the various considerations that showcase opportunities and challenges for using strategic litigation as a tool to promote and protect the rights of women and girls such as developing a litigation strategy, identifying the right victim and choosing the forum to bring the case.

The paper reflects on the elements that played a critical role in sustaining the process of litigating the rights of women and girls in Africa under the *Dorothy Njemanze's case*. The paper identified four elements: funding, emotional and psychological support for victims, partnerships, and media.

While the success of the case is celebrated, readers are reminded that implementation of the decision is yet to happen. However, there are other direct and indirect impacts of the decision. The decision has led to increased awareness about gender-based violence, leading to less tolerance for abuse by the public as well as the Nigerian government.

The ECOWAS Court is positioned to provide an alternative justice mechanism for victims of gender-based violence and discrimination in West Africa in cases where national courts cannot be relied upon. This is possible if lawyers and activists can work collaboratively and bring strong and strategic briefs before the court.

## Introduction

On 12 October 2017, the Economic Community of West African States (ECOWAS) Court in the case of *Dorothy Njemanze & 3 Ors. v Nigeria*<sup>1</sup> decided that the State violated the human rights of the claimants (Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford) by failing to recognise their rights and protect them from gender-based violence.

The judgment has been celebrated as a first for women under the Maputo Protocol,<sup>2</sup> as it was also the first time that a regional court made a pronouncement

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1. Dorothy Chioma Njemanze & 3 Ors v Federal Republic of Nigeria (2017) ECW/CCJ/JUD/08/17: [http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW\\_CC\\_JUD\\_08\\_17-1.pdf](http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CC_JUD_08_17-1.pdf) (accessed 10 October 2020)

2. Ojigbo, O (2017 October). Finally, Justice for Women. [Weblog post]. *Human Rights Post*. Retrieved from <https://rightspost.wordpress.com/2017/10/18/finally-justice-for-women/>; See also: Ojigbo O. J. (2017, November 24). A first for the Maputo Protocol. Institute for African Women in Law Blog (Weblog). Retrieved from [www.africanwomeninlaw.com/single-post-ajg27/2017/11/24/A-First-for-the-Maputo-Protocol](http://www.africanwomeninlaw.com/single-post-ajg27/2017/11/24/A-First-for-the-Maputo-Protocol); Geyer, K (2018 January). Landmark judgement on the Maputo Protocol: Nigeria found guilty of gender-based violence. [Weblog post]. *The Lead*. Retrieved from <https://www.iwi.org.uk/thelead/2018/1/30/>

on the treaty. The court specifically found a violation of Articles 2, 3, 4(1), 4(2), 5, 8 & 25 of the Maputo Protocol.

This paper starts with a background to the circumstances that led to the selection of the ECOWAS court as the appropriate forum for the claimants. This is followed by an analysis of the judgment based on the pleadings of the claimants and the rationale of the ECOWAS Court in establishing that Sexual and Gender Based Violence and Gender Based Discrimination had occurred. The paper further evaluates how the ECOWAS Court's decision has created opportunities for expanding understanding on the Maputo Protocol. It will also address the theme of sustaining the process of litigating the rights of women and girls in Africa by exploring the partnerships between law firms, NGOs, women's rights activists, and the media. Finally, the paper examines the challenges affecting the implementation of the decision of the case and makes recommendations to help address these shortcomings.

## Background

In 2010, Alliances for Africa launched the Gender Justice in Africa project and its working group. One of the aims of the project was to identify and support full litigation and development of jurisprudence on the Maputo Protocol. The Nigerian media had reported incidents about women being harassed on the streets of Abuja – the country's capital by the Abuja Environmental Protection Board (AEPB).<sup>3</sup> Upon investigating these claims, it was discovered that women were grabbed violently as they were sighted by persons who claimed to be state security agents and pushed into waiting vehicles. During these unlawful

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landmark-judgement-on-the-maputo-protocol-nigeria-found-guilty-of-gender-based-violence; IHRDA, ECOWAS Court makes first pronouncement on Maputo Protocol (12 October 2017) <https://www.ihrda.org/2017/10/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/>

3. Amara Nwankpa, "If you are a woman and you live in Abuja, you should be concerned" The New Order (blog post), August 15, 2011, <https://thenewbubusianorder.wordpress.com/2011/08/15/if-you-are-female-and-you-live-in-abuja-you-should-be-concerned/> (accessed 10 October 2020)

arrests, many were beaten, assaulted, groped, verbally abused, and threatened to be shot. When the women arrived at the detention centres, they were threatened and coerced to sign statements that they were sex workers and were constituting a nuisance. Most were forced to pay bribes as bail to escape spending a night in police cells or to avoid a trial before a magistrate for fear of being labelled as sex workers. Sadly, some were raped while in custody. When probed further, it emerged that this was a systematic operation led jointly by the Abuja Environmental Protection Board (AEPB) and security agents (police, military, defence corps) with support from an NGO, Society Against Prostitution and Child Labour in Nigeria (SAPCLN) under the pretext of ridding the streets of Abuja of sex workers. While there appeared to have been a rise in such incidents between 2011 and 2012, it is possible, based on statements by witnesses in the area, that this peculiar attack on women had been taking place as far back as 2009.

Dorothy Njemanze, an actress, got interested in the issue when friends of hers were picked up on their way to a bridal party by the AEPB joint operation in September 2011. The police officers threatened to shoot her when she tried to intervene. A year later, she had a personal experience. On the night of the 29th of September 2012, she went to meet her brother at Dreams Recreational Resort in Wuse 2, Abuja. She had parked her car and was walking down the street when a man in a white bus grabbed her breasts and held on to them to stop her from walking. The bus had the inscription “AEPB in collaboration with SAPCLN”. He was joined by three men in military uniform who tried to force her into the bus. Her cries alerted onlookers who came to her rescue. She made a formal complaint at the police station the next day, but no one was ever prosecuted.

Njemanze was very vocal about what happened to her and the many cases she subsequently documented. This led to the establishment of her foundation, the Dorothy Njemanze Foundation (DNF) to address gender-based violence and to provide a platform for engaging with the authorities on the various cases she had documented. She granted many media interviews and wrote several petitions to government leaders and institutions including the Inspector General of Police (IGP), Attorney-General of the Federation, the House of Representatives, the Minister of the Federal Capital Territory (FCT), the Public Complaints Commission, the Minister of Women Affairs and the National Human Rights Commission (NHRC). As a result of her activism, many NGOs and women's rights

activists supported her cause for justice. Between September 2012 and January 2013, there were many attempts to get justice, including a joint appeal from the Nigerian Women Trust Fund (NwTF) and the NHRC to key representatives of the federal government to stop the “war against women” in Abuja by the AEPB and their partners.<sup>4</sup> Activists posted videos showing abuses by SAPCLN and AEPB online<sup>5</sup> and there was also an idea to create a documentary about the women’s experiences to increase awareness on the issues.

However, the Nigerian authorities were very slow to act to address the abuses and at the worst, were dismissive of the complaints. While some of the victims instituted cases in local courts<sup>6</sup> to demand their rights, the case seemed a strategic one for the Gender Justice project to help set standards regarding gender-based violence against women in Africa at the regional level.

While Dorothy Njemanze was very eager to sue at the regional ECOWAS Court, it was important to identify and interview other victims who could join her in a class action lawsuit. This would increase the chances of success as it would show that the incident was not a one-off but widespread. However, most of the victims were hesitant to sue the Nigerian government, citing safety concerns. They were also worried that publicity around the case would lead to them being stigmatized and labelled as sex workers. The culture of shaming women and girls who are victims of gender-based violence (GBV) continues to be an obstacle in cases like these.

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4. NwTF, “End the war against women in Abuja” – NwTF and NHRC appeal to FG <https://nigerianwomentrustfund.org/nwtf-and-nhrc-appeal-to-fg/> October 8, 2012 (accessed 10 October 2020)

5. Apolmida Haruna Youtube channel, ‘Anti-Woman SAPCLN’ [https://www.youtube.com/watch?v=ibPMO\\_\\_t7Rw&feature=g-upl](https://www.youtube.com/watch?v=ibPMO__t7Rw&feature=g-upl) (accessed 10 October 2020)

6. Some did sue the government in the local courts. In *Yetunde Kiki Akinbohun v Abuja Environmental Protection Board (AEPB)*, Suit no: FCT/HC/M/108/2012, the claimant successfully sued and received compensation for the abuse she suffered.

## Strategic litigation and management of gender equality cases in the public interest

Strategic litigation, “involves an organisation or individual taking on a legal case as part of a strategy to achieve broader systemic change.”<sup>7</sup> The purpose is to go beyond an individual’s claim to obtain social change.<sup>8</sup>

Women’s groups and feminists in Nigeria have campaigned for gender equality using the international legal framework as basis for action.<sup>9</sup> However, they rarely used strategic litigation as a tool for advocacy. One group that did use litigation was the International Federation of Women Lawyers (FIDA) Nigeria Chapter.<sup>10</sup> The organisation regularly supports women claimants with pro bono (free) legal services. But these cases focused on the national legal system and were often related to welfare, marital and criminal cases rather than strategic litigation. Despite a lack of consistent approach for public interest litigation, cases like *Mojekwu v Iwuchukwu* (2004),<sup>11</sup> which upheld the right of a widow and her female children to inherit property, and *Iyalla-Amadi v Nigerian Immigration Services* (2009),<sup>12</sup> which dispensed with the practice of obtaining a husband’s written consent before a married woman can renew her passport, emerged with significant decisions on gender equality.

7. Advocates for International Development, Short Guide – Strategic Litigation And Its Role In Promoting And Protecting Human Rights (2012), p.3

8. Edwin Rekosh, Kyra A. Buchko, Vessela Terzieva (Eds), Pursuing the Public Interest – A handbook for lawyers and activists (2001) p.81

9. See WRAPA, “Gender & Affirmative Action Issue-Based Project (GAA-IBP)” [blog post], <https://wrapanigeria.org/project/gender-affirmative-action-issue-based-project-gaa-ibp/> (accessed 10 October 2020)

10. <https://fida.org.ng/> (accessed 10 October 2020)

11. [2004] 4. S.C. (Pt.11). 1 available in Center for Reproductive Rights, Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts, Vol II, (2010) at p.33 [https://www.reproductiverights.org/sites/default/files/documents/pub\\_legalgrounds\\_vol2\\_2.10.pdf](https://www.reproductiverights.org/sites/default/files/documents/pub_legalgrounds_vol2_2.10.pdf) (accessed 10 October 2020)

12. Dr Priye Iyalla-Amadi v. Comptroller- General, Nigerian Immigration Services and Another. Suit No FHC/PH/CS/198/2008 (Unreported) (Judgement delivered by Justice G. K. Olotu on June 15, 2009).



In research Alliances for Africa conducted in 2009, it was discovered that despite the Maputo Protocol entering into force in 2005, no single case had been the subject of any serious consideration by either the African Commission or African Court as at November 2009.<sup>13</sup> It became apparent that what was needed to reverse the trend of lack of public interest decisions on women's human rights and gender equality was to change strategy and incorporate strategic litigation before the justice mechanisms as part of the campaign for gender justice.

## Developing and implementing the Litigation Strategy

The first step to adapting strategic litigation for advocating for the rights of women and girls was to develop a litigation strategy. This helped in focusing on the issue which was gender-based violence against women and girls. However, in framing the issues for determination, we mapped other violations, including discrimination against women, torture, and cruel and inhuman treatment. It was also important to check Nigeria's ratification status to make sure that the country had ratified the relevant international treaties. A legal strategy team comprising representatives from Alliances for Africa (AfA), IHRDA (Institute for Human Rights and Development in Africa), Nigerian Women Trust Fund (NWTF) and the private law firm of SPA Ajibade & Co were brought on board to provide different skills and expertise.

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13. Alliances for Africa, Background Paper: Working Party on Gender Justice in the African Human Rights System (unpublished) 2009.

**Table 1: List of Relevant International and African Regional Human Rights Instruments Ratified by Nigeria**

No	International Treaty	Date of Ratification
1	African Charter on Human and Peoples' Rights 1981	22 Jun 1983
2	African Charter on the Rights and Welfare of the Child 1990	23 Jul 2001
3	Convention Against Torture or other Cruel Inhumane and Degrading Treatment or Punishment 1984	28 Jun 2001
4	Convention on the Elimination of All forms of Discrimination Against Women 1979	13 Jun 1985
5	Convention on the Rights of the Child 1989	19 Apr 1991
6	Economic Community of West African States (ECOWAS) Revised Treaty 1993	24 Jul 1993
7	International Covenant on Civil and Political Rights 1966	29 Jul 1993
8	International Covenant on Economic, Social and Cultural Rights 1966	29 Jul 1993
9	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002	27 Jul 2009
10	Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women 1999	22 Nov 2004
11	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998	20 May 2004
12	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (Maputo Protocol)	16 Dec 2004

Identifying the right victim(s) is crucial for the success of the case, especially because the time commitment required by the case can be tasking and will interrupt other duties clients may have. The women in the case were generally caregivers, and the litigation team had to find resources to support the victims so they could participate in the process. Moreover, facing the courts against your

country can be daunting and would come with a lot of publicity. Some of the media coverage would be negative thus it is important that the victims are mentally resilient to take on the world even as they fight for justice for themselves and others. The main claimant, Njemanze, was not only bold and fearless, she already had media exposure as an actress and events compere. Additionally, the Dorothy Njemanze Foundation followed up with the authorities on cases of security abuses. It was clear that she was committed for the long term and would be a great support for the other claimants. The other three women who joined Dorothy in the case benefitted from her support and they encouraged one another to keep their spirits up. This contributed a lot to the success of the case as there was less convincing to do on the part of the litigation team.

Due to limited funding for the litigation, it was essential to maximise it in the most cost-effective way. Also, it was crucial to choose forums where the final judgments would be applicable in as many jurisdictions as possible. Therefore, the litigation strategy focused on regional or continental courts. Moreover, cases before national courts can be protracted and it was important to obtain judgment in the quickest forum available. Considering that the state agents were trying to rid the streets of Abuja of 'sex workers,' there were also concerns about whether the Nigerian courts would be open to a case that borders on the morality of the victims within the cultural context. It seemed that a forum where Nigeria is not dominant and where international standards would apply strongly would be less prejudiced against the victims.

In deciding which regional forum to bring the matter, the African Commission on Human and Peoples' Rights (ACHPR) was not an option. As a quasi-judicial body, the ACHPR's decisions are non-binding. Moreover, the ACHPR had suffered much setback in getting states to implement its decisions.<sup>14</sup> While lack of implementation of judgments affects all supranational courts or commissions, it was imperative to select a justice institution whose judgments were binding<sup>15</sup> against state parties. The ACHPR also suffered delays due to backlog of cases before it and like national courts, there was a long-time lapse between the filing

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14. Udombana, N., "Toward the African Court on Human and Peoples' Rights: Better Late Than Never". *Yale Human Rights and Development Law Journal*, (2000) 3(1), 45 at 66-69.

15. *Ibid.*

of a matter and its resolution.<sup>16</sup> Before a matter is brought to the ACHPR, the claimant must prove that they have exhausted local remedies or fall within the exceptions set out by the African Charter.

Nigeria is a member of ECOWAS and had ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights African Court in 2004. Therefore, two options were available: the ECOWAS court and the African Court on Human and Peoples' Rights (African Court). In terms of access to these courts, both individuals and member states can bring matters before the ECOWAS Court.<sup>17</sup>

In relation to the African Court, the parties entitled to submit cases to the court are the ACHPR, state parties and African Inter-Governmental Organisations.<sup>18</sup> NGOs and Individuals may be permitted only in accordance with Article 34(6) of the African Court Protocol.<sup>19</sup> Article 34(6) of the Protocol provides that "at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a state which has not made such a declaration." Article 5(3) of the African Court Protocol, states as follows: "The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission [African Commission on Human and Peoples' Rights], and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol." Nigeria had not made the declaration required by Article 34(6) of the African Court Protocol. This means that choosing the route of the African Court would be a long-winded process, as the case must be initiated before the ACHPR with the hope that on completion, it can be referred to the African Court.

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16. A guide to the African human rights system (2016), at 40, Pretoria: Pretoria University Law Press (PULP)

17. Article 10, ECOWAS Protocol A/P.I./7/91 on the Community Court of Justice (as amended by 2005 Supplementary Protocol)

18. Article 5(1), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights

19. Article 5(3), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights

Furthermore, the African Court requires that claimants provide evidence of exhaustion of local remedies as part of the requirements for hearing their case.<sup>20</sup> This means that claimants should have first used up all the complaint procedures available at the local level before approaching the African Court. The requirement to exhaust local remedies is non-existent in the ECOWAS court system and cases can be instituted for the first time before the court. Therefore, the decisive factors in determining the forum were driven by cost, time, length of trial, access to the courts, judicial independence, and ease of filing court processes. The consideration of the stated factors narrowed the choice of forum to the ECOWAS Court.

## Sustaining the litigation process during the case lifecycle

Starting the strategic litigation was the easy part. Sustaining the litigation required more practical considerations. Securing funding to cover costs related to the litigation was also crucial. Alliances for Africa (Afa) had an ongoing grant from the Open Society Initiative for West Africa (OSIWA) to support strategic litigation under the Gender Justice Project. This initial fund covered the costs of filing the case at the Abuja-based ECOWAS Court, communication, and publicity. Funds were also used to cover travel costs for lawyers and victims to the court. The initial projection was that the case would take 1-2 years from inception to judgment based on previous experience of the conclusion of cases before the ECOWAS Court. However, delays prolonged the case. The legal team started gathering evidence in October 2013, primarily interviewing victims and witnesses. Subsequently, the case was filed in September 2014 but not heard until May 2015.<sup>21</sup> Thereafter, the judgment was adjourned 5 times between 8 November 2016 and 12 October 2017.<sup>22</sup> The donor granted a no-cost extension but Afa and her partners had to rely on organisational funds to continue the case until the judgment was delivered.

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20. Rule 34(4), Rules of Court.

21. IHRDA, Synopsis of the case of Dorothy Njemanze & 3 Others V. The Federal Republic of Nigeria (16 October 2017) <https://www.ihrda.org/2017/10/synopsis-of-the-case-of-dorothy-njemanze-3-others-v-the-federal-republic-of-nigeria/> (accessed 10 October 2020)

22. Ibid.

The victims were informed from the beginning that their case was being handled on a pro-bono basis which assured them that there would be no personal cost for hiring a lawyer and attending court. However, when the case did not proceed quickly as originally envisaged, some of the victims were exhausted mentally. They wanted to move on with their lives but felt trapped. Easing their anxieties meant investing time to call and check in on their general welfare. This strategy kept the communication open and victims were motivated to stay on the case till the end. This showed that recognising that the case was taking a toll on victims' mental health and providing emotional and psychological support helped to mitigate the risk that they would give up on the cause.

During the planning phase of the litigation, it was important to explore partnerships among NGOs, women's rights activists, and law firms. Many NGOs rely on funding for their work and litigation can be costly and time consuming. The idea was that if law firms dedicate pro-bono services to strategic litigation, we can free up resources or stretch funding to cover support services. In selecting the partners, experience and commitment to human rights were key factors. IHRDA works extensively on litigation within the African human rights system particularly before the African Commission on Human and Peoples' Rights. The NWTf had been working with Njemanze calling for an end to gender-based violence. SPA Ajibade was a leading legal provider based in Lagos and Abuja with successful cases before the ECOWAS Court. AfA is a strong advocate for gender equality and women's human rights on the continent. We were able to work collaboratively on the Dorothy Njemanze case by building on our strengths and communicating regularly. An MOU was signed by the three partners to clarify roles and responsibilities. There was institutional commitment hence the case continued despite the departure of Ayisha Osori, Executive Director of NWTf, Meskerem Geset, Deputy Executive Director of IHRDA, and the author, then Deputy Executive Director of AfA from the partner organisations. In their individual capacities, they still contributed expertise and supported colleagues with advice as needed.

Finally, to sustain interest in the case, the media was required to raise the issue and disseminate the right message. To achieve this, it was important to have a mutually beneficial relationship with the media by aligning the litigation objectives with the goals of reporters covering the story.<sup>23</sup> The public perception of the case was

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23. Edwin Rekosh, Kyra A. Buchko, Vessela Terzieva (Eds), *Pursuing the Public Interest – A handbook for lawyers and activists* (2001) p.129

crucial to get buy-in and support whatever the decision of the ECOWAS Court, therefore involving the media by correcting any negative narrative of labelling the victims in derogatory terms was important. Engagements involved targeting specific reporters and a brief was developed to address the issue of the raids and why they were illegal, unlawful and an abuse of human rights. A press conference was held on 16 September 2014 prior to the filing of the case at the ECOWAS Court. The reports arising from the press conference subsequently showed that working with the media early on benefitted the case in a positive light because the news stories did not attack the victims' reputation.<sup>24</sup>

## The ECOWAS Court and its Approach on Women's Human Rights

ECOWAS was established in 1975<sup>25</sup> and although the Court was set up in 1991,<sup>26</sup> it only became operational in 2001 when the first judges were sworn in.<sup>27</sup> The ECOWAS 1991 Protocol limited cases between states. Due to this limited access, the court could not receive individual petitions which stalled its performance in the first years of existence.<sup>28</sup> In 2005, the 1991 Protocol was amended by Supplementary Protocol A/SP.1/01/05, which made it possible for the court to receive complaints of human rights from individuals.

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24. Tobore Ovuorie, September 16, 2017, "4 women sue Nigerian army, others at ECOWAS court over harassment," Premium Times: <https://m.premiumtimesng.com/news/more-news/168246-4-women-sue-nigerian-army-others-at-ecowas-court-over-harassment.html> (accessed 10 October 2020)

25. Treaty of the Economic Community of West African States (ECOWAS) 1975. Reproduced in United Nations Treaty Series (1976) Vol 1010, No. 14843 p.17. <https://treaties.un.org/doc/Publication/UNTS/Volume%201010/V1010.pdf> (accessed 10 October 2020)

26. Protocol A/P.I./7/91 on the Community Court of Justice (1991 Protocol)

27. ECOWAS CCJ Annual Report (2002) para 9 available <http://prod.courtecowas.org/annual-reports-2/> (accessed 10 October 2020)

28. See Ebobrah, S. (2016). Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice. *iCourts Working Paper Series* (57) at 7 [https://docs.escr-net.org/usr\\_doc/S\\_Ebobrah.pdf](https://docs.escr-net.org/usr_doc/S_Ebobrah.pdf)

The ECOWAS Court, unlike other regional or international courts and commissions, does not require litigants to exhaust local remedies. This provides direct access to the court for individuals and NGOs. In a 2018 judgement, the court removed the time limit for bringing cases to the court.<sup>29</sup> This decision recognises that until a remedy for a human rights violation is attained, the violations are continuing and the provision requiring claimants to bring cases within 3 years of it occurring will no longer be relevant for human rights cases.

Despite the progressive access claimants have before the ECOWAS Court, its decisions on women's human rights have been skewed. Before Dorothy Njemanze's case, there was *Hadijatou Mani v Niger*,<sup>30</sup> where a woman who was sold as a slave when she was a child under a type of slavery known as 'Wahiya' complained that Niger had violated her rights. The court held that slavery violated the claimant's human rights but that this did not amount to a violation of her freedom from gender discrimination and gender-based violence (GBV). Other cases involving women's rights before the ECOWAS court includes *Aminata Diantou Diane (represented by APDF & IHRDA) v Mali*,<sup>31</sup> and *Mary Sunday v Nigeria*.<sup>32</sup> Following a family dispute with her brothers-in-law over the health, care and properties of her ill husband, Aminata Diane brought a case for justice over the violence caused by her in-laws and the police. The Court did not find a case for GBV, despite holding that Mali failed to protect Aminata and her children. Similarly, in *Mary Sunday's* case, the ECOWAS court was moved by Mary's wounds caused by her fiancé, a police officer who had poured the contents of a hot pot on her during a domestic incident, but reasoned that to allude gender based discrimination to the State, the act must show a systematic feature and that this was absent in *Mary Sunday's* case. The state was responsible for failing to give her a remedy but did not commit gender-based violence or discrimination.

If one analyses the decisions in these cases, it can be inferred that the court takes a narrow interpretation of states' obligations in protecting women and

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29. Federation of African Journalists & 4 Ors v The Republic of The Gambia (2018). Judgment no: ECW/CCJ/JUD/04/18 [http://prod.courtecowas.org/wp-content/uploads/2019/02/ECW\\_CCJ\\_JUD\\_04\\_18.pdf](http://prod.courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUD_04_18.pdf) (accessed 10 October 2020)

30. (2008) ECW/CCJ/JUD/06/08

31. (2018) ECW/CCJ/JUD/14/18

32. (2018) ECW/CCJ/JUD/11/18



girls from gender-based violence. This can be very problematic when advocating for stronger and more effective state responses to violence in general. The responsibility of the state when it comes to gender-based violence should not only be about state sponsored violence but also violence perpetrated by third parties. This position aligns with the long-established position that the obligation of states to protect includes protection against abuses perpetrated by non-state actors. In *Women Against Violence and Exploitation in Society (WAVES) v Sierra Leone*,<sup>33</sup> the ECOWAS court ordered Sierra Leone to revoke the policy banning pregnant girls from mainstream school as this was discriminatory. The decision follows the pattern that where the state is directly involved, it is easier to hold the state accountable. It appears the court is more inclined to pronounce on gender-based violence when it involves more than one woman as in the *Dorothy Njemanze case* and *WAVES case* than in the other 3 cases highlighted above. This could be a sign of what the court is comfortable with, but it should also be a challenge for lawyers and clients to prepare cases to show why the GBV experienced by the victim constitutes GBV experienced by the majority of women in similar situations. This approach is challenging considering the reluctance of victims of GBV to be associated with public inquiries for fear of stigmatization or shame. However, advocates and litigators must build a compelling case based on numbers that show prevalence and support the argument that many women have been and could suffer further abuse if not addressed. And to corroborate this by showing the link between the abuse victims suffered and state actions. It appears that inaction of states is much harder to prove as causing the GBV or discriminatory practices complained of.

## Anti-GBV Activism and Litigation in Nigeria Post-Njemanze

One can argue that there is more public awareness about GBV now than 10 or 15 years ago. Some of this awareness is due to cases like *Dorothy Njemanze's* that challenge society's notion of women and tolerance for GBV. The indirect impact of the case is the publicity it gave to GBV perpetrated by state security in Nigeria. The symbolic impact is that it has shown the potential of getting justice for

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33. (2019) ECW/CCJ/APP/22/18

women who are victims of GBV if they are willing to prosecute their cases in court.

A big challenge in the *Dorothy Njemanze* case has been the implementation of the decision. The ECOWAS court found that the task force and security agents' treatment of the women amounted to gender-based discrimination, cruel, inhumane, and degrading treatment. The Court ordered Nigeria to pay 6 million naira (approximately US\$16,500) to each claimant as damages. One of the claimants, Edu Oroko, had her case dismissed because her alleged violation occurred outside the time frame to bring cases to the Court.<sup>34</sup> As at the time of writing, the Nigerian government is yet to implement the *Dorothy Njemanze* judgment. There are implications for following-up with implementation in terms of which state agency is responsible and the fluidity of government in many African countries. When there is a change in government, this can also impact implementation as there are bureaucratic delays during transition from old to the new government. It is common for new approvals to be requested for processing claims that started in the previous administration. Regime change may also offer opportunities for the incoming government to exhibit goodwill by implementing outstanding decisions. For instance, the Gambia for many years did not implement decisions about missing journalists during the tenure of former President Yahya Jammeh. The ECOWAS court in 2008 ordered the Gambia to pay \$100,000 as damages in the case of *Ebrimah Manneh v Gambia*.<sup>35</sup> However, implementation and payment of the damages started when the new president H.E. Barrow came into power in 2017.<sup>36</sup>

As a result of the decision in *Dorothy Njemanze's case*, eight other women who were harassed in 2019 by AEPB and security agents under the revamped Federal Capital Territory Administration (FCTA) task force have sued the Nigerian

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34. Article 9(3) of the ECOWAS Supplementary Protocol. The position has changed now with the court clarifying in *Federation of African Journalists & 4 Ors v The Republic of The Gambia* (2018) that a human rights violation continues until remedied.

35. (2008) ECW/CCJ/APP/04/07

36. Media Foundation for West Africa, 'Justice At Last: Gambia Finally Pays Compensation to Families of Ebrima Manneh and Deyda Hydara' [Blog post=] <https://www.mfwa.org/justice-at-last-gambia-finally-pays-compensation-to-families-of-ebrima-manneh-and-deyda-hydara/> (accessed 10 October 2020)

authorities at the Federal High Court in Nigeria.<sup>37</sup> This demonstrates confidence that they can get justice since the Njemanze case was successful. Unlike in 2012, when NGOs and activists petitioned the government to act to stop the violence against women in Abuja, to no avail, when similar raids happened in 2019<sup>38</sup> and activists protested, the government reacted quickly.<sup>39</sup> In the petition presented to the NHRC on the day of the 2019 protest, the government was reminded of the ECOWAS judgment in *Dorothy Njemanze's case*.<sup>40</sup> This led to the relevant security agencies to suspend all raids indefinitely.<sup>41</sup> The NHRC set up the Special Investigative Panel on Sexual and Gender Based Violence (SGBV) in Nigeria with support from the President to investigate abuses by security agents with the aim of addressing the issue once and for all.<sup>42</sup>

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37. Southern Africa Litigation Centre, 21 May 2019, Nigeria: Challenge to arbitrary arrest of women during sweeping exercises: <https://www.southernafricalitigationcentre.org/2019/05/21/nigeria-challenge-to-arbitrary-arrest-of-women-during-sweeping-exercises-2/> (accessed 10 October 2020)

38. Business Day, 5 May 2019, 'Stop Raping Women': Defiant Against Police Assault <https://businessday.ng/life-arts/article/abuja-raid-on-women-defiant-against-police-assault/>; James Emejo, May 10, 2019, "Group Protests Alleged Harassment of Women by Police, FCT Task Force," ThisDay Newspaper, <https://www.thisdaylive.com/index.php/2019/05/10/group-protests-alleged-harassment-of-women-by-police-fct-task-force/> (accessed 10 October 2020)

39. Blueprint, "Breaking: Moments after massive protests, NHRC summons AEPB Boss over 'arrest, rape' of Abuja women" Blueprint, 10 May 2019: <https://www.blueprint.ng/breaking-moments-after-massive-protests-nhrc-summons-aepb-boss-over-arrest-rape-of-abuja-women/> (accessed 10 October 2020)

40. NHRC Nigeria Online. Facebook post: ALLEGED RAIDS ON ABUJA WOMEN, NHRC SUMMONS AEPB BOSS, May 11, 2019, [https://web.facebook.com/NHRCMRU/posts/697748710642433?comment\\_tracking=%7B%22tn%22%3A%22O%22%7D&\\_rdc=1&\\_rdr](https://web.facebook.com/NHRCMRU/posts/697748710642433?comment_tracking=%7B%22tn%22%3A%22O%22%7D&_rdc=1&_rdr) (accessed 10 October 2020)

41. Ade Adesomoju, May 19, 2019, NHRC, Abuja agencies agree on suspending nightclub raids, Punch, <https://punchng.com/nhrc-abuja-agencies-agree-on-suspending-nightclub-raids/> (accessed 10 October 2020)

42. Radio Nigeria, October 14, 2019, "NHRC sets up panel to investigate sexual violence" <https://www.radionigeria.gov.ng/2019/10/14/nhrc-sets-up-panel-to-investigate-sexual-violence/> By November 2019, the NHRC had received 96 cases. See News Agency of Nigeria, November 20, 2019, "Presidential panel on sexual, gender-based violence receives 96 complaints – NHRC" Pulse.Ng, <https://www.pulse.ng/news/local/presidential-pan->

On 14 June 2019, the documentary, *Silent Tears*,<sup>43</sup> was screened at a public viewing in Abuja organised by the Shehu Musa Yar'Adua Foundation, Amnesty International Nigeria and OSIWA<sup>44</sup> where key representatives of the government and the security forces were present. The wife of the Vice-President was a guest of honour. The documentary has been screened privately to senior government officials and heads of security agencies to raise awareness on this issue. Although justice in the form of direct implementation of the specific remedies in the *Dorothy Njemanze* decision is yet to be achieved, there have been indirect and symbolic impacts that have arisen because of the litigation.

## Conclusion

The ECOWAS Court has had the opportunity to adjudicate on a few cases on women's human rights. Its reasoning in those cases has been skewed towards a narrow interpretation of the state's obligation to protect human rights that only focuses on state agents when acting in official capacity. This approach has led to even fewer decisions holding the state accountable for failure to protect women against gender-based violence and discrimination.

The *Dorothy Njemanze* case was successful because it benefited from the expertise of the partner organisations and combined tactics of strategic litigation in a manner that guaranteed results. The fact that the claimants were directly violated by state agents greatly influenced the judgment of the ECOWAS Court to grant the claimants' demands and to hold that gender-based violence had occurred and that the treatment of the claimants amounted to gender-based

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el-on-sexual-gender-based-violence-receives-96-complaints-nhrc/j9dsdrz; The pending covid-19 pandemic restrictions have stalled the NHRC sittings and enquiry (accessed 10 October 2020)

43. Ishaya Bako produced the film in 2015 to document the violent violation of women by the Federal Capital Territory Administration (FCTA) task force under the pretext of cleaning the streets off sex workers. It was screened at the 5th African International Film Festival (AFRIFF) in November 2015 and won The Audience Choice Award. <https://youtu.be/ohcUKhchpGc> (accessed 10 October 2020)

44. Akubeze Okocha, [Vlog post] June 14, 2019 *Silent Tears, The Butterfly Effect*: <http://enlightenment.butterflyty.com/silent-tears/> (accessed 10 October 2020)

discrimination. The most striking jurisprudence in the *Dorothy Njemanze* case is the interpretation of the Maputo Protocol. While the decision would have benefited from a deeper analysis of the provisions, the pronouncement is an important first step.

It is over three years since the ECOWAS court judgment in the *Dorothy Njemanze* case and the Nigerian government is yet to pay the compensation to Njemanze and the other women. The lawyers have written to the Attorney-General of the Federation requesting enforcement of the judgment debt. A petition has been sent to the National Human Rights Commission (NHRC) to urge the federal government to comply with the ECOWAS decision. Sadly, raids targeting women have continued despite the decision, leading advocacy groups to mobilise when one took place in April 2019.<sup>45</sup> There are currently 8 cases in local courts in Abuja challenging the raids of 2019. In addition, the NHRC, in response to complaints about the AEPB raids and police abuses against women during the raid, set up a panel to investigate these acts.

In 2015, the federal government signed into law the Violence Against Persons (Prohibition) (VAPP) Act, after several years of campaigns for domestication of the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Due to Nigeria's federal constitution, this Act is only applicable in the Federal Capital Territory, Abuja. All the 36 states would have to pass similar laws based on the VAPP Act before it can be applicable in their states. By October 2020, 17 states have done so or enacted other gender-based violence laws.<sup>46</sup> If the federal government had implemented the decision of the ECOWAS court in Dorothy's case, by paying compensation and educating its agents on human rights and gender-based violence, there would have been a

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45. David Hundeyin, "The Untold Story of the AEPB, Abuja's Uniformed Female Harassment Unit," NewsWire NG October 31, 2019: <https://newswirengr.com/2019/10/31/the-untold-story-of-the-aepb-abujas-uniformed-rape-syndicate/> (accessed 10 October 2020)

46. Abia, Akwa Ibom, Anambra, Bauchi, Benue, Cross River, Ebonyi, Edo, Enugu, Kaduna, Kwara, Ogun, Osun, Oyo, and Plateau states have local VAPP laws. Ekiti state has the Gender Based Violence (Prohibition) Law 2019 which updated its 2011 version. While Lagos state has the Protection Against Domestic Violence Law 2007. See also Partners West Africa Nigeria (PWAN)'s VAPP Tracker: <https://www.partnersnigeria.org/vapp-tracker/> (accessed 10 October 2020)

marked improvement in terms of the treatment of women and girls by security agents.

While the ECOWAS Court is an accessible mechanism, its approach to the intersection between state obligations under international human rights law and women's rights requires more depth and innovative judging practices to expand the current expert analysis. Such an expanded approach would lead to decisions that benefit a greater number of women and strengthen human rights jurisprudence. As a court of first instance, it provides a viable alternative for persons in the 15 countries in West Africa that form ECOWAS<sup>47</sup> to pursue redress for human rights violations and abuses. While the world celebrates the *Dorothy Njemanze* case, lawyers and litigants should learn from it to strengthen case files for future lawsuits to increase chances of success not only in the courts but also with enforcement of decisions by the State.

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## Chapter 3

# Strategic Litigation as a Tool to Implement Constitutional Protections of Abortion: The Kenya Case Study

Evelyne Opondo & Martin Onyango

### Executive Summary

Strategic litigation is a powerful tool to hold governments accountable to their human rights obligations. Strategic litigation seeks outcomes with a long-term impact, going beyond the origins of the claimant's complaint; is a method of advocacy rather than a cause, and therefore adaptable to a range of purposes; and has objectives that are similarly multi-faceted and go beyond creating effects within the court system.<sup>1</sup>

For many years, the Center for Reproductive Rights (the Center) has been using strategic litigation as a core strategy at the international, regional and national levels to ensure that sexual and reproductive rights of women and girls are respected, protected and fulfilled. One of the Center's recent landmark cases challenged the withdrawal of implementing guidelines for abortion provisions outlined under the Constitution of Kenya (2010). Abortion is a basic health care need for millions of women and girls that remains highly contested globally.

Unsafe abortion is one of the main causes of maternal mortality and morbidity in Kenya with an estimated 28 women dying weekly according to a 2012 study.<sup>2</sup>

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1. Michael Ramsden and Kris Gledhill, *Defining Strategic Litigation*, 4 *Civil Justice Quarterly* 407 (2019).

2. Guttmacher Institute, African Population and Health Research Centre, Ministry of Health [Kenya], Ipas, 'Incidence and Complications of Unsafe Abortion in Kenya: Key

While Kenya is a signatory to the Maputo Protocol, it has a reservation on Article 14(2) (c) which explicitly provides for access to safe legal abortion. However, under the constitution, a trained health professional can legally provide abortion if in their opinion the health or life of a pregnant woman is at risk, in cases of emergency, or if allowed by any other written law.<sup>3</sup>

In 2011, as part of implementation of the abovementioned constitutional provisions, the Ministry of Health (MoH) set up a multi-sectoral working group to draft standards and guidelines for reducing morbidity and mortality from unsafe abortions in Kenya. The working group came up with a four-part guideline which addressed the prevention of unwanted pregnancies, the management of risky and unplanned pregnancies and, the post abortion care management for incomplete abortions and related complications. The fourth part provided standards for the audit, monitoring and evaluation of the implementation of the guidelines. The guidelines were officially adopted in September 2012 but would later be withdrawn arbitrarily barely a year after by a letter from the MoH addressed to some of their key stakeholders indicating that the standards and guidelines were not being used for the intended purposes without clarifying how. This was quickly followed by a warning by MoH sent to all health care providers against attending any training on safe abortion practices and soon thereafter, by a letter from MoH to the Kenya Obstetrical and Gynecological Society (KOGS) reprimanding them for developing a training curriculum on safe abortion.

To challenge the now clear pattern of regression on the gains made on reproductive health rights in the 2010 Constitution, the Center moved to the High Court to contest the withdrawal of the standards and guidelines on abortion and the accompanying curriculum in a case in which the Center represented the Federation of Women Lawyers-Kenya, two community activists who advocate for rights of women living in informal settlement areas and JMM – a minor who had suffered health consequences due to an unsafe abortion she procured during the period of the withdrawal of the guidelines. The case argued that the actions of

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Findings of a National Study. Nairobi, Kenya, African Population and Health Research Center (August, 2013), available at <<https://doi.org/10.13140/RG.2.1.3117.2328>> (last accessed on 10 June, 2020).

3. The Constitution of Kenya 2010, art 26(4) [Hereinafter the Constitution of Kenya].

MoH violated women's and girls' constitutional rights to life, health, dignity, and access to information as well as rights of medical providers.<sup>4</sup>

The judgment, in this case, was delivered on the 12<sup>th</sup> of June 2019 affirming the rights violations and declaring that the actions of the MoH to be null and void ab initio. This paper seeks to critically analyze the judgment from the Constitutional and Human Rights Division of the High Court with a view to identifying how it has responded to the issues surrounding access to safe legal abortion in Kenya, giving effect to the Maputo Protocol provisions.

## Introduction

According to the World Health Organization (WHO), unsafe abortion occurs when a pregnancy is terminated “either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both.”<sup>5</sup> Unsafe abortion is a serious public health and a social justice issue. In no other indicator of reproductive health is inequity due to legal restrictions and to lack of information and services as glaring as in access to safe abortion care. Ninety-nine percent of the abortions performed in Africa are unsafe and “the risk of maternal deaths from an unsafe abortion is one in every 150 procedures which is the highest in the world.”<sup>6</sup> Although induced abortion is a universal practice, legal restrictions and lack of services disproportionately expose women who are young, poor and living in rural areas to the risk of unsafe abortion.<sup>7</sup> The determinants of unsafe abortion include restrictive abortion legislation, lack of

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4. Center for Reproductive Rights et al., *Enforcing Kenya's obligation to provide legal abortion services: FIDA Kenya & 3 others v Attorney General & 2 others Constitutional Petition Non 266 of 2015* available at <https://reproductiverights.org/sites/default/files/2019-10/CFHR101-Cover.pdf>.

5. WHO, *Safe abortion: technical and policy guidance for health systems* 2<sup>nd</sup> ed., (2012).

6. Merhawi Gebremedhin, *Unsafe abortion and associated factors among reproductive aged women in sub-Saharan Africa: a protocol for a systematic review and meta-analysis*, *Systematic Reviews* 7, Article number: 130 (2018.)

7. Elsevier; Shah IH, et al. *Access to safe abortion: progress and challenges since the 1994 International Conference on Population and Development (ICPD)* (2014), available at: [https://www.contraceptionjournal.org/article/S0010-7824\(14\)00155-3/pdf](https://www.contraceptionjournal.org/article/S0010-7824(14)00155-3/pdf).

female empowerment, poor social support, inadequate contraceptive services, poor health-service infrastructure,<sup>8</sup> religion and culture,<sup>9</sup> among others. Deaths from unsafe abortion are preventable by addressing the above determinants and by the provision of safe, accessible abortion care. This includes safe medical or surgical methods for termination of pregnancy and management of incomplete abortion by skilled personnel.<sup>10</sup>

The Kenya Standards and Guidelines for Reducing Unsafe Abortion issued by the MoH were a great tool for mitigating the effects of unsafe abortions in the country. The application of the guidelines was however short-lived following their withdrawal in 2013. The standards and guidelines were meant to make services accessible to women and girls like JMM – a 14-year-old girl who was sexually assaulted by an older man and became pregnant as a result. After the rape, JMM turned to an older girl who introduced her to an unqualified provider who helped her procure an unsafe abortion. She began vomiting and bleeding heavily, she was rushed to a nearby dispensary that was not well equipped, lacked skilled staff and where she could not access the needed care. She was then transferred to the County Referral Hospital, the highest-level public health facility in that county, where she stayed for three nights and received some treatment which was, however, still not adequate. The hospital established that JMM needed specialized treatment, a service they could not provide. They referred her to a Mission Hospital for dialysis even though it is a hospital of a lower classification and located about 50 kilometers away. At the mission hospital, JMM was immediately admitted to the Intensive Care Unit. She was discharged from the facility after seven days without adequate treatment on grounds that the hospital did not have a dialysis machine and could therefore not provide the services for which she had been referred and admitted for.

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8. Europe PMC, S.R. Fawcus, Maternal mortality, and unsafe abortion in *Best Practice & Research Clinical Obstetrics & Gynecology*, pp. 533-548 (2008), available at <http://europepmc.org/article/med/18249585> (last accessed on June 6, 2020).

9. Guttmacher Institute, *Preventing Unsafe Abortion and its Consequences: Priorities for Research and Action* (2006) available at [https://www.who.int/reproductivehealth/publications/unsafe\\_abortion/0939253763.pdf](https://www.who.int/reproductivehealth/publications/unsafe_abortion/0939253763.pdf).

10. Id.



Twelve days after the unsafe abortion, JMM finally arrived at Kenyatta National Hospital (KNH) – the biggest referral hospital in the country – where she received the post abortion care and the dialysis she needed. Diagnosis at KNH indicated that she had a septic abortion, hemorrhagic shock and had developed chronic kidney disease. About 68 days later, she was discharged but was detained at the facility as she was unable to pay for the hospital bill that had risen to 39,500 Kenya shillings (approximately 395 US Dollars). Her bill was finally waived when the hospital established that she could not pay it. JMM lived with the kidney disease arising from the unsafe abortion for three years and required dialysis every month. She died in June 2018 due to complications from kidney disease.<sup>11</sup>

The Center filed a case at the High Court, on behalf of JMM and other petitioners, challenging the arbitrary withdrawal of the guidelines, arguing that the actions had breached fundamental human rights of women and girls including the rights to health, life, non-discrimination, dignity, information, benefit from scientific progress, consumer rights, fair administrative action and the freedom from cruel, inhuman and degrading treatment among others. Further, the case also argued that the rights of health care providers to information, freedom of expression and association, consumer rights, and rights to benefit from scientific progress had been violated.<sup>12</sup> This was the first time a court in Kenya was asked to reaffirm and interpret the constitutional provision that protects Kenyan women and girls' right to access safe abortion service when the pregnancy threatens their life, health and in emergency situations.

Throughout the case, the MoH adopted a narrative which was full of contradictions. In their sworn statements, the MoH acknowledged that unsafe abortion is a global social and public health problem and that Kenya has made the least progress in tackling maternal mortality and morbidity for which unsafe abortion is a key contributor. MoH indeed conceded to the need to establish

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11. Center for Reproductive Rights, Fact sheet: FIDA Kenya and 3 others Vs. AG and 2 others, Constitutional Petition No 266 of 2015.

12. Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae), Constitutional Petition No 266 of 2015 [2019] eKLR, para. 374, available at <http://kenyalaw.org/caselaw/cases/view/175490/>

standards and guidelines for reducing unsafe abortions given these grim realities<sup>13</sup> These contradictions did not escape the attention of the court.<sup>14</sup>

The 5-judge bench in its decision unanimously found that:

1. The MoH's withdrawal of the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya and their ban on training of health professionals on safe abortion were illegal, arbitrary, and unconstitutional;
2. The constitutional provision that allows for abortion when a medical professional deems the pregnant woman's health to be at risk includes threats to mental and social health and not only their physical wellbeing;
3. Abortion is permitted in instances of rape and defilement;
4. In addition to medical doctors, nurses, midwives, and clinical officers are constitutionally permitted to opine whether an abortion is necessary and provide the same services; and
5. The government of Kenya should compensate PKM (JMM's mother) for the physical, psychological, emotional, and mental anguish, stress, pain, suffering and death of JMM occasioned by the violation of JMM's constitutional rights.

## Affirming women and girls' rights to access safe legal abortion services

Kenya is a signatory to several international law instruments that safeguard the rights of women and girls to access safe and legal abortion services. In particular, at the regional level, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) enshrines a myriad of rights which are violated when women and girls are denied sexual and

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13. Center for Reproductive Rights, Fact sheet: FIDA Kenya and 3 others Vs. AG and 2 others, Constitutional Petition No 266 of 2015.

14. *Id.*

reproductive health information and services, including safe abortion services. Article 14(2) (c) of the Maputo Protocol requires state parties to allow abortions when continuing with the pregnancy threatens the life of the pregnant person or the fetus or in cases of sexual assault, rape or incest. While the court acknowledged the reservation made by the government of Kenya on this article of the Maputo Protocol, it nevertheless affirmed the rights protected under the instrument and the obligation of the government of Kenya to respect, protect and fulfill these rights. Further, the Kenyan constitution is the supreme law of the land and any law that is inconsistent with it is void to the extent of the inconsistency, and any act or omission in contravention of it is invalid.<sup>15</sup> Kenya's reservation on article 14 (2) (c) of the Maputo Protocol is therefore inconsistent with the constitution and does not take away the legal grounds for abortion which the constitution provides to be when the life or health of the pregnant woman is in danger or in cases of emergency or as may be provided by any other written law.

One of the contentious issues raised in the case was the definition of “health” as provided under Article 26 (4) of the Constitution. The court in reaching its decision, rejected the respondents' narrow interpretation of health as only meaning physical health and affirmed the WHO definition of health being a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity<sup>16</sup> As the Court explicitly noted, this is also in line with the definition adopted in the Maputo Protocol.

The court also rejected the respondents' argument that when the Constitution allowed a “trained health professional” to legally provide abortion, it meant only medical doctors could provide the services. The court, while acknowledging the scarcity of registered medical practitioners in rural areas, affirmed that qualified doctors, nurses, midwives, and clinical officers can provide legal abortion services. As the court noted, this is critical in expanding the services in the hard to reach areas such as rural and informal settlement areas which are heavily reliant on mid-level providers for their health care services. This is also in line with the guidance that the African Commission on Human and Peoples' Rights

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15. The Constitution of Kenya 2010, Article 2.

16. WHO, Constitution, available at <https://www.who.int/about/who-we-are/constitution> (last accessed on June 6, 2020).

(African Commission) provided regarding the implementation of Article 14 of the Maputo Protocol. As the African Commission in General Comment No. 2 has elaborated, “State parties should avoid all unnecessary or irrelevant restrictions on the profile of the service providers authorized to practice safe abortion...Mid-level providers such as midwives and other health workers should be trained to provide safe abortion care.”<sup>17</sup>

Further, the court upheld that, under Kenyan laws, women and girls who become pregnant because of sexual violence have the right to an abortion. In reaching this decision, the court relied on the Maputo Protocol saying that, it is instructive that the words of the Article mirror in some respects the words used in the Kenya Constitution: **“Article 14(2)(c) the right to safe abortion in cases of sexual assault, rape, incest, and when the pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.”** It further relied on the guidance by the African Commission under General Comment 2 which states: “The Protocol provides for women’s right to terminate pregnancies contracted following sexual assault, rape and incest. Forcing a woman to keep a pregnancy resulting from these cases constitutes additional trauma which affects her physical and mental health ... Apart from the potential physical injuries in the short and long term, the unavailability or refusal of access to safe abortion services is often the cause of mental suffering, which can be exacerbated by the disability or precarious socioeconomic status of the woman.” Therefore, the Court concluded: “In our view, there can be no dispute that sexual violence exacts a major and unacceptable toll on the mental health of women and girls. Whether the violence occurs in the home or in situations of conflict, women suffer unspeakable torment as a result of such violence.”<sup>18</sup>

As articulated by the African Commission, when safe abortion services are provided by law— as in, for instance, under Article 26 (4) of the Constitution of

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17. African Commission on Human and Peoples’ Rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Para. 58 [hereinafter African Commission, General Comment 2].

18. Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] para. 374.

Kenya—the government has the obligation to facilitate access by developing implementation standards and guidelines.<sup>19</sup> The importance of such implementation guidelines was affirmed by the court which found that “by withdrawing the 2012 Standards and Guidelines and the training curriculum, the Director of Medical Services in effect disabled the efficacy of Article 26(4) of the Constitution and rendered it a dead letter.”<sup>20</sup> The Court further held that, the withdrawal of the guideline, which resulted in the denial of abortion services to women and girls of reproductive age, violated their right to non-discrimination, right to information, consumer rights and their right to benefit from scientific progress.<sup>21</sup>

Finally, regarding the suffering of JMM, the court reasoned that, as provided under the Article 43 of the Constitution, “all persons who are in need of treatment are entitled to health care.” This, as the Maputo Protocol requires, entails ensuring availability, accessibility, acceptability and good quality of reproductive health care, including post-abortion services. This obligates the government of Kenya to put in place adequate numbers of facilities with trained health care providers and equipment and ensure that these services are affordable and within a safe distance for all. When these rights are violated, women and girls are entitled to timely and efficient redress mechanisms. In line with this, the court found the case of JMM to be a case of a system lacking in both skilled staff, facilities, and proper referral arrangements.<sup>22</sup> Since this indicates a clear violation of fundamental rights, the court held that the awarding of “compensation against the state is an appropriate and effective remedy [and] redress.”<sup>23</sup>

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19. African Commission, General Comment 2, para. 50.

20. Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019], para. 402.

21. *Id.*, para. 402

22. Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019].

23. *Id.*, para. 407

## Complimenting litigation with other strategies

In order to provide the court with adequate and well-rounded information regarding the issue before it and facilitate a well-informed decision, several organizations, including the Kenya National Commission on Human Rights and the National Gender and Equality Commission—both government entities—joined the case as interested parties and *amicus curiae* in support of the petitioners. In their submissions, the parties covered a wide range of issues including the impact of sexual violence on women and girls and the guidelines for management of sexual violence victims on access to safe abortion services; the gender dimension of unsafe abortion and the disproportionate effect that the denial of safe abortion services have on women and girls including those from marginalized groups; the role of information in facilitating access to safe abortion services; and the impact of denial of training of healthcare professionals on the availability of the health services. They further provided comparative jurisprudence in order for the court to see how other countries and courts have dealt with similar issues and challenges.

Throughout the litigation process and after, the Center and partner organizations strived to keep the public informed about the case, and the decision, after it was rendered. This was crucial for the continued efforts towards holding the government accountable to addressing unsafe abortion. It was also important to inform women and girls of their constitutionally guaranteed right.

## Implementation of the decision

After the court issued its decision, the parties opposing the petition filed their intent to appeal and asked the court to stay the execution of the decision which the court denied since doing so would allow for the continuation of the violation of the rights of women and girls. While the MoH is yet to publicly acknowledge the decision and begin taking measures towards implementation, civil society organizations and the private sector have stepped up in disseminating the decision and training of health care professionals. County governments have also demonstrated interest in playing a role in ensuring access to safe abortion services in their respective facilities in accordance with the Constitution.

## Conclusion

Africa is the region with the highest number of abortion-related deaths<sup>24</sup> and there is a need for immediate legal and programmatic measures to curb the deaths and disabilities arising from unsafe abortion. Governments must move beyond just ratifying human rights instruments and signing consensus documents and implement the obligations they have committed to under these documents. It is important for States to uphold constitutional values, rights, and freedoms and be held accountable when they fail to do so. Litigation is an important accountability tool for ensuring that governments deliver on their obligation. It is also an advocacy tool that offers multiple opportunities that transcend the walls of the courtroom and impact people's values and norms, even if a legal victory is not always achieved at a particular time.<sup>25</sup>

## Recommendations

While the primary obligation to implement the court's decision lies with the government, a concerted effort by different actors is needed in order to ensure that women and girls can access safe abortion services. To this end, Kenya should:

- Through MoH, send out a memo to all providers clarifying that the court has reinstated the Standards and Guidelines on abortion and provide a policy framework that guarantee availability and accessibility of safe legal abortion services in all public facilities across the country;
- Ensure that all healthcare facilities have trained health care professionals and essential medicines to provide legal abortion services;
- Lift the reservation on Article 14 (2) (c) of the Maputo Protocol; and

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24. Guttmacher Institute; Factsheet, Abortion in Africa, Incidence and Trends (March 2018), available at < <https://www.guttmacher.org/fact-sheet/abortion-africa> > last accessed on June 6, 2020.

25. Women's Link Worldwide, Seeking Social change in Courts, Available at: <https://www.womenslinkworldwide.org/en/files/3043/seeking-social-change-in-the-courts-tools-for-strategic-advocacy.pdf>

- Develop the capacity of criminal justice actors on the interpretation and application of Article 26 (4) of the Constitution to ensure that health care providers and women and girls are not harassed and wrongly prosecuted.

Civil society organizations should:

- Amplify the abortion court decision and employ advocacy tools for the implementation of the various aspects of the decision;
- Engage the public, particularly women and girls, to raise their awareness about their sexual and reproductive rights and hold the government accountable for its obligations; and
- Continue generating evidence on the remaining legal and health system challenges to accessing safe abortion services in the country.



## Chapter 4

# Confidentiality or Secrecy? Interpretation of Article 59, and Implications for Advocacy on Pending Communications before the African Commission

Dr. Ruth Nekura & Sibongile Ndashe

### Introduction

Despite persisting controversies about the role of law in social transformation, there is little doubt that the impact of litigation is best understood in relation to other processes (such as advocacy and mobilisation) alongside which, gradual shifts become possible.<sup>1</sup> Thus, litigating for social change requires publicity and freedom of information, which are vital elements that facilitate this ‘cohabitation between advocacy and litigation’ in women’s rights interventions.<sup>2</sup> The aim of this paper is to draw attention to the fallible ways in which a restrictive interpretation of article 59 of the African Charter on Human and Peoples’ Rights (the Charter), specifically the words ‘*all measures*’ in 59(1) and ‘*considered*’ in 59(3) convert an otherwise well-intentioned principle of confidentiality into a shroud of secrecy that cripples advocacy efforts relating to pending communications before the African Commission on Human and Peoples’ Rights (African Commission).

The first section explores how a restrictive interpretation of confidentiality presents an obstacle to legal mobilization and the challenges it presents to the process of submitting amicus briefs before the African Commission. It also considers how the restrictive interpretation of confidentiality contributes to the invisibility of the work of the African Commission and the dearth of jurisprudence on women’s rights, including sexual rights. The second section highlights how

1. Duffy H. *Understanding and maximising the impact of strategic human rights litigation* 2017.

2. Killander, M. “Confidentiality versus Publicity: Interpreting Article 59 of the African Charter on Human and Peoples’ Rights.” *African Human Rights Law Journal*. LJ 6 (2006) 572-580.

a restrictive interpretation of article 59 continues to be used to undermine the independence of the African Commission, with reference to the African Union (AU) Executive Council Decision 1015 of 2018.<sup>3</sup>

## Background to Article 59

Article 59 of the African Charter on Human and Peoples' Rights (the Charter/ACHPR) provides that<sup>4</sup>

1. All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

The 'present chapter' referred to in Article 59 is Chapter III (Articles 46-59) which deals with procedures of the African Commission, including individual communications. The application of Article 59 to the entire communication procedure has been criticized because NGOs have a legitimate interest in publicizing the communications they file at the Commission.<sup>5</sup> In practice, Article 59 has been interpreted to mean that while a communication is pending, the only information to be revealed is to be contained in the Commission's activity reports, and this is limited to the name and number of the communication and the stage at which it is.<sup>6</sup> By this interpretation, pleadings and submissions by parties are essentially kept secret from the public.

3. Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR). Doc.EX.CL/1015(XXXII).

4. Article 59, the African Charter on Human and Peoples' Rights.

5. Killander M. above note 2 at 572.

6. Murray R. "Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal* 19, no. 1 (2019): 1-25.

This austere and formalistic interpretation of Article 59 equates the term ‘*all measures*’ to ‘*everything done or received*’, which adversely affects advocacy efforts by limiting the publicization of information on pending communications. For example, the African Commission has previously asked Civil Society Organisations (CSOs) to pull down their own pleadings from their websites, arguing that the proceedings are entirely confidential.<sup>7</sup> This interpretation leads to uncertainty and NGOs that litigate before the Commission find it difficult to know whether, and to what extent to publicize a case as part of their advocacy efforts. The situation is further complicated by the fact that some versions of the African Charter, including a version published on the Commission’s website for a while, substituted the word ‘Chapter’ with ‘Charter’ which may explain the very limiting interpretation of Article 59.

To some, the term ‘all measures’ logically means all the recommendations and decisions taken by the Commission, whether they are interim or final.<sup>8</sup> Odinkalu has argued that ‘*all measures*’ ideally should be limited to ‘*suitable actions*’, a term that is clearly distinct from ‘*everything done or received*’ by the African Commission.<sup>9</sup> Therefore, the essential facts of a communication that is pending before the Commission, contained in pleadings, is hardly a ‘*measure taken*’. Neither are individual submissions, or the names of parties implicated in a communication.

In the early years of operation, the Commission interpreted Article 59 to mean strict confidentiality and neither publicized any information on the communications before it nor any decisions made.<sup>10</sup> In December 1993, following a request from NGOs, copies of decisions were made available in Activity Reports. From 1994 to 2012 the Commission included decisions it took on communications in its activity reports. Since 2012, decisions on communications appear in reports

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7. African Commission Litigators–Discussion Paper on Confidentiality- *African Commission and Confidentiality of Communications and Pleadings*, January 2015.

8. Gumedze, S. “Bringing communications before the African Commission on Human and Peoples’ Rights.” *African Human Rights Law Journal* 3, no. 1 (2003): 118-148.

9. Odinkalu, A. C. “Proposals for review of the Rules of Procedure of the African Commission of Human and Peoples’ Rights.” *Human Rights Quarterly* 15 (1993): 533-548.

10. Killander M. above note 2 at 578. See also Second Annual Activity Report of the African Commission on Human and Peoples’ Rights, 14 June 1989, para. 35.

merely as references followed by publication on the Commission's website. Many have considered this change of practice since 1994 as a watershed moment which eased the shroud of secrecy under which the entire communication process was hidden.<sup>11</sup> However, none of these developments in interpretation have thus far resolved the question of NGOs' access and publication of information relating to pending communications for purposes of advocacy.

## Challenges of a Restrictive Interpretation of Article 59

### a) A restrictive interpretation of Article 59 as an obstacle to legal mobilisation

The potential impact of litigation is likely to be realised if litigation is conceptualised as part of a broader strategy for change.<sup>12</sup> As such, there is growing recognition and reflection of the value of engaging social movements, outside of the courts, as part of the litigation strategy.<sup>13</sup> This understanding of litigation sees the legal process as a tool that is used alongside other tools such as advocacy, media and communications, with an expectation that litigation has a role to play in 'chang[ing] ideas, perceptions and collective social constructs relating to the litigation's subject matter.'<sup>14</sup> This implies that when strategic litigation is embedded in social movements, it has the capacity to 'alter the cultural or ideological landscape with regard to the social problem posed by the case'.<sup>15</sup>

Strengthening the relationship between litigation and social movements creates opportunities for movements to use litigation to advance advocacy. Social movements can use litigation to catalyse debates by illuminating on issues that are overlooked or considered taboo.<sup>16</sup> Litigation also has the power to humanize

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11. Killander M. above note 2.

12. Duffy H. above note 1.

13. Ibid.

14. Ibid at 54.

15. Ibid.

16. Ibid.

social ills by individualizing a story and providing ‘a graphic illustration of the effects of laws, policies and practices’.<sup>17</sup> However, for strategic litigation to be embedded in social movements, publicity of information regarding pending communications is important because individuals and NGOs need reliable information in order to mobilise. The restrictive interpretation of Article 59 is an obstacle to legal mobilisation because substantive information on individual communications are kept secret from the public.

This secrecy impedes advocacy during litigation, which is especially important because communications before the African Commission can last for many years. In such instances of delay, advocacy can provide the ‘oxygen of publicity’, which is often essential in a prolonged legal process.<sup>18</sup> More importantly, advocacy during the pendency of a communication can create impact on the ground which can lead to social change because it encourages social engagement with the rights issues raised before the African Commission. This way, the impact of litigation is not dependent on the eventual judgement, which may result in legal or policy change. On the contrary, human rights litigation becomes a spark and a contributor to diverse dimensions of long-term change resulting from multiple forms of impact alongside social, political, cultural and institutional processes.

#### **b) Challenges of strict confidentiality to the submission of amicus briefs**

The current interpretation of Article 59 creates a difficulty in the submission of amicus briefs because the shroud of secrecy inhibits individual experts or organizations who may wish to appear as amicus to know the specific issues before the Commission. Consequently, amicus submissions are likely to come from those who catch wind of a case which may be of interest, with little chance of obtaining pleadings or other case information that will allow them to draft their briefs with requisite focus to the issues under consideration.<sup>19</sup>

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17. *Ibid* at 54 - 55.

18. African Commission Litigators-Discussion Paper on Confidentiality above note 7.

19. Murray R. & Obonye J.s, ‘Amicus before the African Commission: Proposals for addressing the challenges of confidentiality’, January 2018. See also F. Viljoen and A. K. Abebe, ‘Amicus Curiae Participation Before Regional Human Rights Bodies in Africa’, 58(1) *Journal of African Law* (2014) 22–44.

Limitations on confidentiality create an amicus system that lacks transparency and clarity, which exposes it to abuse, bias and legitimacy concerns.<sup>20</sup> The current rules on submitting amicus have no restrictions on who can apply, with little clarity on the content of briefs or at what point amicus can intervene during the proceedings. The lack of clear rules encourages contact between parties and amici, outside of the African Commission processes, which may be viewed as a breach of confidentiality outside of the Commission's control.<sup>21</sup> To bypass these difficulties, Murray consolidates lessons learnt from other bodies who have grappled with balancing the need for confidentiality with amicus interventions. She suggests that:<sup>22</sup>

- The African Commission could publish a brief or summary of information on pending communications on its website and activity reports, much like the African Court does.
- The African Commission could actively solicit amicus interventions on the basis of Rule 85 of its Rules of Procedure, through directly approaching experts or issuing a public call for amicus interventions which may be seen as levelling bias.
- The African Commission could actively encourage parties to the case to invite experts they know of to submit amicus interventions.
- The African Commission could invite the parties to share their pleadings with amicus who have been admitted to the proceedings, who could also be bound by confidentiality.
- Relevant information could be shared while sensitive data is redacted.
- The African Commission could issue a resolution to clarify specific requirements on submission of amicus, to formalize the participation of amici making it less ad hoc.

These suggestions are useful ways of beginning to undo the restrictive interpretation of Article 59 and its impact on amicus submissions. However, it is

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20. Ibid.

21. Ibid.

22. Murray R. & Obonye J. above note 19.

important to note that most of these difficulties can be resolved without necessarily shifting the restrictive interpretation of Article 59 that creates secrecy. For instance, actively soliciting amicus only to bind them under the same strict confidentiality as parties to a case may enlarge the elitist sphere of access to the African Commission, but it may not service the kind of public access to information that is necessary for legal mobilisation, outside of the legal process. In addition, while the African Commission may be willing to publish substantive case summaries in its activity reports, a restrictive interpretation of Article 59 would lead the Commission to delete any of this information if/when requested to do so by an Executive Council's decision, a practice that is discussed further below.

The African Commission's 2020 Rules of Procedure has brought new developments in the procedure governing the intervention of an amicus curiae.<sup>23</sup> It provides that once the African Commission grants an application seeking to intervene as amicus, it will share the parties' pleadings with the amicus curiae. The rules require the amicus curiae to respect the confidentiality of the parties' pleadings in accordance with Article 59 of the African Charter.<sup>24</sup> It further allows the African Commission to publish admitted amicus briefs on its website.<sup>25</sup> These developments are useful as they provide the needed guidance on the procedure for amicus curiae interventions. They also provide an opportunity for interpretation of what confidentiality of parties' pleadings means in the context of amicus curiae applications. For example, it may be useful to explore whether or how amicus curiae applications can outline key issues of the matter pending before the African Commission without infringing on the privacy of the parties involved.

However, the rules do not resolve the question of the lack of public information on pending communications which is essential for enabling a wide range of experts and other stakeholders to know the issues pending before the commission in order to make application for amicus curiae in the first place. Although the rules allow the African Commission to invite amicus curiae to make submissions,<sup>26</sup>

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23. Rules Of Procedure Of The African Commission On Human And Peoples' Rights, 2020 Adopted By The African Commission On Human And Peoples' Rights During Its 27th Extra-Ordinary Session Held In Banjul (The Gambia) From 19 February To 04 March 2020.s

24. Ibid Rule 105(5).

25. Ibid Rule 105(6).

26. Ibid Rule 104.

which widens the scope of potential engagement, only the most visible and publicly renowned experts and stakeholders are likely to benefit from these interventions. Therefore, as noted earlier, this may not service the kind of public access to information needed for wide range visibility and inclusive engagement by social movements, activists, lawyers, CSOs and other actors with the protective mandate of the African Commission that is necessary for legal mobilisation.

### **c) Invisibility of the communications mandate and the dearth of jurisprudence on women's rights and sexual rights**

The shroud of secrecy created by a restrictive interpretation of Article 59 creates a general lack of knowledge and information on the communications mandate of the African Commission. This limits the extent to which lawyers, NGOs, human rights defenders, social movements and victims of rights violations engage with this crucial regional human rights protection mechanism. It is especially concerning that over the past 32 years of existence, the African Commission has only issued two decisions on women's human rights.<sup>27</sup> Advocacy with regard to pending communications can bring visibility to the role of the African Commission which may allow new constituencies to engage the African Commission's communications mandate.

## **Article 59 and Challenges to the Independence of the African Commission**

Article 59 has also been used to establish the principle of secrecy when the Executive Council invokes Article 59(3) to undermine the independence of the African Commission and prevent the publication of information on certain individual communications. Article 59(3) as currently interpreted and implemented limits access to all communication related information to the

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27. Communication 323/06, Egyptian Initiative for Personal Rights & Interights v Egypt, ACHPR. And Communication 341/2007, Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia, ACHPR.



parties until the Assembly has approved publication of its Activity Reports.<sup>28</sup> Under Article 54 of the Charter, the African Commission is required to ‘submit to each ordinary session of the Assembly of Heads of State and Government a report of its activities.’ A restrictive interpretation of Article 59 (3) as read with Article 54 gives the Assembly the power to control and censor not only what information the Commission can publish, but to interrogate the substantive content of the Commission’s decisions or findings. Such an interpretation of Article 59(3) implies that the Commission is subordinate to the political organs of the AU.<sup>29</sup>

This political control is also manifested when the Executive Council invokes Article 59 to make prescriptions on what the Commission should or should not publish. For example, in 2006, the Executive Council adopted the 20th activity report, except for decision 245 on Zimbabwe. Zimbabwe and other member states were given two months to submit their observations on the decision.<sup>30</sup> In 2015 the Executive Council requested the African Commission to delete passages from its 37<sup>th</sup> activity reports.<sup>31</sup> These passages concerned two decisions against the Republic of Rwanda, and similarly, the State was given an opportunity to present their views in a public hearing. The basis for this right to reply remains unclear given that states already have the opportunity to participate in the communications process leading up to the final decision.<sup>32</sup>

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28. African Commission on Human and People’s Rights Working Group on Communications, 2017 Reports. See also Analysis on decision 1015 of the executive council of the African Union: a wrongful interpretation of international human rights law to undermine the independence of the African Commission on human and peoples’ rights, Briefing note prepared by AMSHeR, CAL, ISLA, Center for Human Rights (University of Pretoria), Synergía-Initiatives for Human Rights. February 2019, para 31.

29. Odinkalu, A.C. “The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment.” *Transnat’l L. & Contemp. Probs.* 8 (1998): 359.

30. Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) EX.CL/Dec 310 (IX), 2006.

31. Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) Activity Report 37, 2015.

32. Killander M. above note 2.

A recent request for advisory opinion at the African Court on Human and Peoples' Rights (African Court) sought interpretation of Article 59(3) inquiring whether the Executive Council and the Assembly, in these types of decisions, are not exceeding the reasonable limits of the powers to '*consider*'.<sup>33</sup> In September 2017, the African Court issued an evasive decision and bypassed an opportunity to provide guidance on how the term '*considered*' in Article 59(3) should be interpreted.<sup>34</sup> The Court relied on a technicality and failed to engage substantively with the meaning of Article 59(3). It found that the applicants lacked capacity to request an advisory opinion, because they are not organizations 'recognized by the African Union' since they do not have Observer Status before the African Union.

The Executive Council's Decision 1015 issued in 2018 demonstrated further subordination of the African Commission by jeopardising its independence and reinforcing secretive confidentiality in its interpretation of Article 59. The decision directed the African Commission to 'observe confidentiality *at all stages* of its work in line with Article 59 of the Charter'.<sup>35</sup> This is contrary to the confirmation expressed by the Working Group on Communications that while only parties to a communication are entitled to receive information relating to their communications, once the Activity Report has been authorised for publication by the Assembly, the general public can have access to the final decisions mentioned in that report.<sup>36</sup> The Executive Council's blanket directive on confidentiality also misconstrues the Charter which is clear that Article 59 applies to measures (decisions) taken in relation to 'the present Chapter' which are specific sections as explained above.

This directive is dangerous because it could be used to erode the current understanding of Article 59, which lays a basic threshold of public access to information in the activity reports after approval by the Assembly. This erosion will extensively limit access to the workings of the African Commission which is contrary to principles of accountability and transparency.<sup>37</sup>

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33. Advisory Opinion No. 002/2015, African Court on Human and Peoples' Rights, 28 September.

34. *Ibid.*

35. Decision 1015 above note 3.

36. Working Group on Communications 2017 Reports, above note 28.

37. The Initiative for Strategic Litigation in Africa (ISLA), Implications of the African union executive council's decision on the communications procedure, Briefing Note, October 2018.

Other directives in Decision 1015 largely delegitimize the nature of the African Commission, which has implications for the communications procedure, and affect the interpretation of confidentiality under Article 59.<sup>38</sup> This directive threatened the general independence of the African Commission by stating that this independence ‘is functional in nature and does not mean independence from the bodies that created it’.<sup>39</sup> This directive erroneously overlooks the fact that the African Commission derives its existence and mandate from the Charter.<sup>40</sup> The decision also directs States to review the interpretive mandate of the African Commission and challenges the Commission’s autonomy to lay down its own rules and procedures, mandates which are both clearly defined and secured by the Charter.

Murray has argued that an important principle to respect is that the African Commission has the power to interpret the Charter and therefore, the Commission can learn from best practices adopted by other regional and international systems to develop a purposive interpretation of Article 59.

## Conclusion and Suggested Way Forward

The African Commission needs to adopt a functional interpretation of Article 59, one that is read in realization of the fact that one of the functions of the African Commission is to ‘disseminate information’.<sup>41</sup> This function is as much achieved through the Commission’s promotional visits, as well as through the full publication of reports on its work. After all, ‘public bodies hold information not for themselves but as custodians of the public good, and everyone has a right to access this information, subject only to clearly defined rules established by law’.<sup>42</sup> At the very least, this principle on access to information should form

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38. Ibid.

39. Decision 1015 above note 3.

40. ISLA. above note 37.

41. Killander M. above note 2. See also article 3 Constitutive Act of the African Union.

42. Declaration of Principles on Freedom of Expression in Africa, 2002, para 4(1).

the basis for continuing to challenge the shroud of secrecy established by the strict interpretation of Article 59. Some practical steps for NGOs to consider may include: formal engagement with the African Commission to adopt a progressive approach; establishment of a working group to track and analyse practical challenges of restrictive interpretation of Article 59, especially in light of implementation of the new rules of procedure, and to advocate for the publication of information relating to pending communications; working with the ongoing campaign for the independence of the African Commission; and launching a specific campaign on publicity and access to information.

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## Chapter 5

# Litigating the rights of women at the ECOWAS Court

Oludayo Fagbemi<sup>1</sup>

### Introduction

The ECOWAS Community Court of Justice has been given the jurisdictional competence to entertain cases of human rights violations among ECOWAS Member States. In the exercise of this competence, the Court has entertained and decided on cases that allege the violation of the rights of women. This article seeks to draw attention to the failure of the Court, in many cases brought before it, to apply the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and also a failure of the Court to consider and grant structural remedies requested by the Applicants in those cases.

There have been academic commentaries on some of those cases.<sup>2</sup> However, this article relies primarily on the submissions of the Parties, as well as the judgment of the Court, in the cases referred to.<sup>3</sup>

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1. Senior Legal Officer, Institute for Human Rights and Development in Africa (IHRDA).

2. See for example, Maame Efua Addadazi, 'Of the women's rights jurisprudence of the ECOWAS Court: The role of the Maputo Protocol and the due diligence standard' (2020) 28 *Feminist Legal Studies*; Ciara O'Connell, 'Reconceptualizing the first African Women's Protocol case to work for all women' (2019) 19 *African Human Rights Law Journal* 510; Brenda Kombo, 'Silences that speak volumes: The significance of the African Court decision in APDF and IHRDA v Mali for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389.

3. The author was part of the legal team for the Applicants in all cases mentioned in this article, in which the provisions of the Maputo Protocol were invoked.

## ECOWAS Community Court of Justice

The Economic Community of West African States (ECOWAS) Treaty of 1975 in its Article 11 provided for the establishment of a Tribunal of the Community which shall ensure the observance of law and justice in the interpretation of the provisions of the treaty.<sup>4</sup> However, the ECOWAS Court was not created until 1991 by a Protocol adopted by the Member States of ECOWAS.<sup>5</sup> The Court was created as the principal legal organ of ECOWAS. By virtue of articles 6(1)(e) and 15 of the 1993 Revised Treaty of ECOWAS, the Community Court of Justice became one of the institutions of ECOWAS.<sup>6</sup> Under the 1991 Protocol, the jurisdiction of the Court was limited by article 9 to the interpretation and application of the ECOWAS Treaty. Access to the Court was limited to States and ECOWAS institutions but a State Party could bring an action on behalf of its national(s) against another State Party.<sup>7</sup>

The Protocol creating the Court was amended by a Supplementary Protocol in 2005 which expanded the jurisdiction of, and access to the Court. Under the Supplementary Protocol, the Court could determine cases of violations of human rights that occur in any Member State. Also, access to the Court was expanded to allow individuals to come before the Court for relief for violation of their human rights.<sup>8</sup> The Protocol does not require litigants to have exhausted local remedies, and as such, it creates wide access to the Court for all human rights complaints.

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4. Treaty of the Economic Community of West African States (ECOWAS), available at <https://www.refworld.org/docid/49217f4c2.html>, accessed on 30 March 2020.

5. Protocol A/Pl/7/91 on the Community Court of Justice, available at [http://prod.courtecowas.org/wp-content/uploads/2018/11/Protocol\\_AP1791\\_ENG.pdf](http://prod.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf), accessed on 30 March 2020.

6. Revised Treaty of the Economic Community of West African States, available at [http://prod.courtecowas.org/wp-content/uploads/2018/11/Revised\\_Treaty\\_1993\\_ENG.pdf](http://prod.courtecowas.org/wp-content/uploads/2018/11/Revised_Treaty_1993_ENG.pdf), accessed on 30 March 2020.

7. See *Afolabi Olajide v Nigeria*, ECW/CCJ/JUD/01/04.

8. Supplementary Protocol A/SP/1/01/05, available at [http://prod.courtecowas.org/wp-content/uploads/2018/11/Supplementary\\_Protocol\\_ASP10105\\_ENG.pdf](http://prod.courtecowas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP10105_ENG.pdf), accessed on 30 March 2020.



Article 19 of the Court's Protocol provides for the Court's applicable law to be the provisions of the ECOWAS Treaty and the Court's Rules of Procedure. It also gives the Court the power to apply *inter alia* "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states".

This provision allows the Court to consider the interpretation and application of all treaties ratified by the State Party. As such, the Court can interpret and apply the Maputo Protocol, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the African Charter on the Rights and Welfare of the Child (ACRWC) and other instruments that protect the rights of women and girls.<sup>9</sup>

## The Maputo Protocol

The Maputo Protocol was adopted in 2003. The Protocol is the most comprehensive and progressive women's rights instruments in Africa and beyond. Its provisions are all encompassing including civil and political, economic, social and cultural rights. Thus, even though CEDAW already existed at the time of its adoption, the Maputo Protocol brought added value as it reflected the particular realities of African women. For example, as the African continent is confronted with several armed conflicts, the Maputo Protocol provides for protection of women in armed conflicts.<sup>10</sup> It also provides for elimination of all harmful cultural practices seen in many parts of Africa such as female genital mutilation and child marriages.<sup>11</sup> In fact, the Maputo Protocol has been rightfully referred to as the "African Bill of Women's Human Rights for Women's Rights in Africa."<sup>12</sup>

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9. The ACRWC and CEDAW have been ratified by all ECOWAS Member States, while the Maputo Protocol has been ratified by all except Niger.

10. See Article 11 of the Maputo Protocol.

11. See Articles 5 and 6 of the Maputo Protocol.

12. See Women, Gender and Development Directorate (WGDD) of the African Union Commission, 'Maputo Protocol on Women's Rights: A Living Document for Women's Human Rights in Africa', available at [https://au.int/sites/default/files/documents/31520-doc-maputo\\_protocol\\_on\\_womens\\_rights\\_a\\_living\\_document\\_for\\_womens\\_human\\_rights\\_in\\_africa\\_submitted\\_by\\_the\\_women\\_gender\\_and\\_development\\_directorate\\_wgdd\\_of\\_the\\_african\\_union\\_commission.pdf](https://au.int/sites/default/files/documents/31520-doc-maputo_protocol_on_womens_rights_a_living_document_for_womens_human_rights_in_africa_submitted_by_the_women_gender_and_development_directorate_wgdd_of_the_african_union_commission.pdf), accessed on 15 May 2020.

With such a wide spectrum of progressive provisions, one would have hoped that the Maputo Protocol would be effectively utilised by all African regional and sub-regional human rights mechanisms to advance the rights of women and girls. However, this has not been the case. This could partly be explained by the fact that not many cases have been brought before regional and sub-regional mechanisms that allege violations of the Protocol. The first judicial application by a regional mechanism was in the case of *APDF and IHRDA v Mali*,<sup>13</sup> decided by the African Court on Human and Peoples' Rights in 2018. In that case, the African Court held that provisions in the Malian Family Code that allowed for discrimination against women in inheritance, as well as provisions that allowed marriages for girls as young as 15, were discriminatory and contravened the provisions of the Maputo Protocol.

## Women's Rights Cases at the ECOWAS Court

The first case before the Court that concerned the rights of women is the celebrated case of *Hadijatou Mani Koraou v Niger*.<sup>14</sup> The Plaintiff had been sold at the age of 12 years to a local chief and was subjected to forced marriage, rape, torture and unpaid and forced labor for 9 years. The ECOWAS Court held *inter alia* that she was a victim of slavery and that her slavery could be blamed on the inaction of Nigerien administrative and judicial authorities. The Court, however, surprisingly held that the discrimination which the Plaintiff suffered could not be attributable to Niger. Unfortunately, in this case, the Court could not have applied the provisions of the Maputo Protocol as Niger is not a State Party to the treaty.

In 2014, the Court received the case of *Azali Abia and Another v Benin*.<sup>15</sup> The first Plaintiff in this case, Abia Azali had been employed as a domestic servant when

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13. App. No 046/2016 - *APDF and IHRDA v Republic of Mali*, available at <https://en.african-court.org/images/Cases/Judgment/046%20-%202016%20-%20Association%20Pour%20le%20Progr%C3%A8s%20et%20la%20Defense%20Des%20Droits%20Des%20Femmes%20Maliennes%20-%20APDF%20Vs.%20Mali%20-%20Judgment%20of%2011%20Mai%202018%20-%20Optimized.pdf>, accessed on 15 May 2020.

14. ECW/CCJ/APP/08/08

15. ECW/CCJ/APP/04/14

she was a six-year-old girl. Her employer subjected her to serious cruel treatment, suspecting that she had engaged in an intimate relationship with the employer's husband. She alleged that her complaint to the Beninese judicial authorities was not properly dealt with until it became statute barred. Thus, she complained to the ECOWAS Court alleging violations of her rights to fair trial, access to justice and the right to have her cause heard within a reasonable time. The second Plaintiff's case was that she had been denied access to justice in Benin after her complaint to the Beninese authorities, of being treated by a quack gynecologist, was delayed on appeal till it became statute-barred. The Plaintiffs did not invoke the provisions of the Maputo Protocol.

This case would have been a good opportunity for the ECOWAS Court to apply the provisions of the Maputo Protocol to issues in the case involving child labour and access to justice.<sup>16</sup> It is trite principle that the Court must know the law. It is submitted that in assessing the State responsibility of Benin towards the Plaintiffs in this case, the Court as the repository of the law should have applied the provisions of the Maputo Protocol, even if not cited by the Parties.

The ECOWAS Court was for the first time invited to and did apply the Maputo Protocol in the case of *Dorothy Njemanze and 3 Others v Nigeria*.<sup>17</sup> The Plaintiffs were arrested and detained by the Abuja Environmental Protection Board (AEPB) and other government agencies. In the process, the Plaintiffs were sexually, physically and verbally assaulted. The AEPB claimed that the reason for their arrest was that they were 'prostitutes' having been found walking the streets of Abuja at night.

In its decision, the Court found, *inter alia*, that the treatment meted out to the Plaintiffs by the various Nigerian Government agencies constituted gender based discriminatory treatment that is in contravention of Articles 2, 3, 4(1) and (2), 5, 8 and 25 of the Maputo Protocol. The arrests and harassment were being directed only at women who were found on the streets at night, and there were no records of men who were also arrested. The cruel and degrading treatment was therefore targeted at women. Moreover, the Court held that the application of criminal

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16. See articles 13 (g) and 25 of the Maputo Protocol respectively.

17. ECW/CCJ/APP/17/14

laws that prohibit prostitution, in this case, was discriminatory as it targeted only women despite the fact that it takes two persons to engage in such activity.

In terms of remedies, the Court granted declaratory reliefs that affirmed that the women had been discriminated against, and had been subjected to cruel, inhuman and degrading treatment. The Court also held that the failure of the State to investigate and prosecute those responsible for the violation of the rights of the Plaintiffs was a violation of the State's duty to investigate under its international obligations. Consequently, the Court granted financial compensation to the Plaintiffs.

However, the Court totally ignored, and did not make any ruling on, the structural reliefs which had been requested by the Plaintiffs such as:<sup>18</sup>

- i. "An order for the enactment of a law eliminating all forms of violence, including sexual violence against women and the training of the Police, Prosecutors, Judges and other responsible Government Agencies on laws on violence against Women and gender sensitivity and the creation of specialized police Units and Courts dealing with cases of violence against women."
- ii. "An order for the adoption of other legislative, social and economic resources as may be necessary to ensure the protection, punishment and eradication of all forms of discrimination against women."
- iii. "An order for the provision of support services for victims of violence against women including information, legal services, health services and counselling."

In *WARDC and IHRDA (on behalf of Mary Sunday) v Nigeria*,<sup>19</sup> Mary Sunday had been brutally assaulted by her fiancé who was a Nigerian police officer. Despite the many efforts by the victim to secure justice from the Nigerian authorities, there was no effective investigation or prosecution of the perpetrator by the State. The

18. By structural remedies, I refer to remedies that are tailored to achieve structural change in the State. Eg. Orders for legal or policy changes in the State.

19. ECW/CCJ/APP/26/15, Women Advocates Research and Documentation Centre & IHRDA (on behalf of Mary Sunday) v Nigeria.

Applicants argued that the failure of the government to effectively investigate and prosecute the perpetrator made the State responsible for the violations, even though the assault had been committed by Mary's fiancé in his private capacity as a non-State actor. The Applicants sought from the Court, *inter alia*, a declaration that the actions of the Nigerian government constituted gender-based violence, and thus discrimination against women under the provisions of the Maputo Protocol and CEDAW. In its judgment, the Court found Nigeria in violation of Mary's right to access to justice, and right to have her cause heard. Strikingly, the Court found that Nigeria had not violated Mary's right to freedom from discrimination and gender-based violence. In its finding, the Court held that there is need for a general trend of discrimination against women by the State for the Court to hold that there had been gender-based discrimination in this case. In reaching this decision, the Court did not consider or apply the provisions of the CEDAW or Maputo Protocol, the two major instruments that expound on gender-based violence and discrimination against women, despite extensive submissions made by the Applicants on the violation of these instruments.

Apart from declaring that Mary Sunday's right to access to justice and fair hearing had been violated, the Court granted monetary compensation. Similar to the *Dorothy Njemanze case*, the Court also ignored and did not at all consider or make a ruling on the structural reliefs sought by the Applicants, which were similar to those sought in the *Njemanze case*.

The case of *WAVES and Another v Sierra Leone*<sup>20</sup> was brought by two non-governmental organisations in Sierra Leone; on behalf of pregnant adolescent school-girls in Sierra Leone who had been effectively banned from attending public schools and taking their examinations. The ban was contained in a statement made by the Sierra Leonean Education Minister and had been enforced widely in Sierra Leonean public schools.

The Plaintiffs argued that the ban constituted a violation of the right to freedom from discrimination in the enjoyment of the right to education under the provisions of the African Charter, the Maputo Protocol, CEDAW, the UN Convention on the Rights of the Child (CRC), and the ACRWC, among others.

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20. ECW/CCJ/APP/22/18, *Women Against Violence and Exploitation in Society and Child Welfare Society of Sierra Leone v The Republic of Sierra Leone*.

The Plaintiffs sought a declaration that the ban was a violation of the right to freedom from discrimination and the right to education, as well as an order of the Court to reverse the ban. They also sought structural reliefs such as:

- iv. “An order that the Respondent State develops strategies, programmes and nation-wide campaigns that focus on reversing negative societal attitudes that support the discrimination and bias against pregnant girls attending school and that foster the violation of their and teenage mothers’ right to continuous education.
- v. “An order that the Respondent State develops strategies, programmes and nation-wide campaigns to enable teenage mothers to attend school.
- vi. “An order that the Respondent State integrates sexual and reproductive health into school curricula as this increased knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancy.”

The Court held that the differential treatment of pregnant girls in the enjoyment of education constitutes discrimination against the girls, as there was no reasonable justification for the differential treatment of the girls, who were in school before getting pregnant.<sup>21</sup>

However, in its consideration of this case, the Court did not refer to the provisions of the primary African instrument that seeks to protect women and girls from discrimination, i.e. the Maputo Protocol. Also, the Court did not consider the provisions of the ACRWC. Meanwhile, the Court referred to all the United Nations instruments cited by the Applicant. The only African instrument referred to in the Court’s analysis is the African Charter. In other cases in which the Court has had to consider the issue of discrimination against women, the Court has shown a similar lack of regard for provisions of the Maputo Protocol.<sup>22</sup>

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21. See *Ibid*, pages 20–29.

22. See ECW/CCJ/APP/26/15: *Women Advocates Research and Documentation Centre and anor (on behalf of Mary Sunday) v Nigeria*; ECW/CCJ/APP/35/17: *Aminata Diantou Diane v Mali*; ECW/CCJ/APP/04/14: *Abla Azali and anor v Benin*.

It is important for the ECOWAS Court, being a sub-regional mechanism for enforcement of human rights in West Africa, to utilise African regional human rights instrument in the consideration of cases before it, especially when these are invoked by any of the Parties.

In terms of remedies in this case, the Court granted declaratory reliefs sought by the Applicants, and also ordered the immediate reversal of the ban. But remarkably, the Court considered and granted three of the four structural reliefs sought by the Applicant. The Court held that it is within the competence of the Court to grant these reliefs as they add meaning to the right to education. The Court cited the case of *SERAP v Federal Republic of Nigeria*,<sup>23</sup> in which it held that:

“The Court is, however, mindful that its function in terms of protection does not stop at taking note of human rights violation. If it were to end in merely taking note of human rights violations, the exercise of such a function would be of no practical interest for the victims, who, in the final analysis, are to be protected and provided with relief.”<sup>24</sup>

The Court can therefore make orders against the Respondent State “directing it to take certain measures to ensure performance of its obligations as contracted for under the relevant laws”.<sup>25</sup>

The grant of structural reliefs is a welcome departure from the judgments in the previous cases in which the Court did not even consider the structural reliefs sought by the Applicants.<sup>26</sup> It should be noted that the panel of judges of the Court that sat on this case is a new panel that assumed office in August 2018. This change of panel perhaps explains the different attitude of the Court to the consideration of structural remedies in the case.

The failure of the ECOWAS Court to consider and rule on arguments raised, or remedies requested, by the Parties may point to some defect in the process by

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23. ECW/CCJ/JUD/18/12

24. *Ibid*, paragraph 118.

25. *WAVES v Sierra Leone*, *op cit*, page 31.

26. See footnote 22 above.

which the Court considers cases before issuing its judgment. Courts are meant to rule on issues raised by the Parties.

The failure to apply the Maputo Protocol may also point to a deficiency in the knowledge of the judges of the Court with respect to African human rights instruments. This would probably explain why the Court refers to human rights instruments adopted under the auspices of the United Nations but not those adopted under the auspices of the African Union.

## Conclusion and Recommendations

The ECOWAS Court has provided a good avenue for enforcing the rights of women in West Africa. The wide access to the Court, as well as the power of the Court to apply a wide range of human rights instruments are great for litigants. However, a review of the cases show that the Court has not been applying the Maputo Protocol to most of the cases that have come before it concerning the rights of women. In addition, the Court has largely not been inclined to consider requests for structural remedies.

It is thus recommended that for future women's rights cases before the Court, the Court would do well to apply the Maputo Protocol in its consideration. As the Court has done in the *WAVES case*, the Court should also consider structural remedies requested by the Parties, and provide a ruling on these remedies. In like manner, lawyers bringing women's rights cases before the Court are enjoined to refer to the Maputo Protocol and other African human rights instruments in their arguments before the Court, and to consider making requests for structural remedies that go beyond redress for their clients, but that prevent others from experiencing such violations in the future.



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3. ECW/CCJ/APP/35/17: *Aminata Diantou Diane v Republic of Mali*.
4. ECW/CCJ/APP/17/14: *Dorothy Njemanze and 3 Others v Federal Republic of Nigeria*.
5. ECW/CCJ/APP/08/08: *Hadijatou Mani Koraou v Republic of Niger*.
6. ECW/CCJ/JUD/18/12: *SERAP v Federal Republic of Nigeria*.
7. ECW/CCJ/APP/26/15, *Women Advocates Research and Documentation Centre & Institute for Human Rights and Development in Africa (on behalf of Mary Sunday) v Federal Republic of Nigeria*.
8. ECW/CCJ/APP/22/18: *Women Against Violence and Exploitation in Society (WAVES) and Child Welfare Society of Sierra Leone (CWS-SL) v Republic of Sierra Leone*.

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## Chapter 6

# Advancing Sexual Reproductive Health Rights of Women and Girls through Strategic Litigation: The Impact of the Sexuality Education Case in Uganda

By Specioza Avako

### Executive Summary

This article focuses on the importance of strategic litigation as a tool for holding governments accountable for the Sexual Reproductive Health Rights (SRHR) violations of women and girls. It discusses the *Sexuality Education Case* filed by the Centre for Health Human Rights and Development (CEHURD) in 2016 after the state banned the teaching of Comprehensive Sexuality Education (CSE) in Uganda. The processes prior and subsequent to the filing of the case involved intensive advocacy campaigns and support for the protection of SRHR of the youth by several actors such as civil society organizations. The advocacy surrounding the sexuality education case greatly contributed to the passing of the policy.

Although Uganda made reservations to Articles 14(1) (a) and 14(2) (c) of the Maputo Protocol, the *Sexuality Education Case (CEHURD v Attorney General & Family Life Network, Miscellaneous Application No. 309 of 2016)* addressed SRHR embedded in the Protocol including the right to sexual health information, family planning education and self-protection from HIV/AIDS, which are also reflected in Uganda's legal and policy framework. In as much as the court had not made its final decision by the time this article was written, the case had a significant impact on the SRHR for women and girls in Uganda. The greatest achievement realized by litigating the *Sexuality Education Case* was the passing of the National Sexuality Education Framework for Uganda in 2018. However,

admittedly several challenges on its implementation still exist. The case also raised awareness, advocated for the protection of SRHR of vulnerable women and girls, and demanded compliance with human rights norms by the state.

## Introduction

Sexual Reproductive Health Rights (SRHR) broadly apply to four areas including reproductive rights, reproductive health, sexual rights and sexual health.<sup>1</sup> The close interconnection between gender, reproductive health and sexuality ordinarily calls for the protection of SRHR of women and girls.<sup>2</sup> It is undeniable that sexuality education cannot be separated from SRHR. SRHR presents all rights of individuals or groups to make independent decisions in relation to their reproductive and sexual health.<sup>3</sup>

Strategic litigation is an important tool for demanding accountability for the Sexual Reproductive Health Rights (SRHR) of women and girls. Women and girls in Uganda face inequalities that make the realization of their SRHR difficult due to social, cultural and religious norms.<sup>4</sup> The inability of women and girls to make decisions about their sexual and reproductive health denies them the right to enjoy the highest attainable standard of physical and mental health.<sup>5</sup> Uganda's socially conservative position on SRHR is reflected in its reservations to Article 14 (1) (a) and 14 (2) (c) of the Maputo Protocol<sup>6</sup>, the ban of Comprehensive Sexuality Education (CSE)<sup>7</sup> and an inadequate SRHR legal and policy framework.

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1. Gita Sen, "Sexual and Reproductive Health and Rights in the Post-2015 Development Agenda", *Global Public Health*, 9, no. 6, (2014):599.

2. Sonia Corrêa, "From Reproductive Health to Sexual Rights Achievements and Future Challenges", *Reproductive Health Matters*, 5, no.10, (01 Nov 1997):107.

3. *Ibid.*, 110.

4. Robert D. Nanima, "Mainstreaming the 'Abortion Question' into the Right to Health in Uganda", *ESR Review*, 19, no. 0.2, (2018):6.

5. *Ibid.*

6. Attorney General, "Ratification of the Protocol to the African Charter on Human and People's Rights of Women in Africa (Maputo Protocol); Government of Uganda, Kampala, Uganda, (14 Jul 2010).

7. Anthony Wesake, "Government Sued Over Delayed Policy on Sex Education", January 15,

Although Uganda made reservations to Article 14 (1) (a) and 14 (2) (c) of the Maputo Protocol which provides for SRHR, the Center for Health, Human Rights and Development (CEHURD) advocated for these rights through the filing of a case contesting the ban on CSE. The *Sexuality Education Case* focused on the human rights embedded in the Maputo Protocol such as non-discrimination, right to health, access to family planning and sexual health information which are also reflected in Uganda's legal and policy framework. This paper, therefore, discusses the enormous potential of strategic litigation on sexuality education as a powerful tool for systemic change and the protection of SRHR of women and girls in Uganda.

## The Background to the Sexuality Education Case

The realization of SRHR for women and girls requires massive education and awareness on their sexuality at the earliest stage possible as any decision made could have serious ramifications on their health and life. Sexuality education has always been part and parcel of Uganda's culture and religion which emphasizes abstinence.<sup>8</sup> In the early 1980s and 90s, sexuality education was made part and parcel of formal curricula mainly to fight the HIV/AIDS scourge in the country for instance through the Abstinence, Be faithful, Condom use (ABC) campaign.<sup>9</sup> With time, formal curricula emphasized abstinence only, sex within marriage and maintained traditional perceptions of sexuality education.<sup>10</sup> The introduction of technology and modernization has made it easy for children to access sexuality information which does not conform to the Ugandan cultural and religious values.<sup>11</sup> As such, young people are denied access to sexuality education or information which affects their decisions and denies them the opportunity to protect their SRHR.

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2017. Accessed May 27, 2020, <https://www.monitor.com>.

8. Matsiko G. Muhwezi, "Analysis of Cultural and Constitutional Responses to Comprehensive Sexuality Education in Uganda", CEPA, Kampala, Policy Series no. 7, (2016): 5, 6, & 14.

9. Ibid.

10. Ibid.

11. Parliament of Uganda, "Motion for a Resolution of Parliament to Urge Government to Develop a Policy on CSE in Uganda", *Parliamentary Hansard*, August 18, 2016.

Adolescent girls and young women between the ages of 15 and 24 face an intensified risk to sexual gender-based violence which increases their vulnerability to child marriages, unwanted pregnancies, unsafe abortion, HIV/AIDS, and other sexually transmitted illnesses.<sup>12</sup> The HIV prevalence among women aged 15 to 24 years is four times higher than that of young men of the same age.<sup>13</sup> According to the 2016 Uganda Demographic Health Survey report, 24% of teenagers were either pregnant or had given birth. These public health challenges are mainly due to lack of sexuality education and adequate health information to enable young women and girls to self-protect from HIV, sexually transmitted diseases and unwanted pregnancies. It is therefore important to educate them about their rights to reduce their vulnerability. Sexuality education builds values which guide girls and young women to make decisions about their reproductive health. However, a strong cultural and religious belief system in Uganda has created a difficult environment for youths to be taught about their sexual and reproductive health. The failure by the state to provide adolescents with sexual and reproductive health information is contrary to national laws and policies and the recommendation of the UN Committee on the Rights of the Child.<sup>14</sup>

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) International Guidelines on Sexuality Education defines CSE as “a curriculum based process of teaching and learning about cognitive, emotional, physical and social aspects of sexuality education. It aims to equip children and young people with knowledge, skills, attitudes and values that will empower them to realize their health, well-being and dignity; develop respectful social and sexual relationships; consider how their choices affect their own well-being and that of others; and, understand and ensure the protection of their rights throughout their lives.”<sup>15</sup>

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12. Ine Vanwesenbeeck, Judith Westenenga, et al, “Lessons Learned From a Decade Implementing Comprehensive Sexuality Education In Resource Poor Settings: The World Starts With Me”, *Sex Education*, (2016), 16, no. 5:472.

13. WHO/Uganda. Ministry of Health, “The Uganda Population Based HIV Impact Assessment 2016-2017.

14. UN Committee on the Rights of the Child at paragraphs 3, 17, and 24 of General Comment on Adolescent Health and Development, No.4 of 2003.

15. UNESCO, “International Technical Guidance on Sexuality Education: An Evidence Informed Approach”, 2018:16, accessed May 27, 2020, [www.unesco.org/open-access/terms-use-ccbyncnd-en](http://www.unesco.org/open-access/terms-use-ccbyncnd-en).

Several aspects of the UNESCO definition were adopted by the Ministry of Education and Sports (MoES) in the National Sexuality Education Framework in 2018.<sup>16</sup> The framework defines sexuality education as “a lifelong process of acquiring information and forming attitudes, beliefs, and values about vital issues such as sexual development, reproductive health, interpersonal relationships, affection, intimacy, body image, and gender roles. It addresses the socio-cultural, biological, psychological, and spiritual dimensions of sexuality by providing information; exploring feelings, values, and attitudes; and developing communication skills, decision-making, and critical-thinking skills in accordance with the laws and policies of Uganda.”<sup>17</sup>

In early 2016, Ugandan media reported that organisations including the Netherlands-based Butterfly Works and World Population Foundation (WPF) through the World Starts with Me (WSWM) program had misinformed Ugandan schools into training their teachers and students about homosexuality and masturbation.<sup>18</sup> In response, the Ministry of Education and Sports (MoES) issued a circular prohibiting the development and distribution of Information, Education, and Communication (IEC) materials on sexuality education by organisations and individuals in schools without the approval of the Ministry of Education and Sports.<sup>19</sup> The restrictions and hostile environment made the teaching of sexuality education and SRHR programs extremely difficult in schools.<sup>20</sup>

The situation was exacerbated on August 17, 2016 when the Parliament of Uganda passed a resolution urging the Ministry of Education and Sports to ban Comprehensive Sexuality Education materials until it came up with a policy

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16. Ministry of Education and Sports, “The National Sexuality Education Framework 2018”, accessed May 27, 2020, <https://s3-eu-west-1.amazonaws.com>.

17. *Ibid*, p.x.

18. Patience Ahimbisibwe, “At least 100 Schools Tricked into Teaching Homosexuality”, 7 May, 2016. Accessed May 26, 2020, <http://www.monitor.co.ug/News/Education/At-least-100-schools-tricked-into-teaching-homosexuality/688336-3192576-10r641y/index.html>.

19. Ministry of Education and Sports (MoES), “Sexuality Education Materials in Schools”, Circular No.5 issued on 26 April 2016.

20. Amy Fallon, “NGOS Turn to Courts to Unravel Uganda’s Ban on Sexual Education”, April 17, 2017. Accessed May 27, 2020, <http://www.devex.co>.

framework on sexuality education.<sup>21</sup> At the floor of Parliament, the motion for the resolution to ban CSE in schools was moved by the then Woman Member of Parliament for Amuru District, Hon. Lucy Akello.<sup>22</sup> She stated that the book authored by Rev. Jeff Miner and Rev. John Tyler entitled “*Teaching Book: A Reading Strategy for Teachers and Students to familiarize themselves with ‘The Children Are Free’. Re-examination and Biblical Evidence on Same-Sex Relationships*” was one of the materials used in the teaching of CSE in some private schools in Kampala.<sup>23</sup> She stated that the book taught children to engage in sexual activities such as masturbation, homosexuality and the use of contraceptives for children as young as five years.<sup>24</sup>

Following the heated parliamentary debate and the resolution to ban CSE, Hon. Janet Mukwaya, the then Minister of Gender, Labor and Social Development, issued a press statement on 28 October 2016 announcing a ban on CSE in school and non-school environments.<sup>25</sup> The press release emphasized that CSE was not African and that it was meant to erode the virtues and morals of Ugandans.<sup>26</sup> This caused further confusion among various stakeholders on what was permissible. The ban was generic and prohibited all forms of sexuality information and education in the entire country. This was in utter disregard of existing laws and policy on SRHR.

The ban of CSE led the Center for Health, Human Rights and Development, a human rights organization to file the *Sexuality Education Case* in the High Court at Kampala on 18 November 2016. The affidavit in support of the case was sworn

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21 Humphrey Nabimanya, “Young People Loss Out with Back and Forth Sexuality Education ‘Bans’”, July 28, 2018. [https://www.newvision.co.ug/new\\_vision/news/1481820/people-losing-forth-sex-education-bans](https://www.newvision.co.ug/new_vision/news/1481820/people-losing-forth-sex-education-bans).

22 Parliament of Uganda, “Motion for a Resolution of Parliament to Urge Government to Ban CSE in Uganda” under Rule 50 (k) of the Parliamentary Rules of Procedure, August 17, 2016. Parliament of Uganda, “Motion for a Resolution of Parliament to Urge Government to Develop a Policy on CSE in Uganda”, *Parliamentary Hansard*, August 18, 2016.

23. Ibid.

24. Ibid

25. Janet Mukwaya, “Press Release on the Ban of Comprehensive Sexuality Education”, *Ministerial Statement from the Ministry of Gender, Labour and Social Development*, October 28, 2016.

26. Ibid.



by Joy Asasira, a program manager at the Center for Health, Human Rights and Development. The Sexuality Education Case challenged the parliamentary resolution urging the government of Uganda to ban all forms of CSE in Uganda until a policy on CSE is developed. It also challenged the delay and omission by the Ministry of Education and Sports to issue a policy on CSE.

Although the case was initially filed against the Attorney General who is the official legal representative of the government of Uganda<sup>27</sup>, the Family Life Network, an organization based in Uganda, subsequently applied to join the case as an interested party to oppose the teaching of CSE. The Family Life Network filed an affidavit sworn by its executive director, Stephen Langa on 15 March 2017. On 17 March 2017, the Attorney General filed an affidavit in response sworn by Ismail Mulindwa, who was the acting commissioner in charge of private schools and institutions and Health/HIV Unit Coordinator at the Ministry of Education. During the court appearances, the judge encouraged the Ministry of Education and Sports to involve the Center for Health, Human Rights and Development and other stakeholders in developing a policy on sexuality education. In spite of the conclusion of the case in 2017, by the time this article was written, the court had not given its final decision.

## Methodology

The researcher systematically collected and analyzed data through participation, observation and her own experience as a lawyer working with the Centre for Health, Human Rights and Development at the time and her lead role in the litigation, legal research and advocacy of the *Sexuality Education Case*. The researcher also conducted desk review research on existing literature on sexuality education, SRHR and strategic litigation. The research investigates the importance of applying strategic litigation as an intervention method and mobilizing support from CSOs, the public and other stakeholders as important for SRHR promotion.

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27. Article 119(3) of the Constitution of the Republic of Uganda, 1995.

## Advancing SRHR through Litigation of Sexuality Education Case

Strategic litigation is increasingly being used to promote human rights including Sexual Reproductive Health Rights (SRHR).<sup>28</sup> It allows the judiciary to hold governments accountable for any human rights violations.<sup>29</sup> Strategic litigation means litigation that is of a public nature because of its potential to impact the wider society as opposed to individual interests.<sup>30</sup> It challenges the existing structural legal frameworks, practices and attitudes through the courts of law.<sup>31</sup> Strategic litigation is therefore a powerful avenue for advancing SRHR.

Strategic litigation for SRHR advancement can have a positive impact, if the non-provision of SRHR are framed as violations of human rights that are recognised in the national legislation. Admittedly, Uganda's Constitution and statutes do not provide for SRHR or sexuality education. However, the Constitution provides for the right to access to information, the right to education and the right to equality and non-discrimination which are also important elements of sexual and reproductive health.<sup>32</sup> This implies that in arguing for SRHR, the constitutional rights should be framed in a SRHR lens for instance the right to access (health) information or (sexuality) education. The rights-based perspective also involves the application of international and regional human rights treaties, providing an avenue for promoting SRHR in countries that do not have the relevant provisions in their legal frameworks.

Sexuality education cannot be dissociated from the right to the highest attainable standard of physical and mental health in Article 12 of the

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28. Susie Talbot, "Advancing Human Rights in Patient Care through Strategic Litigation: Challenging Medical Confidentiality Issues in Countries in Transition", *Health and Human Rights*, 15, no.2, (December 2013):70.

29. Ibid.

30. Mónica Roa & Barbara Klugman, "Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia", *Reproductive Health Matters*, 22, no. 44, (30 Dec 2014):31.

31. Ibid.

32. Articles 41, 30, 34(2), 33(3), 45, 111(2), of the Constitution of Uganda (1995), Article 14 of the Maputo Protocol.

International Covenant on Economic, Social, and Cultural Rights (ICESCR) because the availability, accessibility, acceptability and quality of information form the crux of wellbeing.<sup>33</sup> SRHR goes beyond sexual and reproductive health care and includes underlying factors of SRH such as “access to safe and potable water, adequate sanitation, adequate food and nutrition, adequate housing, safe and healthy working conditions and environment, health-related education and information, and effective protection from all forms of violence, torture and discrimination and other human rights violations that have a negative impact on the right to sexual and reproductive health.”<sup>34</sup> In order to realize SRHR, States are obliged to promote the rights provided under in the International Covenant of Economic, Social and Cultural Rights right to education and the right to non-discrimination and equality between men and women, the right to education on sexuality and reproduction that is “comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate.”<sup>35</sup>

The use of the human rights approach in strategic litigation gives the opportunity to tactfully articulate SRHR in the Maputo Protocol and other international instruments. It provides an avenue to hold the government and other key actors accountable for human rights violations.<sup>36</sup> This is possible through articulating the relevant provisions in the national and regional or international laws which the country has ratified. The State may also be held accountable under other non-treaty based international commitments. Target 5 of the 2030 Sustainable Development Goals (SDGs) calls upon states to ensure access to SRHR and promotion of gender equality and non-discrimination for all women and girls.<sup>37</sup> Uganda committed to promoting SRHR of women and girls by

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33. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36co.html> [accessed 18 November 2020]

34. General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 7.

35. *Ibid.*

36. Edmund H. Kellog and Jan Stepan, “Legal Aspects of Sex Education” *The American Journal of Comparative Law*, (1978) 26, no.4:573.

37. UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: <https://www.refworld.org/docid/57b6e3e44.html> [accessed 18 November 2020]

adopting a Program of Action in the International Conference on Population and Development (ICPD) in 1994.<sup>38</sup> The ICPD emphasized the promotion of women's rights to CSE, SRHR, human rights, gender equality, and protection from HIV and AIDS.<sup>39</sup> Moreover, Uganda also committed to providing CSE under the Ministerial Commitment on Comprehensive Sexuality and Sexual and Reproductive Services for Adolescents and Young People in Eastern and Southern Africa (ESA).<sup>40</sup>

The Ugandan Government, through the Ministry of Education and Sports, has an obligation to respect, protect, promote and fulfill human rights under Article 20(2) of the Constitution of the Republic of Uganda, 1995. This includes the mandate to formulate policies on education under Article 111(2) of the Constitution and Section 5(1) (b) of the Education (Pre-primary, Primary and Post-primary) Act 2008. This includes the policy on sexuality education. Uganda's obligation to formulate policies and laws is important for the protection of SRHR of girls and young women. Access to information and sexuality education are matters of great urgency and time lost could mean a youth could make a wrong life choice that could result in ill health and death. Moreover, the ban on sexuality education was counterintuitive to the already existing government policies and initiatives on prevention of teenage pregnancies, HIV/AIDS and other Sexually Transmitted Illnesses.

Uganda made great progress in outlining policies and setting standards for the realization of the right to education in the country. These policies include, the Gender in Education Policy (2010), the Early Childhood Development Policy (2008) and the National Physical Education and Sports Policy (2004). Uganda has also developed strategic plans for implementing these policies including the Education Sector Strategic Plan (2015), the Strategic Plan for Universal Secondary Education in Uganda (2009) and Guidelines for Early Childhood Development Centres (2010). The important policies and strategic documents for sexual and reproductive health in Uganda include; the National Health

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38. Partners in Population and Development, "Report on the International Forum on "ICPD@15: Prospects and Development", 24-25 November, 2008 / Kampala, Uganda.

39. Ibid.

40. Para. 3 of the Ministerial Commitment on Comprehensive Sexuality and Sexual and Reproductive Services for Adolescents and Young People in Eastern and Southern Africa (ESA). Accessed May 27, 2020, <https://share-netinternational.org>.

Policy (2010), Adolescent Health Policy (2004), Education and Sports Sector HIV Prevention Strategic Plan (2011), Standards and Guidelines for Sexual and Reproductive Health (2012), National Policy Guidelines on HIV/AIDS (2006), the National Strategy to End Child Marriage and Teenage Pregnancy 2014/15 to 2019/20 and other initiatives such as the Presidential Initiative on AIDS Strategy to Youth (PIASCY) 2011. These policies and guidelines provide a framework for the provision of information and family planning to prevent the spread of HIV/AIDS and sexually transmitted diseases, control child marriages and teenage pregnancies, and improve adolescent health among learners in Uganda.

Uganda did not have a standard sexuality education framework for training learners in sexual and reproductive health. The consequence was that learners were provided with inadequate sexual reproductive health information which was not streamlined by the government. This made it easy for the government to inhibit the teaching of sexuality education in the country in 2016.<sup>41</sup> The State is the custodian of information on sexuality education which children and young people are entitled to. Therefore, the right to information corresponds to the responsibility of the state to refrain from actions which impede such information. The Committee on ESCR, in Article 12 of General Comment 14 on the Right to the Highest Attainable Standard of Physical and Mental Health indicated the need to provide education and access to (health) information as crucial to prevention of health related problems.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (also known as the Maputo Protocol) is the first international human rights instrument that clearly recognizes women's sexual and reproductive health rights. Article 14 provides for the promotion and respect of the SRHR of women. It further provides that states should ensure that women have the right to control their fertility, have access to family planning education, choice of methods of contraception, right to determine number of children and spacing, the right to sexual health information, self-protection from STDs including HIV/AIDS and right to abortion where pregnancy occurs due to rape, incest, sexual assault or endangers the health or life of the mother or child

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41. Article 41, 30, and 34(2) of the Constitution of Uganda 1995, section 4(1) (c), (g) and (i) of (the Children's (Amendment) Act, 2016, and section 4(1) and (2) of the Education (pre-primary, primary and post-primary) Act 2008.

Although Uganda adopted the Protocol on 18 December 2003, signed in 2004 and ratified it on 22 July 2010, it made reservations to Article 14 (1) (a) and 14 (2) (c).<sup>42</sup> A “reservation means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>43</sup> Article 14 is integral towards the realization of SRHR for women and girls. Uganda’s reason for reservation of Article 14(1) (a) of the Maputo Protocol “in respect to the women’s right to control their fertility” was “interpreted to mean women entirely have the right to control their fertility regardless of their marital status.”<sup>44</sup> While Article 14(2) (c) of the protocol was “interpreted in a way conferring an individual right to abortion or mandating a State Party to provide access thereto. The State is not bound by this clause unless permitted by domestic legislation expressly providing for abortion.”<sup>45</sup> The reservation to Article 14(1) (a) and 14(2) (c) makes it difficult to enforce the rights articulated by these provisions.

However, the Maputo Protocol contains several other provisions which may be articulated for the promotion of SRHR for women and girls. Article 2 of the Maputo Protocol calls upon states to eliminate all forms of discrimination against women through appropriate laws, policies and other institutional measures. Article 5 obliges states to eliminate harmful practices and protect women and girls from abuse, violence and intolerance that impacts on their human rights. Article 8(f) calls for reformation of existing discriminatory laws and practices in order to protect the rights of women. States have an obligation in Article 12 to promote the right to education and take all steps to eliminate all forms of discrimination against women and guarantee access in the sphere of education and training. In Article 12 (1) (b) states are mandated to eliminate all stereotypes in text books, syllabi, and media that propagate discrimination of women and girls.

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42. Robert D. Nanima, “Mainstreaming the ‘Abortion Question’ into the Right to Health in Uganda”, *ESR Review*, 19, no. 0.2, (2018):7.

43. Article 1(d) of the United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html> [accessed 18 October 2020].

44. Lucy Asuagbor, “Status of Implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa”, African Union, 60th Meeting -Commission On The Status Of Women, New York, 18 March 2016:3.

45. *Ibid.*

Therefore, strategic litigation was a great mechanism of advancing the SRHR of women and girls enshrined in the Protocol. The *Sexuality Education Case* focused on the human rights generally encompassed within Uganda's domestic and international legal framework such as the right to access (sexual and health) information, (family planning) education, non-discrimination and the right to health. The sexuality education case built pressure towards the issuance of the sexuality education policy.

## The Role of Advocacy in Litigation of the Sexuality Education Case

Civil Society organizations (CSOs) that advocated for SRHR were essential for expediting the passing of the policy on sexuality education by increasing pressure on the government to issue a policy on sexuality education. CEHURD took up the lead role in filing the sexuality education case in addition to advocacy. Civil society participation involved advocating and creating awareness of SRHR. This further involved the articulation of Sexual and Reproductive Health (SRH) issues within a human rights perspective, emphasis on the rule of law and reminding the state of its obligations.

The process prior to and after filing of the case involved intensive advocacy campaigns and support for the protection of SRHR by Civil Society Organisations. These CSOs worked towards advocating for SRHR through various engagements and consultation meetings. They developed strategies and came up with a position paper on the ban of CSE. They participated in the technical working groups for developing the sexuality education framework in Uganda. CEHURD held several meetings with the Ministry of Education, the Ministry of Gender, religious leaders, Members of Parliament, traditional leaders, teachers, parents and the media to discuss issues of sexuality education.

CEHURD's role in strategic litigation backed up by advocacy for SRHR was essential for enhancing awareness on the positive impact of promoting the SRHR of women and girls. CSOs demanded for the implementation of the policy which could lead to a better social, legal and policy environment for SRHR. The immediate outcome of the advocacy relating to the *Sexuality Education Case* and SRHR was issuance

of the National Framework on Sexuality Education. This enabled CEHURD and other CSOs to constantly demand the Ministry of Education to implement the framework. CSOs also stirred public discussions on televised and radio talk shows which promoted the understanding of the importance of sexuality education. The information sent out on different media platforms articulated SRH issues within a human rights perspective and provided scientific evidence on the dangers of lack of sexuality and health information. This was necessary to overcome opposition from religious leaders while advocating for SRHR. The human rights approach for instance defied the cultural and religious narrative on sexual and reproductive health. It also politicized SRH by reminding the state of national and international commitments.<sup>46</sup> In Uganda, religious and cultural values play an important role in discussions of SRH. Therefore, scientifically proven arguments and the human rights approach advanced by CSOs was important for a rational perspective in the granting of the SRHR in the country.

## Results

Strategic litigation motivated the analysis of sexuality education and sexual reproductive health from a human rights perspective. The human rights approach was anchored on the right to health with particular reference to the right to information and education. This enabled holding the state accountable for SRHR including access to sexuality education and sexual reproductive health information. The case also brought together many stakeholders and became a mobilization tool for resources to support SRHR for women and girls.

The *Sexuality Education Case* led to identifying gaps in the legal and policy framework which at the time did not reflect the realities of the sexual and reproductive health of young people. In 2018, the Ministry of Education and Sports issued the National Sexuality Education Framework for Uganda.<sup>47</sup> The

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46. Alice. M. Miller, Eszter Kismodi, et al, "Sexual Rights as Human Rights: A guide to Authoritative Sources and Principles for Applying Human Rights to Sexuality and Sexual Health", *Reproductive Health Matters*, (Nov 2015), 23, no.46:16.

47. UNFPA, "The Government of Uganda launches the National Sexuality Education Framework", May 11, 2018. Accessed May 27, 2020, <https://uganda.unfpa.org/en/news/government-uganda-launches-national-sexuality-education-framework>.



issuance of this framework was mainly attributed to the increasing pressure from the litigation, extensive advocacy and vigorous engagements with stakeholders for a sexuality education policy. The National Sexuality Education Framework outlines efforts directed at changing individual and community attitudes in order to reduce the risk of unintended pregnancy, HIV/AIDS, and STDs which promotes SRHR reflected in the Maputo protocol.<sup>48</sup>

In Uganda, SRHR have always been influenced by social, cultural and religious attitudes.<sup>49</sup> As such, many activists faced strong opposition when they advocated for sexuality education.<sup>50</sup> At the start of the litigation on the sexuality education case, the Center for Health, Human Rights and Development was greatly opposed by religious leaders, government and other organisations such as the Family Life Network that believed that CSE programs would negatively affect children's cultural and religious values.<sup>51</sup> Discussions on sexuality education were extremely sensitive in the country, a situation that required advocates to employ caution and tactic in the way they engaged on the topic.

The filing of the case provided a first-time opportunity for activists to openly discuss the human rights espoused in sexuality education. There was safety and security in discussing sexuality education within the human rights perspective and under a well-established legal system. This was because the human rights approach provided a somewhat tolerable narrative to approaching SRH. This was mainly enabled by the state's commitments to respect, promote and protect human rights under national, regional and international law.

The sexuality education case motivated public discussions on the SRHR of young people, particularly young women and girls. It further opened up discussions on available SRHR policies and enabled the drafting and publication of the Sexuality Education Framework. This was a step towards promoting systemic and

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48. Ministry of Education and Sports, "The National Sexuality Education Framework 2018", accessed May 27, 2020, <https://s3-eu-west-1.amazonaws.com>.

49. Amy Fallon, "NGOS Turn to Courts to Unravel Uganda's Ban on Sexual Education", accessed May 27, 2020, <http://www.devex.co>.

50. Ibid.

51. Ibid.

social change in the country. The public was better informed on the importance of promoting SRHR through sexuality education. This was also important for future protection of SRHR because individuals who are aware of their rights are able to know when the state has deprived them of such rights and can through the legal systems request the courts to make decisions to correct the wrongs.

## Challenges

The challenges faced by CEHURD and other actors in promoting SRHR of women and girls through litigating the *Sexuality Education case* include prolonged court processes and delay of the court to provide a final judgement. The time lag between the ban of CSE in 2016 and the issuance of policy in 2018 meant that youth did not access sexuality education. The CSE ban was unprecedented and unexpected. Therefore many CSOs did not have emergency funds for advocacy or litigation and had to mobilize funds for sexuality education advocacy and litigation. Budget constraints made it difficult to engage stakeholders, hold colloquiums, engage in advocacy, file court documents and move to the courts of law following the ban of CSE in the country.

Some of the stakeholders such as religious leaders out rightly opposed sexuality education, smearing it as evil and foreign. Journalists also published biased newspaper articles describing sexuality education as unfit for the Ugandan religious, culture and value system. Many of the meetings organized by the Center for Health, Human Rights and Development in the first few months, after filing the sexuality education case were boycotted by invited guests who did not want to oppose the government or associate with sexuality education. Furthermore, partners and members of the advocacy groups were unwilling to swear affidavits to enable CEHURD file more evidence in support of the case.

During the development of the National Sexuality Education Framework 2018, discussions centred around whether or not sexuality education in Uganda should be “comprehensive.” This registered further opposition from the several religious leaders who oversee religious based schools in Uganda.<sup>52</sup> The result of

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52. Amy Fallon, “NGOS Turn to Courts to Unravel Uganda’s Ban on Sexual Education”, April 17, 2017. Accessed May 27, 2020, <http://www.devex.co>.

these deliberations was the formation of a framework that recognized sexuality education but is considerably basic as it does not provide for sexuality education to be comprehensive.<sup>53</sup> This can be seen from the emphasis on the abstinence-only programs, which promote restraint from sexual activity outside marriage.<sup>54</sup> The framework does not provide for abstinence-plus programs which emphasize a harm reduction approach that encourages abstinence but also safer sexual practices for sexually active young people.<sup>55</sup> Moreover, the implementation of the framework has proved extremely difficult, by the time of writing this article, the government had not yet come up with a plan for the implementation of the framework.

## Conclusions

In conclusion, the *Sexuality Education Case* was an invaluable tool for advocating SRHR for women and girls in Uganda. It enabled the Center for Health, Human Rights and Development to articulate human rights enshrined in Uganda's legal and policy framework in order to advocate for a sexuality education framework and SRHR espoused in the Maputo Protocol and other international instruments. Therefore, strategic litigation provides direction for the enactment of laws and policies for the protection of SRHR of women and girls. It also shows the increasing need of litigation for purposes of changing attitudes particularly about the stereotyped roles of women and girls and the moralization of SRHR. It provides insight into the possibility of remodeling laws and policies through litigation for the advancement of SRHR.

Strategic litigation is important for raising awareness, protecting vulnerable people and ensuring compliance with human rights norms by the state. The use of human rights approaches in legal arguments is vital for accountability, policy formulation and implementation. Strategic litigation is important because it enables the policy makers, the public, civil society, lawyers, and judges to

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53. Bille de Haas, "Uganda's New Sex Education Framework Will do More Harm than Good", University of Groningen, *The Conversation*. July 1, 2018. <http://theconversation.com>.

54. *Ibid*

55. *Ibid*.

openly discuss SRHR of young women and girls. Furthermore, strategic litigation ensures that SRHR reflected in the Maputo protocol are interpreted and granted even though Uganda made reservations to Article 14(1) (a) and 14(2) (c). This paper has shown how strategic litigation is an essential advocacy tool because it offers several opportunities to impact people's values and norms.

## Recommendations

CSOs should pursue strategic litigation as an advocacy tool for SRHR. This is because even though legal success is not always realized at a particular point in time, strategic litigation has the potential to contribute to collective change in the attitudes of the people, systemic change, the development and implementation of sexual reproductive health laws beyond the courtroom. A positive final decision on the Sexuality Education case will build great jurisprudence for the protection of SRHR for young women and girls. In as much as great success has been achieved by the issuance of the sexuality education framework, it is not enough to have a policy. The policy should be implemented systematically taking into account social, economic, religious, and cultural factors that greatly impact on the sexuality education and SRHR of girls and young women. The implementation of the policy will require a lot of determination, prioritization and willingness of the state and stakeholders. For successful implementation of the policy enough resources should be allocated and teachers trained.

Furthermore, litigating a case of this nature requires a lot of strategies to achieve desired results. CSOs or persons that file strategic litigation cases should engage partners, allies, other stakeholders such as donors to support the litigation through advocacy, financial or technical support. It is important to conduct research, gather evidence and choose experienced persons to swear affidavits and provide evidence through affidavits or witness statements. Courts should permit persons to swear anonymous affidavits or give evidence in private where individuals do not feel comfortable to be witnesses in a contentious human rights issue.

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## Chapter 7

# Realising the right to Menstrual Health and Hygiene in Sub-Saharan Africa

Gicuku Karugu

### Introduction

Menstrual health and hygiene (MHH) encompasses “menstrual health management (MHM) and the broader systemic factors that link menstruation with health, well-being, gender equality, education, equity, empowerment, and rights.”<sup>1</sup> According to the Programme of Action from the 1994 International Conference on Population and Development, sexual and reproductive health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes.”<sup>2</sup> Because menstruation is central to the functioning of the reproductive system, it is, therefore, integral to sexual and reproductive health rights.<sup>3</sup> This means that there can be no separation between menstrual health and sexual and reproductive health as they essentially refer to the fundamental biological functions of a woman’s body. Therefore, when discussing sexual and reproductive rights of women, one must also keep in mind that MHH is an integral part of the discussion.

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1. UNICEF, “Guidance on Menstrual Health and Hygiene,” (2019): 8, <https://www.unicef.org/wash/files/UNICEF-Guidance-menstrual-health-hygiene-2019.pdf>.

2. Path, “Outlook on Reproductive Health- Girls’ and Women’s Right to Menstrual Health: Evidence and Opportunities” (2016): 1, <https://www.path.org/resources/girls-and-womens-right-to-menstrual-health-evidence-and-opportunities/>.

3. Path, “Outlook on Reproductive Health,” 1.

MHM is acknowledged as a “rights and development issue,” thanks to its indirect inclusion in the Sustainable Development Goals (SDGs).<sup>4</sup> The United Nations General Assembly adopted the SDGs in 2015, with the aim that by 2030 it would amongst other things “protect human rights and promote gender equality and the empowerment of women and girls.”<sup>5</sup> In adopting the SDGs, the UN General Assembly was cognisant of the importance of guaranteeing gender equality and empowering of women and girls,<sup>6</sup> as reflected in Goal 3 and Goal 5, which aim to, amongst other things, ensure universal access to sexual and reproductive health-care services.<sup>7</sup> Furthermore, Goal 6.2 acknowledges the need for access to adequate and equitable sanitation and hygiene with special attention to the needs of women and girls. As discussed above, it is imperative that in advancing the sexual and reproductive health of women and girls, we keep in mind that all intended actions must also advance menstrual health, as it is an integral part of a woman’s reproductive functioning.

This paper seeks to explore the reasons why women and girls in Sub-Saharan Africa continue to have restricted or no access to the menstrual health and hygiene and the associated rights such as the right to access menstrual products and adequate sanitary facilities in order to manage their menstruation. With a focus on the Kenyan context, this paper will also examine the consequences of restricted menstrual hygiene and health, and the impact that this has on women and girls rights including the right to education, health, and equality and freedom from discrimination.

The paper will then scrutinise the international and regional instruments which provide for the recognition of health and sanitation rights and determine whether they sufficiently provide for MHH, or whether MHH can be protected by implication.

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4 Siri Tellier and Maria Hyttel, *WoMena*, “Menstrual Health Management in East and Southern Africa: a Review Paper,” UNFPA (2017): 3.

5 UN General Assembly, “Transforming Our World: the 2030 Agenda for Sustainable Development,” (A/Res/70/1) para 3

6 *ibid*, p1

7 *ibid*, p 35



The paper will look at the best practices on promoting the right to MHH in Kenya and Scotland, and how the same can be replicated throughout sub-Saharan Africa through strategic litigation. The paper's intended outcome is to demonstrate that despite the gaps that exist in international and regional human rights law, states can set the pace for improving the access to and the protection of the right to MHH.

## Obstacles to accessing the right to MHH

Access to the right to MHH in sub-Saharan Africa is integral to effective development. However, there exist several obstacles that women and girls in the continent face in accessing their MHH from the onset of their menstruation. These obstacles can diminish the quality of their lives as they may suffer from limited mobility and restricted freedoms and choices.<sup>8</sup> Although the focus of this paper is on the Kenya context, the challenges faced are similar throughout the region. The obstacles to accessing the right to MHH include culture, limited access to MHH products, and lack of proper sanitation infrastructure. This paper discusses these obstacles in turn.

### Culture

The taboos and stigma around menstruation depict it as dirty, shameful, and as something which should be hidden.<sup>9</sup> Menstruating women and girls are regarded as smelly, impure, or even contaminated.<sup>10</sup> This results in women and girls developing negative thoughts and feelings about a natural and unavoidable biological process.<sup>11</sup> Due to the secretive nature of menstruation, many women

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8. Sarah Jewitt and Harriet Ryley, "It's a Girl Thing: Menstruation, School Attendance, Spatial Mobility and Wider Gender Inequalities in Kenya", *Geoforum* 56: 143, <http://dx.doi.org/10.1016/j.geoforum.2014.07.006>.

9. Wash United/Human Rights Watch, "Understanding Menstrual Hygiene Management and Human Rights," (2017):14.

10. Inga T. Winkler and Virginia Roaf, "Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality," *Cardozo Journal of Law & Gender* 21, no. 1 (August 2014):3.

11. Winkler and Roaf, "Taking the Bloody Linen Out of the Closet," 3.

and girls experience shame, anxiety, and embarrassment; all of which hurt their ability to manage their periods, and on their larger wellbeing.<sup>12 13</sup>

## Limited Access to MHH products

Women and girls, especially from poor or rural backgrounds, have limited access to the materials and supplies necessary for managing their menstruation.<sup>14</sup> This is because many of the commercial menstrual health products, like pads and tampons, are more expensive due to import and sales taxes.<sup>15</sup> 65% of women and girls in Kenya cannot afford sanitary pads every month.<sup>16</sup> Additionally, in households with limited finances or where men control finances, access to menstrual products can be impeded as they are viewed as unnecessary expenses.<sup>17</sup>

## Lack of Proper Sanitation Infrastructure

Adequate water and sanitation infrastructure are of utmost importance to menstruating women and girls as they enable them to “change menstrual materials in privacy, with dignity and in safety” and to do so as often as they need

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12. Path, “Outlook on Reproductive Health,” 2.

13. Certain cultural beliefs may develop in a bid to explicitly bar women and girls from enjoying their rights. For instance, a 2018 BBC article reported a widespread myth in the Central Region of Ghana that girls are banned by the local river god from crossing the river to go to school when menstruating and on Tuesdays. Cultural beliefs that seek to explicitly prevent women and girls from enjoying their rights on account of their menstruation are detrimental to the progress that governments are attempting to make in ensuring that there is equality in education. In another example, women in certain communities in Madagascar are forbidden from bathing during their periods, a cultural taboo that can be detrimental to the health of women. “Menstruating Girls Banned from Crossing Ghana River” BBC, January 11, 2018, <https://www.bbc.com/news/world-africa-42652314> accessed 11 November 2020

14. Path, “Outlook on Reproductive Health,” 2.

15. Path, “Outlook on Reproductive Health,” 3.

16. FSG, “Menstrual Health in Kenya: Country Landscape Analysis,” (2016): 13, [https://menstrualhygieneday.org/wp-content/uploads/2016/04/FSG-Menstrual-Health-Landscape\\_Kenya.pdf](https://menstrualhygieneday.org/wp-content/uploads/2016/04/FSG-Menstrual-Health-Landscape_Kenya.pdf) accessed 11 November 2020

17. Path, “Outlook on Reproductive Health,” 3.

to.<sup>18</sup> The lack of proper sanitation infrastructure and systems, for example, soap and water in public washrooms make it more difficult for women and girls to manage their menstrual health.<sup>19</sup> Improved sanitation<sup>20</sup> of these facilities is therefore essential. Many schools in informal settlements and rural areas do not provide proper hygiene facilities, and many schools do not even have separate latrines for girls and boys or latrines with doors or locks.<sup>21</sup> An assessment by PATH carried out in rural Kenya found that, of the 62 primary schools surveyed, only 23% of the latrines had locks on their doors.<sup>22</sup> Additionally, according to FSG, only 32% of rural schools provide girls with a private place to change their menstrual products.<sup>23</sup>

## Negative Effects of Poor MHH

The right to MHH is intertwined with other sexual and reproductive rights as well as the right to water, sanitation, and hygiene (WASH). When women and girls in Africa cannot access proper MHH facilities, this creates barriers to the enjoyment of other fundamental human rights like education, water, health, and hygiene and vice versa.<sup>24</sup> The negative impacts of poor MHH include poor school performance and high drop-out rates, safety risks and gender based violence, and risks to health.

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18. Wash United/Human Rights Watch, “Understanding Menstrual Hygiene Management,” 17.

19. Path, “Outlook on Reproductive Health,” 3.

20. The World Health Organisation has defined ‘improved sanitation facility’ as “one that likely hygienically separates human excreta from human contact and includes: flush or pour-flush to piped sewer systems, septic tanks or pit latrines; ventilated improved pit latrines; pit latrines with slab; and composting toilets.” However, a sanitation facility is not ‘improved’ if it is shared with other households, open to public use. World Health Organisation, “The Global Health Observatory: Population Using Improved Sanitation Facilities” accessed October 21, 2020. [https://www.who.int/data/gho/data/indicators/indicator-details/GHO/population-using-improved-sanitation-facilities-\(-\)#:~:text=Improved%20sanitation%20of%20facilities%20include%3A%20%2D%20Flush,or%20open%20to%20public%20use](https://www.who.int/data/gho/data/indicators/indicator-details/GHO/population-using-improved-sanitation-facilities-(-)#:~:text=Improved%20sanitation%20of%20facilities%20include%3A%20%2D%20Flush,or%20open%20to%20public%20use)

21. Path, “Outlook on Reproductive Health,” 3.

22. Path, “Outlook on Reproductive Health,” 3.

23. FSG, “Menstrual Health in Kenya,” 1.

24. Wash United/Human Rights Watch, “Understanding Menstrual Hygiene Management,” 5.

## Poor School Performance and High Drop-out Rates

The Forum of African Women Educationalists and the United Nations Children's Fund (UNICEF) report that menstruation is one of the leading factors for school dropout among African girls, and that this is primarily due to a lack of sanitation products and facilities in schools.<sup>25</sup> Many girls are rendered immobile and unproductive in their education during their periods.<sup>26</sup> According to the Kenyan Ministry of Education, Science, and Technology, thousands of girls miss one and a half months of class each year due to menstruation.<sup>27</sup> UNICEF has additionally reported that an estimated 1 in 10 schoolgirls in Africa drop out of school at puberty due to a lack of sanitary facilities.<sup>28</sup>

Additionally, studies in Kenya have shown that many girls have trouble focusing in class as they are worried about leakage of period blood onto their clothes.<sup>29</sup> Furthermore, poor school attendance is attributed to the discomfort caused by menstruation, as girls do not participate in class work which affects their overall school performance.<sup>30</sup>

## Safety Risks and Gender-Based Violence

Having limited access to menstrual hygiene facilities and products increases the risk of exposure of women and girls to gender-based violence (GBV), sexual

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25. Collaborative Centre for Gender and Development, "The Effect of Provision of Modern Sanitary Products to Pubescent Girls' School Attendance and Performance," (2016): 9, [https://www.academia.edu/29843190/The\\_Effect\\_of\\_Provision\\_of\\_Sanitary\\_Products\\_on\\_Pubescent\\_Girls\\_School\\_Attendance\\_and\\_Performance.pdf](https://www.academia.edu/29843190/The_Effect_of_Provision_of_Sanitary_Products_on_Pubescent_Girls_School_Attendance_and_Performance.pdf).

26. Collaborative Centre for Gender and Development, "The Effect of Provision of Modern Sanitary Products," 8.

27. Collaborative Centre for Gender and Development, "The Effect of Provision of Modern Sanitary Products," 8.

28. Collaborative Centre for Gender and Development, "The Effect of Provision of Modern Sanitary Products," 9.

29. Path, "Outlook on Reproductive Health," 5.

30. Collaborative Centre for Gender and Development, "The Effect of Provision of Modern Sanitary Products," 9.

harassment, assault, and rape.<sup>31</sup> It is documented that girls and women are at risk of being raped when using toilets, bathing, or collecting water.<sup>32</sup> This is particularly risky for women and girls who travel far distances and at irregular hours to change and wash their menstrual materials.<sup>33</sup>

Additionally, many school-going girls will engage in transactional sex to obtain money to buy MHH products and basic living expenses.<sup>34</sup> This behaviour has been documented in Kenya, Uganda, Tanzania, and South Sudan.<sup>35</sup> This destructive practice exposes young girls to health risks such as HIV, STIs, and unwanted pregnancies as well as other physical and psychological effects that result from being subjected to sexual violence.<sup>36</sup>

## Health Risks

When girls cannot afford sanitary products they may turn to methods that endanger their health including the use of rags, tissue paper, leaves, and cotton wool.<sup>37</sup> Where materials are dirty or are composed of irritant fabrics or other chemicals, this increases the chances of developing infections.<sup>38</sup> Furthermore, in Kenyan communities that practice female genital mutilation (FGM), particularly infibulation; women and girls face unique health complications such as “blockages and build-up of blood clots created behind the infibulated area” which cause painful and long periods, odour, discomfort, and heightens the risk of contracting infections.<sup>39</sup>

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31. Path, “Outlook on Reproductive Health,” 5.

32. Path, “Outlook on Reproductive Health,” 5.

33. Path, “Outlook on Reproductive Health,” 5.

34. Path, “Outlook on Reproductive Health,” 4.

35. Path, “Outlook on Reproductive Health,” 4.

36. Path, “Outlook on Reproductive Health,” 5.

37. Collaborative Centre for Gender and Development, “The Effect of Provision of Modern Sanitary Products,” 12.

38. Collaborative Centre for Gender and Development, “The Effect of Provision of Modern Sanitary Products,” 12.

39. Collaborative Centre for Gender and Development, “The Effect of Provision of Modern Sanitary Products,” 11.

Having established the reasons why women on the continent have poor access to MHH and the negative implications this has on their quality of life; this paper will now address the question of whether there are policies and systems in place to offset the consequences of the shortcomings in our societal and communal constructs.

## International and Regional Law and Policies on Women, Health, and Hygiene

A result of the taboos and stigma around menstruation is that it has taken a considerable amount of time for MHH concerns to be addressed at the policy level.<sup>40</sup> Unfortunately, the right to MHH “continues to receive limited attention in policies, research priorities, programs, and resource allocation.”<sup>41</sup> Furthermore, policies on sexual and reproductive health and rights prioritise the prevention of sexually transmitted infections and family planning, especially targeting young girls.<sup>42</sup> For example, the **2015 Global Strategy for Women’s, Children’s and Adolescent’s Health** fails to make any reference to MHH.<sup>43</sup> In another example, the **Beijing Declaration and Platform for Action 1995** addresses reproductive health and the importance of sexual education but fails to address menstrual hygiene explicitly.<sup>44</sup> <sup>45</sup> This is also the case with the **Cairo Programme of Action 1994**.<sup>46</sup>

This section will explore the international and regional laws that protect the sexual and reproductive health rights of women and determine whether their

40. Winkler and Roaf, “Taking the Bloody Linen Out of the Closet,” 11.

41. Winkler and Roaf, “Taking the Bloody Linen Out of the Closet,” 11.

42. Tellier and Hyttel, “Menstrual Health Management in East and Southern Africa,” 4.

43. Tellier and Hyttel, “Menstrual Health Management in East and Southern Africa,” 4.

44. Winkler and Roaf, “Taking the Bloody Linen Out of the Closet,” 14.

45. Moreover, in the *UN Standard Minimum Rules for the Treatment of Prisoners 1977*, mention is given to the provision of water and toilet articles necessary for health and cleanliness, which include facilities to enable men to shave regularly to maintain a good appearance and self-respect. The same consideration is not extended to women in prisons to manage their menstrual health needs.

46. Winkler and Roaf, “Taking the Bloody Linen Out of the Closet,” 14.

provisions expressly provide for the right to MHH or whether such provision must be implied through linking menstrual health and hygiene and the rights of sexual and reproductive health. This section will also seek to highlight the gaps that exist in the international and regional human rights frameworks towards fulfilling the right to MHH.

## Hard Law

It is important for the right to MHH to be expressly mentioned in international and regional human rights treaties and conventions, being sources of hard law, as human rights laws bind state parties to carry out specific actions towards realising those rights.<sup>47</sup> States which ratify these human rights instruments are compelled to facilitate the access and enjoyment of the rights contained therein and must refrain from impeding or interfering with access to those rights.<sup>48</sup> Furthermore, if an international or regional instrument expressly provides for the right to MHH, it would guarantee that states parties establish domestic legislation and policies which are “compatible with their treaty obligations and duties.”<sup>49</sup> The domestic laws will provide the “principal legal protection” of the right to MHH guaranteed under the international or regional law.<sup>50</sup>

There is no treaty or convention on the right to MHH and none of the existing hard law instruments explicitly discuss the right to MHH. However, several provisions within the existing hard law instruments can be relied upon to develop the right to MHH.

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47. “The Foundation of International Human Rights Law,” United Nations, accessed April 12, 2020, <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>.

48. UN, “International Human Rights.”

49. UN, “International Human Rights.”

50. UN, “International Human Rights”

## I. **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**<sup>51</sup>

Article 5 of the CEDAW Convention calls upon State parties to “modify the social and cultural patterns of conduct of men and women” in order to eliminate of prejudices and customs and all other practices which are based on the “idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” This provision can be interpreted in a way that obliges governments to eliminate the cultural biases and taboos surrounding menstruation which allow men to subjugate women and girls.

Article 12 of the CEDAW Convention urges States to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.” This Article, however, focuses on the provision of services in connection with pregnancy and the postnatal period and does not expressly mention menstrual health and hygiene which may be considered a prenatal health imperative.

## II. **Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol)**<sup>52</sup>

The Maputo Protocol provides, under Article 10 (3), that State parties must take appropriate action to reduce military expenditure in favour of spending on social development in general, and the promotion of women in particular. This provision indicates that African States are keen on securing the rights of women by allocating sufficient funding towards providing those rights. Additionally, Article 13 (j) calls upon States to ensure the equal application of taxation laws to women and men. This provision is applicable where menstrual hygiene products are taxed as

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51. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 UNGA Resolution 34/180, entered into force 3 September 1981) (CEDAW).

52. Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (adopted 11 July 2003, came into force 25 November 2005) (Maputo Protocol).



luxury items as opposed to the necessities that they are. States, therefore, have a positive obligation to ensure that women across the continent are not impeded from accessing their rights due to discriminatory tax laws such as the taxation of MHH products.

This paper has established that poor access to menstrual health and hygiene has harmful effects on the right to education of girls. Article 12 of the Maputo Protocol seeks to protect this right by urging States to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training. Therefore, one way in which States can ensure that girls are not impeded from accessing their right to education is by ensuring that there is adequate access to the right to MHH.

Article 14 (c) of the Maputo Protocol refers to the rights of women to sexual and reproductive health, however, the focus of the Article is on birth control and contraception, sexually transmitted infections and HIV/AIDS, and fertility. The document does not make any express reference to menstrual health management or menstrual health and hygiene. However, as has been elaborated throughout this paper, the right to MHH is interrelated with sexual and reproductive health rights. As such, this Article must be interpreted constructively so as to include access to the right to MHH.

## Soft Law

The fact that treaties and conventions do not contain express provisions on the right to menstrual health and hygiene makes it difficult for girls and women to advocate for the right.<sup>53</sup> Although soft law is not legally binding, it is still useful in expanding the recognition of various human rights. According to Michèle Olivier, the significance of sources of soft law instruments, such as resolutions of international organisations, lies in their ability to adapt to accommodate new developments in international norms unlike sources of hard law.<sup>54</sup> This is of

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53. Typically, where sources of hard law are rigid and fail to accommodate 'new' rights, sources of soft law step in to fill the gap.

54. Michèle Olivier, "The Relevance of 'Soft Law' as a Source of International Human

particular importance when it concerns the right to MHH as it was not an explicitly recognised right at the time when the key human rights treaties and conventions discussed above were promulgated. Soft law instruments further provide states, which choose to abide by their provisions, with principles to guide them in the implementation of various human rights norms and standards. In this case, the various recommendations and resolutions which expressly recognise the access to menstrual health and hygiene of women and girls set the stage for nations to take positive steps in the fulfilment of these rights.

**i. Committee on Economic Social and Cultural Rights (CESCR) General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)<sup>55</sup>**

According to paragraph 30, where States take action to improve access to safe drinking water and adequate sanitation facilities, they should also ensure that these facilities meet the women's specific hygiene needs. The use of the phrase 'specific hygiene needs' can be interpreted to apply to the hygiene needs of women during their menstruation.

**ii. General Recommendation No. 24: Article 12 of the Convention (Women and Health)<sup>56</sup> of the Committee on Elimination of Discrimination of Against Women (CEDAW)**

Under paragraph 12, states are required to report on their understanding of how health care policies and measures can address the health rights of women "from the perspective of women's needs and interests." States must also demonstrate how these policies and measures address the distinctive and differing features and factors that affect women compared to men, including biological factors such as their menstrual cycle, reproductive function, and menopause.

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Rights," *The Comparative and International Law Journal of Southern Africa* 35, no. 3, (November 2002): 290-291.

55. E/C.12/GC/23.

56. Contained in Document A/54/38/Rev.1, chap. I).

States are held accountable under paragraph 17 to take appropriate legislative, judicial, administrative, budgetary, and economic measures to ensure that women realize their rights to health care. Furthermore, according to paragraph 30, State parties “should allocate adequate budgetary, human and administrative resources to ensure that women’s health receives a share of the overall health budget comparable with that for men’s health, taking into account their different health needs.”

The existence of paragraphs 17 and 30 reflects that the CEDAW Committee is cognizant that the allocation of monetary resources to women’s health is integral to placing both women and men on equal standing when it comes to access to health. Furthermore, where national governments have in place legislative and judicial measures in line with these recommendations, it is easier for stakeholders to advocate for those rights and hold their governments accountable where there is non-compliance.

**iii. General Comment No. 2 on Article 14. 1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa of the African Commission on Human and People’s Rights**

According to the African Commission, the right to health care without discrimination requires States to remove all impediments to health care services which are reserved for women. These impediments may be rooted in ideology or traditional beliefs. The Commission goes on to state that the enjoyment of rights is “non-discriminatory and grants gender equality when women are well informed of products, procedures and health services that are specific to them and when they actually have access to the latter, including in the area of family planning, contraception and safe abortion.”<sup>57</sup>

The African Commission recognises the responsibility of States to protect, respect and fulfil the reproductive rights of women and ensure that there are no hindrances to accessing the products and services necessary

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57. Para 31

for enjoying their rights. This document thusly serves as guidance for recognising and protecting the right to MHH.

**iv. UNHRC Resolution 39/8 on the Human Rights to Safer drinking Water and Sanitation<sup>58</sup>**

States are called upon under paragraph 8 (e) to “address the widespread stigma and shame surrounding menstruation and menstrual hygiene by ensuring access to factual information thereon, addressing the negative social norms around the issue and ensuring universal access to hygienic products and gender-sensitive facilities, including disposal options for menstrual products.”

**v. East African Legislative Assembly Motion for a Resolution of the Assembly to Provide Sanitary Facilities and Protection for Girls in the East African Community Region<sup>59</sup>**

The resolution states that “various conventions and linked action plans elaborate on women’s sexual and reproductive rights but stop short of explicitly naming menstruation as one of the most stigmatized, silent and socially constructed silent curses that plague a third of the world’s population throughout the developed and developing world.” The Resolution urges States to take several measures to effect positive change including improving access to, quality of, and affordability of sanitary pads in schools by abolishing taxes imposed on sanitary napkins. Additionally, governments and actors in the private sector are urged to consider making school sanitation facilities more user friendly for menstruating girls.

This document is significant as it links MHH to provisions that exist in hard treaty law in a very explicit way. This, therefore, establishes MHH as existing in the broad range of rights provided by these hard law treaties.

As has been demonstrated above, and postulated upon by Boosey and Wilson, there is no international treaty that makes “allusions or clear references to

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58. A/HRC/RES/39/8.

59. EALA/RES/3/10/2013.

menstruation.”<sup>60</sup> The same can be said about African regional human rights instruments. Furthermore, there are no regional guiding principles, general comments or reports by the Special Rapporteur on the Rights of Women in Africa, which expressly provide African nations with a road map to ensuring the full and proper implementation of legislation on women’s health rights. That is not to say that the general comments and recommendations by the various bodies of the United Nations do not apply within the African context, as they do.

The existence of soft law instruments above demonstrates the evolving recognition of the distinct needs and rights of women and girls. The language relating to the right to health is expanding to include menstruation, indicating that states and human rights stakeholders appreciate the unavoidable nature of menstruation and its interconnectedness to the rights to health, reproduction, and sanitation. This also denotes that states are more willing to dedicate the necessary focus and funding to fulfil the right to MHH.

## National Legislation and Policy on Menstrual Health and Hygiene: Case Study

Although many international and regional legislative models have failed to address menstrual health and hygiene, several nations have worked towards addressing this issue on their own terms. Under the soft law instruments provided above, a variety of methods to address MHH have been recognised; from tackling the issue of taxation on menstrual hygiene products, to providing sanitation facilities to meet women’s menstrual needs; and enacting laws which ensure women and girls fully realise their right to health. The case studies below demonstrate the willingness of many nations to apply newly recognised international norms regarding women’s health rights and in particular the right to menstrual health and hygiene.

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60. Robyn Boosey and Emily Wilson, “The Menstrual Hygiene Management and the International Rights System: A Vicious Cycle of Silence,” 8, [https://consultations.worldbank.org/sites/default/files/consultation-template/update-world-bank-group-gender-strategy-consultations/submissions/a\\_vicious\\_cycle\\_of\\_silence\\_final\\_version\\_of\\_paper\\_o.pdf](https://consultations.worldbank.org/sites/default/files/consultation-template/update-world-bank-group-gender-strategy-consultations/submissions/a_vicious_cycle_of_silence_final_version_of_paper_o.pdf) accessed 11 November 2020

This section shall focus on Kenya as an example of one African state which has adopted a variety of national laws and policies to provide women and girls with the means to access their right to menstrual health and hygiene. Reference will also be made to the Scottish government's efforts to adopt policies to better uphold the right of women and girls to access their MHH rights.<sup>61</sup>

## Kenya

Focus has been placed on Kenya in this study as it is ranked first, in a 2012 World Bank report, amongst 141 countries in having the “highest number of legal and regulatory changes aimed at improving gender parity and reducing legal gender discrimination in recent years.”<sup>62</sup> The Kenyan Government has shown great enthusiasm and increasing commitment to menstrual health and hygiene rights over the past several years. Kenya is reported to be the first nation in the world to abolish taxation on menstrual hygiene products in 2004,<sup>63</sup> and in 2011 the Kenyan Government removed import duties on menstrual hygiene products and solutions.<sup>64</sup>

The Sanitary Towels Programme was launched in 2011 under the Ministry of Education with the aim of procuring and distributing sanitary towels to girls in disadvantaged communities.<sup>65</sup> It is estimated that KShs1.9 billion (around USD 17 million) has been invested in the programme and it is estimated to have benefited 11.2 million girls.<sup>66</sup> The programme was later

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61. These countries will serve as examples of how, despite the lack of express protections under international and regional treaties and conventions, states can and will embrace emerging human rights norms in order to protect and enhance the fundamental rights and freedoms of vulnerable members of society.

62. FSG, “Menstrual Health in Kenya,”3.

63. Gins Reiss-Wilchins, “Kenya and Menstrual Equity: What You Didn't Know,” Huffington Post, March 29, 2017, [https://www.huffpost.com/entry/kenya-menstrual-equity-wh\\_b\\_9557270](https://www.huffpost.com/entry/kenya-menstrual-equity-wh_b_9557270).

64. FSG, “Menstrual Health in Kenya,”17.

65. “Sanitary Towels Program,” Ministry of Public Service and Gender, State Department for Gender, accessed April 10 2020, <https://gender.go.ke/sanitary-towels-program/>.

66. “Sanitary Towels Program.”

transferred to the Ministry of Public Service, Youth, and Gender Affairs during the 2017/2018 financial year and the budget significantly increased by 470 million Kenyan Shillings (around 4 million US Dollars).<sup>67</sup>

Furthermore, in 2020 the Ministry of Health published its **Menstrual Hygiene Management Policy (2019-2030)** which aims to, amongst other things, “provide a critical reference to all agencies, both public and private that are, or will be, actively working towards achieving SDG 6.2 by ensuring that by 2030, Kenya pays special attention to the needs of women and girls and those in vulnerable situations through menstrual management focused interventions.”<sup>68</sup>

As well as policy and economic advancements made by the Kenyan Government, there have also been legislative reforms that have brought menstrual health and hygiene into the forefront of Kenya’s health and hygiene laws. In 2017, Section 39 (k) of the Basic Education Act No. 14 of 2013 was amended to add to the list of the Cabinet Secretary’s duties, the duty to “provide free, sufficient and quality sanitary towels to every girl child registered and enrolled in a public basic education institution who has reached puberty and provide a safe environmentally sound mechanism for disposal of the sanitary towels.”<sup>69</sup>

It is worth noting that several other African countries have also put in place progressive menstrual health and hygiene measures and policies.<sup>70</sup> One example is Uganda, where the government has implemented strong school-related menstrual health management policies.<sup>71</sup> The Ugandan Ministry of Education, Science, Technology, and Sports has committed to working towards empowering girls with life skills to manage their menstruation such as making

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67. “Sanitary Towels Program.”

68. Ministry of Health, “Menstrual Hygiene Management Policy (2019-2020)”, v

69. Section 39 (k).

70. Additionally, in Zambia, the government has put in place a variety of menstrual health management policy initiatives including the National Menstrual Health Management Guidelines and toolkit. The government has also enacted a law called ‘Mother’s Day’ under which women are given a day off per month during their menstruation. Tellier and Hyttel, “Menstrual Health Management in East and Southern Africa,” 26.

71. Tellier and Hyttel, “Menstrual Health Management in East and Southern Africa,” 26.

their own sanitary pads, empowering girls and boys to understand and appreciate menstruation, and holding parents and teachers to fulfilling their roles and responsibilities in the promotion of menstrual hygiene management.<sup>72</sup> Furthermore, the Ministry has urged the government to establish a National Menstrual Hygiene Steering Committee to be responsible for the effective coordination of menstrual health management policies and programmes.<sup>73</sup>

In certain respects, African nations are a model for the advancement of human rights norms around the world. Even though the relevant regional treaties and conventions have failed to provide African nations with any guiding principles on how to enforce the right to MHH, these countries have taken it upon themselves to advance the right under their national legal contexts. Moreover, this proves that state actors are indispensable in expanding conceptions of human rights such as MHH within national contexts.

## Scotland

Before exiting the European Union (EU), the United Kingdom advocated changing the EU rules on MHH imposing a minimum of five percent tax on menstrual hygiene products.<sup>74</sup> The efforts of the United Kingdom appeared to be paying off as early as 2016, when EU leaders “signalled support for member states to scrap the VAT on tampons.”<sup>75</sup> However, by mid-2016, the EU parliament had voted against the proposals and opted to allow EU countries to continue to impose taxes on tampons ranging from five percent to over twenty percent themselves.<sup>76</sup> The taxes on menstrual products remain in the EU, yet proposals have been presented to lower VAT rates on e-books and digital publications.<sup>77</sup>

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72 “Menstrual Hygiene Management Charter-Uganda 2015” Ministry of Education Science Technology and Sports, accessed October 22, 2020 [https://www.ircwash.org/sites/default/files/menstrual\\_hygiene\\_management\\_charter\\_finalised\\_april\\_2015\\_1\\_.pdf](https://www.ircwash.org/sites/default/files/menstrual_hygiene_management_charter_finalised_april_2015_1_.pdf)

73. Ministry of Education Science Technology and Sports, “Menstrual Hygiene Management,” 2

74. Jorene Ooi, “Bleeding Women Dry: Tampon Taxes and Menstrual Inequality,” *North Western University Law Review* 113, no. 1 (2018): p112.

75. Ooi, “Bleeding Women Dry,” 112.

76. Ooi, “Bleeding Women Dry,” 112.

77. Ooi, “Bleeding Women Dry,” 112.



The United Kingdom has continued to pursue reforms on the taxation of menstrual products,<sup>78</sup> and in 2019 the Scottish Parliament made history by introducing the Period Products (Free Provision) (Scotland) Bill. The Bill recognises that every woman, girl, or transgender person who requires period products in Scotland has the right to obtain such products for free.<sup>79</sup> The Bill creates a universal “period products scheme” which shall operate on an ‘opt-in’ basis allowing for individuals to “request and access period products, free of charge, throughout Scotland...”<sup>80</sup> The format of the scheme seeks to ensure that all persons, including those without a permanent address or homeless people, will have access to sanitary products.<sup>81</sup> Part 2 of the Bill elaborates on the provision of free period products in schools, universities, and colleges for pupils and students.

If this Bill is passed, Scotland will be the first country in the world to provide universal free pads and tampons.<sup>82</sup> This is significant in a world where women and girls struggle every month to meet their menstrual sanitation needs due to the high taxes placed on MHH products. The Scottish government is demonstrating that even though there are no express provisions in human rights instruments and no express support from continental unions, it is still possible for states to advance human rights reforms to the benefit of their citizens.

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78. Ooi, “Bleeding Women Dry,” 112.

79. Section 1.

80. Scottish Parliament, “Period Products (Free Provision) (Scotland) Bill: Policy Memorandum:” 6, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/period-products-free-provision-scotland-bill/introduced/policy-memorandum-period-products-scotland-bill.pdf>.

81. Scottish Parliament, “Policy Memorandum.”

82. Ceylan Yeginsu, “Scotland Set to be the First Country to Provide Free Pads and Tampons,” February 27, 2020, <https://www.nytimes.com/2020/02/27/world/europe/scotland-pads-tampons.html>.

## Opportunities for Strategic Litigation to establish the Right to MHH and Recommendations

Strategic litigation is a useful tool in generating social change by using “legal means to tackle injustices that have not been adequately addressed in law or politics.”<sup>83</sup> Mónica Roa & Barbara Klugman posit that national and international strategic litigation is instrumental to the sexual and reproductive rights movement as it can be utilised to raise awareness of rights and “promote the need of vulnerable populations to have access to those rights and demand government compliance with human rights obligations.”<sup>84</sup> In the context of this paper, strategic litigation can serve as an integral instrument for raising awareness of the existence of MHH as a human right and the obligation on States to protect, respect and fulfil this right just like any other health right.

In order for social change to be accomplished through strategic litigation, Roa and Klugman assert that activists must be able to,

*“identify and frame problems as rights violations. This requires a constitutional or legal framework that recognizes human rights or the possibility to use international human rights law or comparative law. When citizens understand that the law guarantees them something they need but has not been granted by the elected government, activists can design strategies to demand judges take measures to correct this deficit.”<sup>85</sup>*

It has been established earlier in this paper that international and regional legislative frameworks do not expressly recognise MHH as a right as would be required for effective strategic litigation. However, strategic litigation allows legal practitioners to utilise hard and soft law instruments to engage in and promote the right to MHH through constructive interpretation to convince

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83. “Strategic Litigation” ECCHR, accessed October 22, 2020 <https://www.ecchr.eu/en/glossary/strategic-litigation/>

84. Mónica Roa, Barbara Klugman, “Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia,” *Reproductive Health Matters* 22, no. 44 (December 2014): 31

85. Roa, Klugman, “Considering Strategic Litigation as an Advocacy Tool”, 31

judges and the public of the existence of such rights. Strategic litigation within the sub-Saharan region can be monumental in bringing about legal recognition and uniform protection of MHH as a human right. Moreover, through strategic litigation, legal practitioners can highlight the gaps in the law so as to initiate the process of implementing laws which recognise and protect the right to MHH. As discussed in the foregoing, Articles 12, 13 and 14 of the Maputo Protocol, if read constructively, can be employed by legal practitioners to litigate on the right to MHH.<sup>86</sup>

## Conclusion

This paper has demonstrated the significance of the right to menstrual health and hygiene which includes access to clean and safe sanitation facilities, and affordable and accessible menstrual hygiene products. The right to MHH is interrelated with the right to education, work, and the highest attainable standards of health and living. Without access to menstrual health and hygiene rights, many women and girls in Africa will continue to be marginalised in their communities, with many of them unable to complete their education due to the avoidable and manageable complications surrounding menstruation. Without proper education, these women are unable to work and contribute to their own development and that of their respective nations.

It has further been demonstrated that there has been a slow but promising development amongst international and regional human rights bodies to adopt legal instruments, policies and interpretations which, although unable to bind member states, can guide African nations on how to properly enforce the right to MHH. Moreover, despite the slow progress within the international and regional

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86. Although the several states in sub-Saharan Africa have taken positive steps towards recognising and legislating on the right to menstrual health and hygiene, there has not been a uniform effort within the region. Human rights experts in sub-Saharan Africa are yet to engage in strategic litigation towards establishing the right to MHH as there are currently no cases which seek to explore the issue of MHH within the context of human rights. For example in Kenya the only mention to menstruation in case law is in the context of sexual assault when analysis physical evidence such as bleeding, or establishing the age of a minor.

community in legislating on the right to MHH, it has been established through the case studies above that individual states can make positive legislative and policy reforms to advance the right to MHH in their national contexts. This is of particular salience to women and girl's rights activists at the forefront of agitating for an expansive articulation of the right to MHH. By providing a wide array of perspectives, viewpoints and approaches aimed at realising the right to MHH, both soft and hard law provides manifold avenues for advocacy and more pointed forms of strategic litigation on this issue.

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Yeginsu Ceylan. "Scotland Set to be the First Country to Provide Free Pads and Tampons," February 27, 2020, <https://www.nytimes.com/2020/02/27/world/europe/scotland-pads-tampons.html>.

## Chapter 8

# A Quest for Justice: Pursuing the Right to Maternal Health Services in Uganda

Susan Murungi

### Executive Summary

In Uganda, the right to adequate maternal health services has on several occasions come under scrutiny. **Although constitutional** and policy provisions highlight the importance of reproductive health rights, maternal mortality and morbidity remain a challenge faced by women and girls across the country mainly because of inadequate maternal health services.

This paper argues that the right to maternal health services is a contentious subject in Uganda that is constrained by physical, legal and governance aspects that limit the attainment of the highest standard of health stipulated in international and regional instruments as well as the Constitution of the Republic of Uganda (1995). It further argues that strategic litigation plays a crucial role in unearthing and addressing an array of human rights issues and barriers to attaining Maternal Health Rights.

The article makes reference to the case of *CEHURD & Others v Attorney General* on the right to maternal health and maternal health care services in Uganda to examine and portray to what extent reproductive health rights of women and girls have been achieved in fulfilment of the provisions of article 14(2)(a) & (b) of the Maputo Protocol that obligates Uganda to take appropriate measures to provide adequate, affordable and accessible health services, and to establish and strengthen existing maternal health care services for women.

## Introduction

Reproductive health rights are not only an integral aspect of the life cycle of women but also a critical aspect of women's rights. With the recognition of women's rights as human rights<sup>1</sup>, aspects of gender equality, non-discrimination of women and girls in all fields, women's human rights are now understood as inalienable and an indivisible part of universal human rights.<sup>2</sup> Uganda is a signatory to human rights instruments that recognize, protect and provide for the highest attainable standards of the right to health which includes maternal health rights.

When analyzing the multiple facets of reproductive rights of women, it is crucial to understand to what extent women's maternal health rights are recognized at international, regional and national level.

According to the World Health Organization (WHO), maternal health is defined as the wellbeing and health of women during pregnancy, childbirth and the postpartum period, and up to a year after the end of the pregnancy.<sup>3</sup> Primary indicators of maternal health include assessment of factors like maternal mortality and maternal morbidity.<sup>4</sup> Maternal mortality refers to deaths that occur during pregnancy or within 6 weeks after the pregnancy ends that are related to pregnancy or its management.<sup>5</sup> Thus, a maternal mortality ratio represents the number of maternal deaths per 100,000 live births. Maternal morbidity describes unexpected short or long term health complications; mental or physical related to pregnancy, labour or delivery that negatively impact the lives of mothers.<sup>6</sup>

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1. Ben Kiromba Twinomugisha, MATERNAL HEALTH RIGHTS, POLITICS AND THE LAW, Professorial Inaugural Lecture, MUK, 28 April 2017 at 2

2. Vienna Declaration and Programme of Action, para. 18.

3. WHO, 'Maternal Health', available at [http://www.who.int/topics/maternal\\_health/en/](http://www.who.int/topics/maternal_health/en/) (accessed February 10 2020)

4. Rice, Margaret, "Maternal Health & Rights In Uganda" (2019). Public Health Theses. 1839. <https://elischolar.libraryyale.edu/ysphtdl/1839> (accessed February 10 2020)

5. *ibid*

6. *ibid*



To unpack and examine the right to maternal health care services in Uganda, this article takes into consideration provisions of international and regional law; to wit Article 2(2) of the International Convention on Economic, Social and Cultural Rights (ICESCR), Article 18(3) of the African Charter on Human and Peoples' Rights, Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and Article 12 of the Convention on Elimination of all forms of Discrimination Against Women (CEDAW). All these provisions cast an obligation on Uganda as a state party to respect, protect, promote and fulfil the right to health without any form of discrimination on the basis of sex. Since Uganda has signed and ratified these treaties, Article 287 of the Constitution legitimizes and recognises their applicability in Uganda.<sup>7</sup>

At the national level, Article 8A<sup>8</sup> and 45<sup>9</sup> of the Constitution read along with objectives XIV and XX<sup>10</sup> of the National Objectives and Directive Principles of state policy cast an obligation on the state to ensure that all development

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7. Article 287, states that, Where—

(a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or (b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it.

8. Article 8A states that, “1. Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy. 2. Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this article.

9. The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

10. Objective XIV states that, “The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and b. all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.”

Objective XX states that, “The State shall take all practical measures to ensure the provision of basic medical services to the population.”

efforts are directed at ensuring maximum social and cultural well-being. These provisions oblige the government to provide health and basic medical services to the people of Uganda. These services extend to adequate maternal health services for women and girls in Uganda.

## Maternal Health Rights as Human Rights

Essential to the realization of women's human rights are reproductive health rights. The rights encompass a broader spectrum of civil, political, economic and social rights that include the rights to equality and non-discrimination, the right to health, the right to be free from all forms of torture or ill treatment, right to life, privacy, information and enjoyment of women's rights as a whole.<sup>11</sup> All these rights are embodied in an array of human rights treaties and regional instruments such as the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention Against Torture (CAT). At regional level, there exists the African Charter on Human and Peoples' Rights and most importantly for African women the Protocol to the African Charter on Human and Peoples' rights on the Rights of Women (Maputo Protocol). Cross cutting provisions in these instruments intersect with access to comprehensive reproductive health information and services and the guarantee that individuals enjoy and experience positive health outcomes such as the lowering of rates of maternal mortality and morbidity.

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11. Breaking ground 2020; Treaty Monitoring bodies on reproductive rights, Centre for Reproductive Rights at 3 <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2020.pdf> accessed 10 November 2020

## Maternal Health Rights and the Right to life

Maternal health rights embody several human rights guarantees that extend to the right to life, health, equality, non-discrimination to aid safe motherhood.<sup>12</sup> Alongside the right to health, the right to life is directly violated upon death resulting from lack of adequate maternal health services. International law provisions cast an obligation on states to protect the right to life guaranteed under Article 6 of the ICCPR<sup>13</sup>, and further cast an obligation on states to refrain from actions that violate the right to life and also imposes a positive obligation to take all necessary measures to sustain and increase the life expectancy of individuals.<sup>14</sup>

Treaty monitoring bodies have attributed high rates of maternal mortality in Africa to lack of access to emergency obstetric care<sup>15</sup> and identified barriers to access to reproductive health care such as costly treatment and medical expenses during pregnancy<sup>16</sup>, and poor access to antenatal services, and lack of skilled health personnel as contributing factors to increased maternal death rates.

Although women in Uganda face similar barriers during the antenatal and postnatal period, the biggest maternal health challenges they face include non-provision of basic indispensable maternal health facilities, inadequate number of midwives and doctors to provide maternal health services, inadequate budget allocation to the maternal health sector, frequent stock outs of essential drugs, lack of emergency obstetric services at health facilities, non-supervision of public health facilities and the poor and unethical behaviour of health workers towards expectant mothers.

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12. *ibid*

13. Article 6, provides that; “Every human being has the inherent right to life.” This right shall be protected by the law and no one shall be arbitrarily deprived of his life.

14. Human Rights Committee, General Comment 6: art 6 (16th session, 1982) para 5, UN Doc HRI/GEN/1/Rev5

15. See Concluding Observations of the Human Rights Committee on Mali, para 14, UN Doc CCPR/CO/77/MLI (2003); Concluding Observations of the CEDAW Committee on Burundi, para 36, UN Doc CEDAW/C/BDI/CO/4 (2008).

16. See Concluding Observations of the CRC Committee on Central African Republic, para 54 UN DocCRC/C/15/Add.138 (2000).

The discourse on the right to life in maternal health rights has also been continued by General Comment No. 22 of the ESCR on the right to sexual and reproductive health (2016) under paragraph 16 to the effect that lack of emergency obstetric care, which often leads to maternal mortality and morbidity, constitutes a violation of the right to life.

At the regional level, the right to life is also guaranteed under Article 4 of the African Charter on Human and Peoples' Rights (Banjul Charter) and under Article 4(1) of the Maputo Protocol to the effect that '[e]very woman shall be entitled to respect for her life integrity and security of person'.<sup>17</sup> The Maputo Protocol further has specific provisions under Article 14 that obligate states to provide adequate, affordable and accessible health services, and strengthening of maternal health services for women.

In Uganda, the right to life as provided for under Article 22(1)<sup>18</sup> of the Constitution is held in high regard and courts have determined and proclaimed the right as one of the most fundamental rights.<sup>19</sup> Thus, any deaths occurring as a result of preventable maternal mortality indicate a violation of the right to life and the right to maternal health services.

Article 14 of the Maputo Protocol imposes four general obligations on state parties, like several provisions on human rights, to respect, protect, promote and fulfil human rights guarantees.<sup>20</sup> The obligation to respect requires Uganda as a state party to refrain from hindering, directly or indirectly, with women's rights and to ensure that women are duly informed of their reproductive health rights. The obligation to protect is cast wide to prevent private actors from interfering

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17. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) 32 (11 July 2003).

18. Article 22(1) "*No person shall be deprived of the right to life intentionally except in execution of a sentence passed in a trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.*" 1995 Constitution of Uganda as amended

19. Attorney General V Susan Kigula & 417 others, Constitutional Appeal no. 3 of 2006

20. Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

with the enjoyment of the guaranteed human rights while the obligation to fulfil takes into consideration legislative, judicial and administrative and appropriate measures that translate into realisation of human rights.<sup>21</sup>

Despite recognition of the rights and policy affirmations of the importance of women's rights as human rights, Uganda has been faulted for non-fulfilment of its obligations towards advancing sexual reproductive health and rights and specific to this context, the right to maternal health services.

In 2010, the CEDAW committee called upon Uganda to take all necessary measures to improve, raise awareness and increase women's access to health care and health-related services and medical assistance by trained personnel, especially in rural areas.<sup>22</sup> The committee further urged Uganda to strengthen its efforts to reduce the incidence of maternal and infant mortality.

To address women's right to maternal health services, individuals, and human rights organisations advancing sexual reproductive health rights have taken advantage of national legal accountability mechanisms to hold the government of Uganda accountable for violations of the right to sexual reproductive health rights, and the right to maternal health services.<sup>23</sup> National legal accountability refers to legal rules and mechanisms employed under which a claim can be made to find one liable in a civil lawsuit or culpable in a criminal matter.

In Uganda, national legal accountability has been exercised through strategic litigation on reproductive health rights and the right to maternal health services to raise awareness on the rights, promote the need of vulnerable populations to

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21. Onyema Afulukwe-Eruchalu, *Accountability for non-fulfilment of Human rights; a key strategy for reducing Maternal Mortality and Disability in sub-saharan africa*, University of Pretoria, South Africa, 2014 at 121

22. Paragraph 36, UN Committee (CEDAW) Concluding Observations on Uganda, UN Doc CEDAW/C/UGA/CO/7(2010).

23. DK Agaba 'Implementing legal accountability to reduce maternal mortality and morbidity in Uganda'(2018) 18 *African Human Rights Law Journal* 123-145 <http://dx.doi.org/10.17159/1996-2096/2018/v18n1a6> accessed 10 November 2020

have access to those rights and demand government's compliance with human rights obligations.<sup>24</sup>

Strategic litigation is defined as litigation of a public interest case whose outcome has a broad impact on society beyond the specific interests of the parties involved.<sup>25</sup> A number of cases on reproductive health rights and the right to maternal health services have been heard in the High Court of Uganda as well as the Constitutional Court and Supreme Court.

Under Article 50(1) of the Constitution, individuals whose fundamental rights or freedoms have been infringed or threatened can apply to a competent court for redress which may include compensation. Article 50(2) further gives individuals or an organisation the right to bring action against the violation of another person's or group's human rights.

When determination of questions regarding interpretation of the Constitution arise or where the meaning of Articles of the Constitution are in dispute, individuals or organisations can petition the Constitutional Court under Article 137 for interpretation. Article 137(3)(b) specifically provides that: "*A person who alleges that – any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a decision to that effect, and for redress where appropriate.*"

Thus, it's on the basis of these Constitutional provisions that advocates for reproductive rights in general and the right to maternal health in particular have had audience in court through strategic litigation. Organisations advocating for Reproductive Health Rights like the Centre for Human Rights and Development (CEHURD) have been at the forefront of filing and litigating cases in both the High Court and the Constitutional Court as well as executing orders granted in judgments obtained.

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24. Mónica Roa & Barbara Klugman (2014) Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia, *Reproductive Health Matters*, 22:44, 31-41, at page 31 [https://doi.org/10.1016/S0968-8080\(14\)44804-3](https://doi.org/10.1016/S0968-8080(14)44804-3) accessed 10 November 2020

25. Rekosh E, et al, editors. *Pursuing the Public Interest, A Handbook for Legal Professionals and Activists*. p. 81–82. [http://www.pilnet.org/component/docman/doc\\_download/35-pursuing-the-public-interest-a-handbook-for-legal.html](http://www.pilnet.org/component/docman/doc_download/35-pursuing-the-public-interest-a-handbook-for-legal.html) accessed 10 November 2020

These cases highlight the prevailing status of reproductive health rights in Uganda and more particularly the right to maternal health services, the right to life and women's rights in general. For instance, in the cases of ***The Center for Health, Human Rights and Development (CEHURD) & 4 Ors v. Nakaseke District Local Administration***<sup>26</sup> and ***Hon. Bernard Mulengani v. The Attorney General and 2 Others***, the court heard evidence and was satisfied that hospital staff were negligent and had caused the death of mother and child in the first case and mother in the second case.

Subsequently, in the case of ***The Centre for Health, Human Rights and Development (CEHURD), Mubangizi Micheal and Musimenta Jennifer v The Executive Director, Mulago National Referral Hospital & Attorney General***, where a mother gave birth to twin babies and was later informed that one of the twins had died, the court noted that this case highlights a bigger issue in maternal health.<sup>27</sup> During the trial, it was discovered that the mother (2<sup>nd</sup> defendant) was only able to make one antenatal visit due to cost concerns and had not been informed that she was expecting twins. The case also reflected a violation of Article 2(a), (b) of the Maputo Protocol which requires state parties to take appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programs to women especially those in rural areas as well as establish and strengthen existing pre-natal and postnatal health and nutritional services for women during pregnancy and breast-feeding.

In 2011, through strategic litigation, The Centre for Human Rights and Development (CEHURD), a human rights organisation focused on advancing reproductive health rights in Uganda, filed a Constitutional Petition ***CEHURD & others V AG***<sup>28</sup> after two women, Sylvia Nabalowa and Jennifer Anguko died while giving birth at two different public hospitals. The petition challenged actions and omissions of the Government of Uganda in failing to provide minimum maternal health services including the non-provision of basic and indispensable maternal health facilities; inadequate number of midwives and doctors to provide maternal health services; the inadequate budget allocation to the

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26. Civil Suit No. 111 of 2012

27. Civil Suit No. 212 OF 2013

28. Constitutional Petition No.16 of 2011

maternal health sector and the poor and unethical behaviour of health workers towards expectant mothers that led to the death of women during childbirth. The petitioners alleged that all these actions and omissions were inconsistent with Objective 1(i), XIV (b), XV and Articles 33(2) & (3), 20(1) & (2), 22(1) & (2), 24, 34(1), 44(a), 287,8A and 45 of the Constitution.

However, when the petition was first heard in 2012, the respondent raised a preliminary objection on the basis of “the political question doctrine” and secondly that the petition did not disclose competent questions requiring interpretation of the Constitution. The Constitutional Court upheld this objection and dismissed the petition on those two grounds.

On appeal in 2013, the Supreme Court overturned the decision of the Constitutional Court and directed that the Petition be heard on its merits.<sup>29</sup> More importantly, the Supreme Court held that “the *political question doctrine* has limited application in Uganda’s current constitutional order and only extends to shield both the executive arm of government as well as parliament from judicial scrutiny where either institution is properly exercising its mandate duly vested in it by the Constitution.

The Supreme Court further retaliated and emphasised the duty of the Constitutional Court, and the Judiciary in general, under Article 137 of the Constitution to adjudicate the petitioners’ claims regarding the constitutionality of the acts of the executive and its agents as the political question doctrine did not bar such review. The Constitutional Court had mandatory jurisdiction under Article 137 to hear the petition on its merits before deciding whether it raised a political question.

In his concurring judgment, Bart M Katureebe, CJ (as he then was) emphasised that separation of powers is not absolute and that the petition raised constitutional interpretation issues regarding the right to health and medical services (Objectives XIV and XX), life (Article 22), and, more broadly, fundamental rights and other human rights and freedoms in Chapter 4. Thus, the Constitutional Court would need to consider where the right to health falls in the Constitution and whether the government had taken “all practical measures to ensure basic medical services” as required under Objective XX.

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29. Constitutional Appeal No. 1 of 2013



With the directive to hear the petition on its merits, the Constitutional Court heard and delivered a unanimous judgment on 19 August 2020. In its judgment, the Court agreed with the submissions of the Petitioner and recognised the right to basic maternal health care services and emergency obstetric care.

The court made declarations that the government's omission to adequately provide basic maternal health care services as well as emergency obstetric care in public health facilities violated constitutional provisions on the right to health, the right to life, and the rights of women. In respect to the government's omission to adequately provide emergency obstetric care, leading to obstetric injury, the court found that this was a violation of women's freedom from inhuman and degrading treatment, in contravention of constitutional provisions regarding this freedom.

The Constitutional Court also ordered the government to prioritise and provide sufficient funds geared towards maternal health care in the next financial year. Additionally, the Court ordered the government through the minister responsible for health to ensure that all staff who provide maternal health care services in Uganda are fully trained and all health centres equipped within the next two financial years. The minister responsible for health was also directed to compile and submit to parliament an audit report on the status of maternal health in Uganda for the next two financial years, an order aimed at maintaining a consistent and deliberate effort to improve the status of maternal health care in the country. The third and fourth petitioners in the case were each awarded 70 million Uganda shillings worth of general damages each (around 19,000 US Dollars) and 85 million Uganda shilling each for exemplary damages (around 23,000 US Dollars). Last but not least, the Attorney General was directed to submit a report at the end of the 2020/2021 financial year showing progress of the implementation of the orders issued by the Court.

The orders by the court directing the government to prioritise and provide sufficient funds geared towards maternal health reiterates the recommendations in paragraph 62 of General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Maputo Protocol which obligates Uganda as a state party to allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care for reproductive

health services.<sup>30</sup> This includes making specific budget allocations under the health budget at national and local levels, as well as tracking expenditures on these budget lines. This allocation will improve the quality of reproductive health care services and most importantly promote the right to maternal health services.

In the most recent Government of Uganda budget for Fiscal Year 2020/2021, 2.8 trillion Uganda shillings (around 760 million US Dollars) was allocated to the health sector, up from 2.6 trillion Uganda shillings (around 705 million US Dollars) in the 2019/2020 Fiscal Year. It is not clear what percentage of this budget line is allocated to reproductive health infrastructure to improve the quality of health care services and more **specifically** to address the issue of maternal mortality and morbidity.

Litigation of this landmark case and accompanying advocacy by CEHURD highlighted the plight of preventable maternal deaths suffered by many Ugandan women and girls. It also raised questions regarding the government's obligations to protect, respect, promote and fulfil the right to sexual reproductive health and the right to maternal health services.

In essence, this petition also emphasised the role of the judiciary in strategic litigation cases and subsequently restored confidence to potential and current economic, social and cultural rights litigants who had been discouraged by the precedent set by the Constitutional Court in 2011.

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30. Paragraph 62 provides that, "Pursuant to Article 26.2 of the Protocol, paragraph 26 of the Abuja Declaration and paragraph 7 of the Maputo Plan of Action, State parties should allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care in family planning / contraception and safe abortion. This includes making specific budget allocations under the health budget at national and local levels, as well as tracking expenditures on these budget lines. Information on health expenditures should be available to facilitate monitoring, control and accountability."

## Recommendations

To advance and prioritize women's right to maternal health services through strategic litigation, continued extensive research, documentation and dissemination of information on trends in the maternal health sector will strengthen litigation, advocacy and shed more light on the right to maternal to health services.

Strengthening and increasing advocacy for a better understanding of women's right to maternal health services in order to build a critical mass whose tipping point prioritizes the right is crucial when employing strategic litigation as a tool to advance sexual reproductive rights of women in Uganda

Monitoring and evaluation of actions of government on maternal health services & holding government accountable by using binding legal instruments, Courts of law through strategic litigation, engaging the African Commission on Human and Peoples' Right to interpret the Banjul Charter and the Maputo Protocol, following up and participating in the production of shadow reports to periodic reports for instance submitting reports under instruments like CEDAW would also aid in advancing the right to maternal health services and reproductive health rights of women and girls in Uganda.

## Conclusion

As Uganda celebrates the landmark decision in **CEHRD & Ors V AG** that recognised basic maternal health care services and emergency obstetric care, the pursuit for women's right to maternal health services remains paramount as the path to implement the declarations and orders of the court is only just beginning. To advance the sexual and reproductive rights of women, strategic litigation, advocacy, documentation and monitoring of trends in the maternal health rights sector needs to continuously be explored and applied by both individuals and organisations to give women and girls an opportunity to enjoy this right guaranteed under international and regional instruments as well as National Legislation.

This allocation will improve the quality of reproductive health care services and most importantly promote the right to maternal health services.

Although litigation is sometimes a lengthy process, it is an integral tool and strategy to hold the government accountable for violations of women's rights taking into consideration women's unique status and natural maternal functions which can be fulfilled with provision of adequate maternal health services.

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*The Constitution of the Republic of Uganda as amended 1995*

*The Penal Code Act Cap 120 as amended.*

## Conventions

*Convention on the Elimination of All Forms of Discrimination against Women adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981*

*International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976*

*International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976*

## Regional Documents

*African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) adopted 11 July 2003*

*Organization of African Union (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter') adopted June 27, 1981 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 198*

*UN Committee Concluding observations*

*UN Committee (CEDAW) Concluding Observations on Uganda, para 36, UN Doc CEDAW/C/UGA/CO/7(2010).*

## Chapter 9

# Strategic Litigation: A Tool for Promoting and Protecting the Rights of Women and Girls in The Gambia

Janet Ramatoulie Sallah Njie

### Executive Summary

Strategic litigation has been defined as the litigation of a public interest case, with the power to affect the lives of an interest group, (usually marginalised or disadvantaged groups), beyond the specific interest of the parties involved. The advancement of this form of litigation for the promotion of the rights of women and girls in The Gambia is limited by barriers such as the country's tripartite legal system, sociocultural norms and an unwillingness to embrace judicial activism to influence change.

This article highlights the existing legal framework, with particular focus on the non-discrimination clause in the Constitution of the Republic of The Gambia (1997), and other laws applicable to the protection of the rights of women and girls in the Gambia; with emphasis on the Women's Act (2010) and the Children's Act (2005). These two laws seek to domesticate key international and regional legal instruments on the rights of women and girls, namely, CEDAW, Maputo Protocol, ICRC, and the ACRWC. The paper also highlights strides made by a Civil Society Organisation (CSO), the Female Lawyers Association Gambia (FLAG), to litigate women's rights before the courts of The Gambia using the provisions of the Women's Act, on equitable distribution of matrimonial property upon separation or dissolution of marriage. The lapses in the legal and judicial system that impede the employment of strategic litigation for the enforcement of the rights of women and girls, as evidenced in the decisions of the Supreme Court of The Gambia, are also illustrated.

The concluding part of the article underscores the actions required for the proper and effective implementation of strategic litigation for the promotion and protection of the rights of women and girls in The Gambia. These include law reform, proactivity on the part of CSOs, and willingness on the part of the judiciary to embrace judicial activism as a means of influencing change and the development of ground-breaking jurisprudence and precedence for the enforcement of the rights of women and girls.

## Introduction

Gambian women constitute 1,218,124 million out of the country's estimated 2.4 million population,<sup>1</sup> yet they are one of the most vulnerable and marginalised groups in the country. In this respect, strategic litigation may serve as a mechanism to alleviate the challenges faced by marginalised women and to hold governments accountable in fulfilling their international treaty obligations.

Women's Link Worldwide has identified four conditions necessary to effect "successful and sustainable change using strategic litigation".<sup>2</sup> The four conditions are: an existing rights framework; an independent and knowledgeable judiciary; civil society organizations with the capacity to frame social problems as rights violations and to litigate; and a network able to support and leverage the opportunities presented by litigation.<sup>3</sup> This paper therefore examines the existing legal framework in The Gambia to determine its adequacy or otherwise for effective strategic litigation. The attitude of the judiciary in the enforcement of relevant provisions of the law as highlighted in judicial decisions for the

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1. World Population Prospects 2019, File POP/1-1: Total Population (both sexes combined) by Region, Subregion and Country, Annually for 1950-2100, United Nations Population Division, available at <[https://population.un.org/wpp/Download/Files/1\\_Indicators%20\(Standard\)/EXCEL\\_FILES/1\\_Population/WPP2019\\_POP\\_F01\\_TOTAL\\_POPULATION\\_BOTH\\_SEXES.xlsx](https://population.un.org/wpp/Download/Files/1_Indicators%20(Standard)/EXCEL_FILES/1_Population/WPP2019_POP_F01_TOTAL_POPULATION_BOTH_SEXES.xlsx)> last accessed 14<sup>th</sup> April 2020 at 16:25

2. Mónica Roa & Barbara Klugman (2014) Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia, *Reproductive Health Matters*, 22:44, 31-41, DOI: 10.1016/S0968-8080(14)44804-3

3. As above

enforcement and interpretation of innovative provisions in the existing legal framework is also examined. The review of the judicial decisions also highlights efforts made by Civil Society Organisations (CSO) like the Female Lawyers Association-Gambia (FLAG), to litigate cases before the courts in their advocacy for the promotion of the rights of women and children.

## Existing Domestic Legal Framework

The principal legal framework for the protection of the rights of women and girls in The Gambia is the 1997 Constitution. The Gambia is also a signatory to, and has ratified, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol), the Convention of the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the Solemn Declaration on Gender Equality in Africa (SDGEA). The domestication of these treaties marked important turning points in the fight for gender equality, and the promotion and protection of the rights of women and girls in The Gambia. These international legal instruments have been domesticated into laws such as the Children's Act of 2005, the Women's Act of 2010, the Sexual Offences Act of 2013 and the Domestic Violence Act of 2013. The Government of The Gambia has also adopted the National Gender Policy 2010 - 2020 "to direct all levels of planning, resource allocation and implementation of development projects with a gender perspective."<sup>4</sup>

The domestic laws and policies provide protection for women against all forms of abuse, exploitation, discrimination, and particularly place emphasis on the protection of their best interests where rights are violated. Despite the constitutional limitations, these laws have played a crucial role in the promotion and protection of the rights of women and girls.

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4. The Gambia National Gender Policy 2010 – 2020, Ministry of Women's Affairs, available at <<https://www.ilo.org/dyn/travail/docs/1958/Gambia%20national%20gender%20policy.pdf>> last accessed 14<sup>th</sup> April 2020 at 23:00



## The Constitution 1997

The 1997 Constitution provides the main legal framework for the protection of the rights of women in The Gambia.<sup>5</sup> Section 33 particularly deals with protection from discrimination, and expressly provides in subsection (1) that “[a]ll persons shall be equal before the law”. Subsection (2) provides that “subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect”. However, subsections (5)(c) and (d) provide that:

“subsection (2) shall not apply to any law in so far as that law makes provision

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; and

(d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter in the case of persons who, under that law, are subject to that law.”

This in essence means that the National Assembly can enact laws that are discriminatory against women, once such laws are deemed to be in consonance with personal law. Furthermore, Section 7 of the Constitution recognises Sharia (as regards matters of marriage, divorce and inheritance) and customary law, (as concerns members of the communities to which it applies), as part of the laws of The Gambia. This conflict of laws under the tripartite legal system poses a challenge for the promotion of women’s rights in The Gambia, as highlighted by case law. This in effect impedes the effective implementation of strategic litigation before the national courts for enforcement of the progressive provisions in the Women’s Act.

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5. Chapter IV provides for the Bill of Rights including the Rights of Women. (Sections 27 and 28- Right to marry and Rights of women)

## Children's Act 2005

The Children's Act provides a comprehensive legal framework for the protection of the rights of children, including the girl-child, and lays emphasis and primacy at all times on the best interest of the child. In addition to rights of the child, the act deals with other pertinent issues such as protection of children from sexual exploitation, procurement and other illegal dealing, trafficking and slave dealing, protection from exploitative labour, establishment of the Children's Court, custody matters, and child justice administration. The Act was amended in 2016 to provide for the criminalisation of child marriage in The Gambia, with offenders now facing up to 20 years imprisonment.

## Women's Act 2010

The Women's Act was enacted to incorporate and enforce the provisions of CEDAW and the Maputo Protocol.<sup>6</sup> The Act provides, *inter alia*, for protection from discrimination, women's human rights protection, temporary special measures in favour of women, rights of women during separation, divorce and annulment of marriage, widows' rights, right to inheritance, and special protection of women with disabilities. These novel provisions provide crucial protection for Gambian women, especially those living in rural or disadvantaged communities. The Women's Act was amended in 2015 to criminalise female genital mutilation (FGM) in The Gambia, which has a prevalence rate of 74.9% among women and girls aged 15-49.<sup>7</sup> This amendment is also applicable to children as FGM is usually practiced on prepubescent girls in The Gambia.

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6. Long Title of the Women's Act 2005

7. The Gambia: The Law and FGM, [https://www.28toomany.org/static/media/uploads/Law%20Reports/gambia\\_law\\_report\\_v1\\_\(september\\_2018\).pdf](https://www.28toomany.org/static/media/uploads/Law%20Reports/gambia_law_report_v1_(september_2018).pdf) last accessed 11<sup>th</sup> November 2020

## Strategic Litigation in Promoting and Protecting the Rights of Women and Girls

This section examines attempts made by CSOs such as FLAG to advocate and litigate matters before the courts, with a view to promoting judicial activism and decisions that would have a wider impact on the society for the promotion of the rights of women and girls.

Against the backdrop of constitutional and legislative innovations cited in previous sections, FLAG has litigated cases before the national courts and also assisted individuals to enforce the provisions of the Women's Act, particularly Section 43(3). This provision mirrors Article 7(d) of the Maputo Protocol, which deals with the right of a woman to an equitable share of joint matrimonial property derived from the marriage, in the case of divorce, separation and annulment of marriage. This is illustrated in the decisions of the High Court, the Court of Appeal and the Supreme Court, in cases filed by two women to enforce their rights under the Women's Act.

### ***Karla Keita v Mustapha Dampha***<sup>8</sup>

Karla Keita was married to Mustapha Dampha in 1967, with whom she had eight children. Karla's uncle sold them a piece of land, and she paid half the purchase price. However, in line with the culture of patriarchy, the title to the land was in the name of the husband. The husband later became visually impaired and Karla had to take care of the family through her gardening and petty trading business. She developed the land and built the house which was the matrimonial home. About 38 years after their marriage, the husband married a younger wife and sought to evict Karla from the matrimonial home.

Through the assistance of and collaboration with FLAG, Karla filed a matter before the High Court seeking for the enforcement and declaration of her right to equitable share of the joint matrimonial property in accordance with Section 43(4) of the Women's Act. The High Court held that the property was a

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8. (Unreported) - Civil Suit no. HC/024/12/MF/008/f1

joint matrimonial property and that the Women's Act has put the matter of the wife's claim to ownership of joint matrimonial property beyond controversy. The Court further held that a wife who contributes towards the matrimonial home can claim an equitable share even though the legal title is in the name of the husband. In arriving at this decision, the court made reference to principles of equity relating to constructive trust and the express provisions of section 43(4). The judgement was a trailblazer and laid the foundation to the emancipation of women from the cruelty and violence they always experienced during the process of divorce. The judgment was not appealed against and therefore Karla benefited from her fifty percent share of the property.

Prior to the enactment of the Women's Act, Karla would have been violently evicted from her matrimonial home, as was the experience of most women in The Gambia, who suffer grave violence during divorce, irrespective of any contributions made in the acquisition and development of matrimonial property.

### ***Dawda Jawara v Matty Faye***<sup>9</sup>

The case of *Dawda Jawara v Matty Faye* is the landmark case on the enforcement, interpretation and application of section 43(4) of the Women's Act 2010. Matty Faye was married to Dawda Jawara for 26 years. During the marriage the couple occupied the matrimonial property which was acquired by the husband prior to the marriage. At the time they moved into the property, it was an incomplete building and the wife expended considerable resources in completing and substantially improving it. The husband at some point lost his job, became ill and had no means of earning an income. The wife was solely responsible for the upkeep of the family including the maintenance of the children. The husband filed for divorce before the Sharia Court and sought to evict the wife from the matrimonial home. The Sharia Court ordered that the woman should leave the home after observing the traditional Idda Period.<sup>10</sup>

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9. (Unreported) SC CA 023/2016)

10. Idda is the waiting period of three month that a woman must observe before a divorce is final.

Matty Faye then filed a suit at the High Court on 4<sup>th</sup> October 2011 for the enforcement of her right to an equitable share of the matrimonial property and was represented by FLAG.<sup>11</sup> The High Court stated in its judgment dated 21<sup>st</sup> January 2013 that Matty Faye had “an equitable share in the Respondent’s property to the value of D152,773.00 (\$2,949.70)<sup>12</sup> being half the value of the extensions and renovations carried out on the property by the Applicant.”<sup>13</sup> The Court arrived at this decision based on receipts provided by her as evidence of her contribution, and an unsubstantiated allegation by the husband that he provided the funds to the wife. The wife was dissatisfied with this decision as her interest was her right to the equitable share of the matrimonial property and not a refund of monies expended.

On appeal, the Court of Appeal quashed the decision of the lower court in a judgment delivered in 2016 and held that she was entitled to a 50% ownership of the matrimonial property (an equal share to her ex-husband). The Court also ordered that both parties were to live in the same property with their children “for the duration of their lifetime and that of their children.”<sup>14</sup> In arriving at this decision, the Court of Appeal took due consideration of both monetary and non-monetary contributions made by Matty Fye in the matrimonial home and maintenance of the family. Even though the property was acquired before the marriage, the Court recognized that the property in its present state was matrimonial property derived from the marriage.

However, the Supreme Court of The Gambia reversed the decision, holding that section 43 (4) of the Women’s Act could not be applied to this case solely because the matrimonial property was acquired prior to the marriage of the Appellant and the Respondent and therefore, not ‘jointly owned’.<sup>15</sup> That for this reason, the principle in *Mensah v Mensah*<sup>16</sup> relied on by the Respondent in her

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11. The Female Lawyers Association of The Gambia was founded by Mrs. Janet R. Sal-lah-Njie in 2007 and she served as the organisation’s first President until October 2011.

12. This calculation is based on the current conversion rate of \$1 = D51.79

13. (n 9) above page 2, paragraph 2

14. (n 9) above page 9, paragraph 13

15. (n 9) above page 10, paragraph 15

16. Gladys Mensah v Stephen Mensah Civil Appeal No. J4/20/2011 Dated 22<sup>nd</sup> February 2012

submission could not be applied to the instant appeal. The Court held that the wife was only entitled to the amount of financial contributions she was able to prove as expenses due to her at the trial court, being D305,546 (\$5,899.38)<sup>17</sup>. This judgment disregarded the substantial improvements made on the property by the wife and any other forms of contributions made by the wife in the upkeep and maintenance of the family. The Supreme Court applied a very narrow and restrictive interpretation to what constitutes “property derived from the marriage.” Essentially the court’s decision was premised on the fact that since the husband acquired the land and the unfinished structure prior to the marriage, the property in its finished and improved state was not property derived from the marriage. Therefore, where a man acquires property prior to a marriage, irrespective of the state of the property, whether completed or dilapidated, improvements and developments made on it as the matrimonial home by the wife would not under any circumstances be regarded and considered as relevant in determining equitable share under Section 43(4) of the Women’s Act.

This judgment certainly sets a dangerous and absurd precedent which would limit women’s rights to their beneficial and equitable share in property acquired prior to marriage irrespective of substantial contribution and improvements upon the value of the property. This certainly poses a great challenge for women in The Gambia, where the majority are uneducated and may not know the value of keeping track of financial contributions made in the development of their matrimonial homes. This is a classic example of lack of judicial activism for the promotion of the rights of women.

### ***Susan Badjie v Isatou Secka***<sup>18</sup>

This case illustrates the conflict posed by the tripartite legal system in relation to the enforcement of matrimonial rights of women and the attitude of the judiciary in resolving this conflict. Marriages in The Gambia are regulated by different statutes, namely-

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17. (n 12) above

18. (2014-2015) 1GSCLR

- The Muslim Marriages and Divorce Act of 1941 and the Sharia Law Recognition Act of 1905 regulate Muslim marriage, which are potentially polygamous;
- Civil Marriage Act of 1938 regulates monogamous devoid of any religious ceremony;
- Christian Marriage Act of 1862 and the Matrimonial Causes Act of 1986 regulate Christian Marriages, which are monogamous; and
- The Constitution of the Republic of The Gambia 1997 recognises personal law based on the tripartite system of law The Gambia.

Susan Badjie contracted a marriage with Ebrima Badjie under the Civil Marriage Act. During the subsistence of the marriage, Susan and Ebrima Badjie acquired a number of properties, with Susan investing a sum upwards of 250,000 Euros. Subsequently, Ebrima passed away, and it was only after his death that Susan learnt that Ebrima had contracted a second marriage under Islamic law, with Isatou Secka, without Susan's knowledge. Ebrima was a Muslim at the time of contracting both marriages. Isatou held herself out to be the lawful widow of Ebrima and made claims on the deceased's estate. Susan challenged the validity of the marriage, and the second wife's claim to the estate.

The High Court as the court of first instance held that the marriage was not void but was voidable and offered no reason for its decision. Dissatisfied with the judgment, Susan appealed to the Court of Appeal, which held that by marrying under the Civil Marriage Act, Ebrima had opted out of his personal law (which allows polygamy) and contracted a monogamous marriage. Thus, the second marriage was declared void. On appeal, the Supreme Court held that:

***“The right of a Muslim male to marry more than one wife under Sharia law is unalterable. The Muslim male may decide not to exercise the right but the right remains exercisable. Under a person's Islamic personal law one can decide to marry and remain married to one wife whether or not the marriage contracted is a Muslim marriage or is one contracted under the Civil Marriage Act, but that by itself does not mean that such a person had ‘opted’ out of his personal law and his decision irreversible while he remains married to that one wife.*”**

The implication of the Supreme Court judgment is that the main feature of monogamy that has long been attached to civil marriages and protected women from polygamous union is rendered nugatory. Thus, a Muslim man can contract a marriage under the Civil Marriage Act, and then go ahead to contract another marriage under the Muslim Marriages and Divorce Act, with the pretext of exercising his right to polygamy under personal law, in complete disregard of the monogamous oath taken. The judgment therefore renders the oath taken by the parties during a civil marriage worthless and proactively encourages and enables a Muslim man to break the oath, without any recourse available to a woman, contrary to the express intent of the monogamous union.

## Conclusion and Expected Results

The cases highlighted above provide evidence of attempts made by citizens and CSOs to enforce innovation in the existing legal framework and the attitude of the judiciary in the adjudication of such cases. It is indeed clear that based on the decision of the Supreme Court, more needs to be done by the government in promulgating laws to alleviate the plight of women who for now are subject to these disadvantageous decisions. Because cases such as the ones cited in this article are few and far between, there have not been any structural remedies capable of drastically altering the lives of women and girls in The Gambia.

As a follow up to the enactment of the Women's Act, which predominantly domesticates the Maputo Protocol, the Government recently commissioned a review of all laws that are discriminatory against women with a view to amending them. The findings of this review were embodied in a report entitled "*Mapping and Analysis of the Laws of The Gambia from a Gender Perspective: Towards Reversing Discrimination in Law*" (Mapping Report).<sup>19</sup> Based on the finding of the review, several bills were introduced into the National Assembly for amendment of all discriminatory laws including Section 43(4) of the Women's Act to ensure

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19. The Review is a critical part of the Government of The Gambia's democratic and transitional justice reforms and grounded on the Equality in Law for Women and Girls by 2030: A Multistakeholder Strategy for Accelerated Action.



with absolute clarity that in computing equitable share of a woman during divorce or annulment of a marriage that the court will take into consideration property accumulated by joint industry of husband and wife during marriage; contributions made by a woman in developing and improving upon property acquired prior to the marriage; and contributions made by a woman in raising and caring for the family throughout the marriage.

It is hoped that the enactment of the series of laws under the aegis of the Mapping Report will provide an adequate legal framework for strategic litigation for the promotion and protection of the rights of women and girls. This should be accompanied with the enhanced capacity of judicial and law enforcement officers to facilitate effective implementation and appropriate interpretation of the laws to ensure social change for the protection of the rights of women and girls. Civil society organisations should also be more proactive in promoting and litigating the rights of women before the national courts, and as a last resort, before regional mechanisms for the enforcement of human rights such as the African Commission on Human and Peoples Rights, the African Court on Human and Peoples Rights and the ECOWAS Court.

## References

### Statutes

- (1) The 1997 Constitution of The Gambia
- (2) The Children's Act 2005
- (3) The Women's Act 2010
- (4) The Muslim Marriages and Divorce Act 1941
- (5) the Sharia Law Recognition Act 1905
- (6) Civil Marriage Act 1938
- (7) Christian Marriage Act 1862
- (8) Matrimonial Causes Act 1986
- (9) The Sexual Offences Act 2013
- (10) The Domestic Violence Act 2013

## Case Law

- (1) Karla Keita v Mustahpa Dampha (Unreported- civil suit no. Hc/024/12/mf/008/f1)
- (2) Dawda Jawara v Matty Faye (Unreported SC CA 023/2016)
- (3) Susan Badjie v. Isatou Secka (2014-2015) 1GSCLR
- (4) Gladys Mensah v Stephen Mensah Civil Appeal No. J4/20/2011 Dated 22nd February 2012

## International and Regional Instruments

- (1) Convention on the Elimination of all Forms of Discrimination Against Women, (CEDAW)
- (2) Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, (Maputo Protocol)
- (3) Convention of the Rights of the Child, (CRC)
- (4) African Charter on the Rights and Welfare of the Child, (ACRWC)
- (5) Solemn Declaration on Gender Equality in Africa (SDGEA)

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- (2) World Population Prospects 2019, File POP/1-1: Total Population (both sexes combined) by Region, Subregion and Country, Annually for 1950-2100, United Nations Population Division, available at [https://population.un.org/wpp/Download/Files/1\\_Indicators%20\(Standard\)/EXCEL\\_FILES/1\\_Population/WPP2019\\_POP\\_F01\\_TOTAL\\_POPULATION\\_BOTH\\_SEXES.xlsx](https://population.un.org/wpp/Download/Files/1_Indicators%20(Standard)/EXCEL_FILES/1_Population/WPP2019_POP_F01_TOTAL_POPULATION_BOTH_SEXES.xlsx)
- (3) The Gambia National Gender Policy 2010 – 2020, Ministry of Women's Affairs, available at <https://www.ilo.org/dyn/travail/docs/1958/Gambia%20%national%20gender%20policy.pdf>
- (4) UN Women, Equality in law for women and girls by 2030: A multi-stakeholder strategy for accelerated action, available at <https://www.unwomen.org/en/digital-library/publications/2019/03/equality-in-law-for-women-and-girls-by-2030>

## Chapter 10

# Analyzing the Effectiveness of Strategic Litigation on Reproductive Rights: A Case of Abortion Laws in Malawi

By Alfred Majamanda\*

### Executive Summary

Under Protocol to the African Charter on Human and Peoples` Rights on the Rights of Women in Africa (Maputo Protocol), states have an obligation to protect the reproductive rights of women and girls by, among others, authorising medical abortion in some prescribed instances. This inevitably means states should adopt legislation that seeks to enforce these rights. The Republic of Malawi is yet to enact legislation providing for medical abortion despite a process to do so commencing more than eight years ago. Currently, under the Malawian Penal Code that was enacted during the colonial era, abortion is illegal except where the life of the pregnant woman is endangered by the pregnancy. This exception is partially in conformity with one of the grounds in art 14 (2) (c) of the Maputo Protocol. However, due to the limited exception permitted under the Penal Code, girls and women fail to access legal and safe abortion.

Recent experience with the proliferation of strategic litigation across the world shows that courts can very well either influence a change in the law or influence a progressive legal interpretation that is akin to the creation of new laws. An attempt has thus been made in this paper to show that strategic litigation could influence the necessary change in the abortion legal framework in Malawi, enabling the country to fully comply with the Maputo Protocol.

## Introduction

From time immemorial women have been largely marginalised in many respects.<sup>1</sup> The marginalisation of women on the basis of gender prompted various efforts by states and non-state human rights stakeholders to take steps to eradicate marginalization and other forms of gender-based discrimination experienced by women. To this effect, the African Union (AU) adopted the Maputo Protocol in 2003 and the Protocol came into force in 2005. The Maputo Protocol provides for health and reproductive rights of women and states have an obligation to protect reproductive rights of women by several *modus operandi* including authorising medical abortion in some prescribed instances.<sup>2</sup> This inevitably means states have an obligation to respect, protect and fulfil the right to medical abortion and, among other measures, enact laws that seek to promote and respect these rights. However, some countries including Malawi are yet to pass the necessary legislation in order to be fully compliant with the Maputo Protocol. It is thus imperative to analyse whether strategic litigation would be a viable option in Malawi in effecting the necessary legislative changes to ensure the realisation of the right to medical abortion as guaranteed by the Maputo Protocol. This paper seeks to examine the effectiveness of strategic litigation on the reproductive rights of women and girls in Malawi in so far as abortion law is concerned.

The paper is divided into four parts. The first part briefly discusses the paper's methodology while the second part sets out states' obligation under the Maputo Protocol and the current position of the abortion law in Malawi. The third part discusses strategic litigation and how this can be used in advocating for reforms that permit medical abortion. The last part concludes the argument in support for strategic litigation as a catalyst for change of the law on abortion in Malawi.

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As defined in Art 1 (k) the author shall use women to indicate people of a female gender; girls inclusive.

2. Art 14 of the Maputo Protocol

## Methodology

The study adopts doctrinal research methodology: an analytical study of existing laws, related cases and authoritative materials.<sup>3</sup> Relevant cases are scrutinised in order to learn how strategic litigation was used in different instances. Authoritative legal materials on the subject matter have also been considered. Essentially this is desktop research.

## Malawi's international obligations to ensure access to safe abortion

The Maputo Protocol was adopted on July 11, 2003 with the aim of supplementing the African Charter on Human and Peoples' Rights (the Charter).<sup>4</sup> Under Article 14 (2)(c) of the Protocol, states are enjoined to take appropriate measures "to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." Such measures include states promulgating the necessary law that can take into account this obligation. Alternatively, states can amend existing law in order for it to be in compliance with the protocol. While other countries have done either of the two, Malawi is yet to pass law on authorised medical abortion as stipulated in the Maputo Protocol. The General Comment on Art 14 (1)(d) of the Maputo Protocol (the General Comment) recognises that "art 14 (1) (d) and (e) imposes four sets of general obligations on states parties namely respect, protect, promote and fulfil."<sup>5</sup> The obligation to promote requires states to create the legal, social and economic conditions that enable women to exercise their rights in relation to sexual and reproductive health.<sup>6</sup>

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3. Kharel, Amrit. «Doctrinal Legal Research.» Available at SSRN 3130525 (2018) page 4

4. Art 66 of the Charter provides for special protocols to supplement the provisions of the Charter.

5. Clause 20 of the General Comment

6. Clause 23 of the General Comment

Malawi has ratified several treaties on this subject matter like Maputo Protocol and Convention on Elimination of All forms of Discrimination against Women (CEDAW). The Committee of CEDAW (CEDAW Committee) has expressed concern about Malawi's criminalisation of abortion and its impact on the maternal mortality ratio. It has recommended that Malawi should provide the legal and practical availability of abortion at least in cases in which the life or health of the pregnant girl or woman is at risk.<sup>7</sup> Under General Comment No. 35, the CEDAW Committee opined that violations of women's sexual and reproductive health and rights which include criminalization of abortion are forms of gender based violence against women.<sup>8</sup>

## Malawi's current legal framework concerning abortion

The current law on abortion is found in the Penal Code, which was promulgated in 1930 during the British colonial era. The Penal Code allows abortion only to save a woman's life<sup>9</sup> otherwise the performance of abortion is generally illegal.<sup>10</sup> Malawi therefore has a restrictive law on abortion.

The above stated legal position contributes significantly to why women terminate pregnancies under unsafe conditions. Due to fear of being prosecuted and lack of facilities that provide safe abortion services, a significant number of women end up aborting clandestinely in an unsafe manner thereby endangering their lives. For instance, the first national wide cross-sectional survey on the magnitude of unsafe abortion found that in 2009, an estimated 67,300 abortions occurred and 18,700 women were treated in health facilities for abortion complications.<sup>11</sup>

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7. Concluding Observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/MWI/CO/7 (2015).

8. CEDAW/C/GC/35 found on [http://: www.docstore.ohchr.org](http://www.docstore.ohchr.org) last accessed on 18/10/2020

9. Section 243 of the Penal Code

10. Sections 149, 150 and 151 of the Penal Code

11. Godfrey Kangaude and Chisale Mhango, «The Duty to make abortion law transparent: A Malawi case study» *International Journal of Gynecology and Obstetrics* 143:3 (Dec. 2018): 409–413,

The Malawi Law Commission agreed that restrictive abortion law contributes to the problem of unsafe abortion, including serious complications such as loss of uterus, permanent disability and death, because it drives women to resort to clandestine abortions by unskilled providers.<sup>12</sup> Consequently, it is arguable that the Malawi Law Commission seems to have taken heed to the grand clarion by CEDAW Committee and the Maputo Plan of Action. The Law Commission, through a Special Law Commission on the Review of Abortion Law, proposed a liberal law to provide for expanded cases to safe abortion. This was around February 2015.<sup>13</sup> The recommendation brought to life the Termination of Pregnancy (Top) Bill. The Top Bill relaxes to some extent the restrictions but does not decriminalise abortion. Essentially the Top Bill has introduced certain justifiable grounds where termination of pregnancy should be permissible, namely: where continued holding of pregnancy will endanger the life of a pregnant woman; where termination is necessary to prevent injury to the physical or mental health of a pregnant woman; where there is severe malformation of a foetus, which will affect its viability or compatibility with life; and where the pregnancy is a result of rape, incest, or defilement.<sup>14</sup> Although the proposed bill is arguably better aligned to internationally recognised human rights norms, it is to date yet to be passed into law.<sup>15</sup> The delay in enacting the law should ignite a search for other strategies that can facilitate the necessary change in the law.

## Strategic Litigation as a catalyst for decriminalizing abortion in certain cases

Strategic litigation has been defined as litigation of a public interest case that will have a broad impact on society beyond the specific interests of the parties

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12. Malawi Law Commission. Report of the Law Commission on the review of the law on abortion (Penal Code Cap.7:01 of the Laws of Malawi). Lilongwe: Malawi Law Commission; 2015.

13. Malawi Country factsheet (2016): Unsafe Abortion

14. Section 3 of the Top Bill

15. Ibid note 11 page 414



involved.<sup>16</sup> It has also been described as being able to serve dual goals of shaping and defining international standards and holding governments accountable when they fail to comply with these norms.<sup>17</sup> Strategic litigation differs from conventional forms of litigation especially because the legal 'strategy' deployed is oriented towards not only solving a past dispute in the clients interests but also seeking to develop principles that could be used by others and produce a broader impact.<sup>18</sup> Strategic litigation does not focus solely on legal outcomes, but on producing broader social effects, including the building blocks to change social attitudes and effectuate legal and policy reforms.<sup>19</sup> The change in question may be as a result of the legislature being influenced to pass new law or by a lower court being bound by the earlier decision of the superior court.

Strategic litigation has four main components. The first is the extrinsic legal component i.e. its intention to have effects beyond that of individual litigant bringing the case. The second is cause variety, which is basically tying strategic litigation to the cause of securing and advancing human rights. The third is the intentional deployment of legal action to transform a targeted social, economic, political or legal issue. The fourth is litigation broadly conceived which entails allowing or including techniques that have a direct impact on society through campaigning, media, training or other tools.<sup>20</sup> The four components make strategic litigation well equipped to deal with an area where Government is pussyfooting on matters of legal abortion due to social political and religious considerations.

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16. Mónica Roa & Barbara Klugman (2014) Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia, *Reproductive Health Matters*, 22:44, 31-41,

17. Nancy Northup, *Reproductive Rights at Home and Abroad*, 15 CUNY L. Rev. 265(2012)

18. Ramsden, Michael and Gledhill, Kris, «Defining Strategic Litigation» (2019) 4 Civil Justice Quarterly 407 (October 9, 2019). «Defining Strategic Litigation» (2019) 4 Civil Justice Quarterly 407, Available at SSRN: <https://ssrn.com/abstract=3467034>

19. Ibid note 12

20. Fuchs, Gesine. «Using strategic litigation for women's rights: Political restrictions in Poland and achievements of the women's movement.» *European Journal of Womens Studies* 20.1 (2013): 21-43

When embarking on strategic litigation, it is imperative to involve other strategies. There is a need for a good case that could significantly bring about the much-needed change, a complainant who is willing to go through the process and sufficient funding.<sup>21</sup> It is also necessary to raise public awareness of the case in court and the evils it seeks to arrest in order to build pressure for legislative changes.

## Strategic Litigation in Malawi and the Question of Locus Standi

In Malawi, the courts have the responsibility of interpreting, protecting and enforcing the Constitution and all laws in accordance with the Constitution in an independent and impartial manner with regard only to legally relevant facts and prescriptions of law.<sup>22</sup> The Constitution further states that in interpreting the provisions of the Constitution, a court of law shall take full account of the provisions of Chapters III (Fundamental Principles) and IV (Human Rights) and where applicable, have regard to current norms of public international law and comparable foreign case law.<sup>23</sup> This means that, using other materials like the four components of strategic litigation as mentioned above, the courts in Malawi, and probably other common law jurisdictions, can be influenced to take some strategic positions in their decision-making.

There has been some controversy in determining *locus standi* on the part of the courts. The High Court of Malawi has largely held that all one needs to prove is that he or she has sufficient interest in the protection or enforcement of human rights, irrespective of whether the right at issue is his or hers or another person's.<sup>24</sup> The Supreme Court of Appeal on the other hand has taken a restrictive approach. It has held that a person must have real interest that he or she seeks to

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21. Ibid note 20

22. Section 9 of the Constitution of the Republic of Malawi

23. Section 11(2) (b) and (c)

24. *Thandiwe Okeke v Minister of Home affairs* Miscellaneous Civil application No. 73 of 1997 (unreported)

protect or a substantial interest in the remedy he or she seeks from the court in order to be allowed to bring an action. Such an interest must be over and above the general interest.<sup>25</sup> It is evident that the issue of standing in Malawi is yet to be settled.<sup>26</sup> Therefore, if a litigant does not want preliminary objections on the basis of *locus standi* issues, the best way out is to go with the Supreme Court of Appeal's position. For a case to be brought up in court as a strategic litigation, it may be important to avoid such hurdles by commencing the court action through a complainant who has real interest that he or she seeks to protect or substantial interest in the remedy he or she seeks from the court. Alternatively, one can also bring up a case, which will raise a controversy on *locus standi* with the aim of having a definite position on this by the highest court in Malawi.

The courts have taken a different approach when statutory bodies like Malawi Law Society (MLS) and Malawi Human Rights Commission have commenced an action in court on a public interest litigation matter. MLS is said to have standing on public interest matters even if it is not directly affected.<sup>27</sup> Therefore, as a strategy, one could also lobby these bodies to commence action where necessary.

## Is Strategic Litigation effective?

In Malawi, strategic litigation has been used in various thematic areas namely the death penalty<sup>28</sup>, rogue and vagabond crimes<sup>29</sup>, property rights<sup>30</sup>, and prisoners'

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25. *President of Malawi & Another v Kachere & Others* [1995] 2 MLL 616; *Civil Liberties Committee v Minister of Justice and Registrar General* MSCA Civil Appeal No. 12 of 1999 (unreported)

26. Chirwa, Danwood Mzikenge. *Human rights under the Malawian Constitution*. Juta and Company Ltd, 2011 at 77

27. *MLS & Others v President & Others* (2002) AHRLR 110; *MLS v President & Others* Constitutional Cause No.6 of 2006; *MLS v Lilongwe Water board & Others* Judicial Review No. 16 of 2017

28. *Francis Kafantayeni and Others v Attorney General* Constitutional Case No. 12 of 2005

29. *Mayeso Gwanda v The state* Constitutional Cause No. 5 of 2015

30. *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General* Constitutional Case No.3 of 2009

rights.<sup>31</sup> In the majority of such cases, it has brought about the much-needed change in the law by having some law declared unconstitutional or by creating a basis for enacting a new law or amending law on the part of parliament. It can also be used to change some entrenched legal positions on the basis that they are unconstitutional. For instance, the case of *Francis Kafantayeni and Others v Attorney General*<sup>32</sup> broke a long statutory based tradition of using mandatory death penalty in murder cases. Due to the outcome of this case, courts are no longer bound to impose capital punishment in every murder case but have discretion to mete out a sentence taking into account circumstances of the particular case.<sup>33</sup> The court was also able to consider the offence of rogue and vagabond<sup>34</sup> under the lens of the Constitution in the case of *Mayeso Gwanda v The State*.<sup>35</sup> Rogue and vagabond offences have for a very long period of time been used by the police to effect an arrest based on mere suspicion and without a warrant. The victims have largely been women and poor people. The court held that Section 184 of the Penal Code is unconstitutional as it among others violates the right to dignity, freedom from inhuman and degrading treatment and freedom from discrimination and equal protection of the law.

It is evident from the cases discussed above that their being brought up in court resulted in some change in the law either directly or indirectly. It can also be noticed that it is an easier way to have some laws changed without taking the long route of going through parliament. Therefore, it can be argued that using strategic litigation on matters of women`s reproductive health rights has the potential of achieving the much-needed change faster than through legislation, especially as it pertains controversial issues such as abortion.

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31. *Gable Masangano (Suing on his own and on behalf of all prisoners in Malawi) v The Attorney General and Others* Constitutional Case No. 15 of 2007

32. *Ibid* note 28

33. Nkhata, Mwiza Jo. «Bidding farewell to mandatory capital punishment: Francis Kafantayeni & Others v Attorney General: notes and comments.» *Malawi Law Journal* 1.1 (2007): 103-112 at 103.

34. Section 184 of the Penal Code

35. *Ibid* note 29

## Challenges for advocating for safe abortion in Malawi

Malawi claims to be a God-fearing nation.<sup>36</sup> It also has diverse cultural beliefs and values. Abortion is inherently a sensitive issue that permeates cultural, social, moral, religious, and legal dimensions.<sup>37</sup> Government would thus have to tread carefully in handling this issue.

In Malawi many non-governmental organizations (NGOs) have fought hard over the years to lobby for a change in the law of abortion. This hard work culminated into Government's willingness to review the restrictive law on abortion in its three reports to human rights bodies namely: the African Commission on Human and Peoples' rights, the Universal Periodic Review at the United Nations Human Rights Council and the United Nations Human Rights Committee.<sup>38</sup> This was remarkably different from a position the Government had propounded in its 2010 report to the Universal Periodic Review, in which the Government rejected calls from both local and international organizations to reform its abortion law.<sup>39</sup> Ultimately in Malawi, the Top Bill was drafted, which is a tremendous progress towards law reform on this subject matter. However, there is ambivalence towards legal reform throughout the society. There is also religiously based opposition such that in some article, religious leaders in 2016 expressed the following views, "After a critical reflection on these matters, we came to a conclusion that it was in fact the abortion bill that needed aborting."<sup>40</sup>

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36. <http://www.sdn.org.mw/malawi/vision-2020/mission-statement.htm>

37. Georgina Yaa Oduro & Mercy Nana Akua Otsin (2014) "Abortion—It Is My Own Body": Women's Narratives About Influences on Their Abortion Decisions in Ghana, *Health Care for Women International*, 35:7-9, 918-936 at 918

38. Daire, Judith, Maren O. Kloster, and Katerini T. Storeng. «Political priority for abortion law reform in Malawi: Transnational and national influences.» *Health and human rights* 20.1 (2018): 225 at 231

39. *Ibid* note 38 page 231

40. M. Munthali, "Why abortion bill in Malawi must be aborted," *Nyasa Times* (September 21, 2016). Available at <http://www.nyasatimes.com/abortion-bill-malawi-must-aborted>.

In order to promulgate the Top Bill into law, there is need for support from members of parliament and key politicians who must take into account views of religious and traditional leaders. It is evident in the circumstances that the support for legal reform remains fragile and there is now more open resistance to law reform than was evident prior to the publication of the Top Bill.<sup>41</sup> An international anti-choice movement, that claims that the bill represents international sexual and reproductive health and rights organizations' efforts to deconstruct African culture and pan-African values as part of cultural imperialism has compounded the national ideological opposition.<sup>42</sup> The Top Bill still awaits parliamentary debate. Given the national as well as external influence from the anti-choice movement, it is uncertain if the Top Bill will be passed into law soon. This calls for thinking out of the box in order to find an alternative way of seeking to comply with the Maputo Protocol.

Strategic litigation, as has been stated before, can be used to contribute to the change in the law. The way the legislature operates is very different from the courts. The courts may not use political considerations in coming up with its decision but have regard only to legally relevant facts and prescriptions of law. The courts do not have to consult religious and traditional leaders in deciding a case. The courts can have regard to human rights principles in the constitution and where applicable, have regard to current norms of public international law and comparable foreign case law. The courts are thus in a better position to spearhead change in a controversial area of law. For example, in the case of *Tysiac v Poland*,<sup>43</sup> the European Court on Human Rights held that governments have a duty to establish effective mechanisms for ensuring that women have access to abortion where it is legal. The Court opined that the case relates to the right to respect for private life, since circumstances that surround it are inseparably linked with the woman's private life: they determine her physical and psychological integrity. Therefore, strategic litigation is better placed to complete the work

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41. Ibid note 38 at page 231

42. Human Life International Tanzania, Malawi December 2014 conference (December 30, 2014). Available at <http://hlitanzania.org/malawi-december-2014-conference>

43. Application 5410/03 available at <http://hudoc.echr.coe.int/eng-press?i=003-1952452-2061288> (accessed 2 November 2020)

that local and international NGOs and other stakeholders in Malawi started in advocating safe abortions.

## Conclusion and recommendations

A significant progress has been made for Malawi to be closer to complying with the Maputo Protocol by coming up with the Top Bill. But as they say, it almost doesn't count. Up and until that bill is passed into law, Malawi remains to be non-compliant with the Maputo Protocol. Given the sensitivity of the subject matter from the traditional and religious point of view, giving the courts a chance through strategic litigation is a viable option. If strategic litigation has been utilized very well, it is capable of bringing up a much-needed change in the law.

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## Chapter 11

# Policy Practice Divide: Examining the State Obligation to Protect Women and Girls from Sex Trafficking in Kenya

Anita Nyanjong<sup>1</sup>

### Executive Summary

This paper examines the state obligation to protect women and girls from sex trafficking in Kenya through an analysis of the Counter Trafficking in Persons Act of Kenya. The paper notes that sex trafficking is a gendered phenomenon with a majority of victims being women and girls. The paper also demonstrates how structural and systemic inequalities, including poverty and gender discrimination exacerbate women and girls' vulnerabilities to sex trafficking. This paper recommends that Kenya address the root causes of sex trafficking and establish systems and frameworks according to the provisions of the Counter Trafficking in Persons Act.

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## Introduction

Human trafficking<sup>2</sup> is one of the most egregious human rights violations in the world today, a majority of its victims being women and girls.<sup>3</sup> Sex trafficking, as one of the forms of human trafficking, is the most prevalent, existing alongside labour trafficking, which also has a majority of victims being women and girls. The United Nations Office for Drugs and Crime (UNODC) estimates that 59% of all victims of human trafficking face sexual exploitation, many being women and girls.<sup>4</sup> A majority of these victims of trafficking for sexual exploitation are labouring in the profitable global prostitution industry, which generates 7 to 12 Billion U.S. Dollars in profits each year.<sup>5</sup> There are other forms of trafficking for sexual exploitation such as arranged child or adult marriages, forms of sexual slavery exhibited in debt bondages amongst other forms of sex trafficking for purposes of sexual exploitation.<sup>6</sup>

Sex trafficking is a gendered crime, and its root causes are anchored in existing structural and gendered inequalities perpetrated against women and girls.<sup>7</sup> Gendered poverty manifesting in inadequate access to education,

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2. 'US Trafficking in Persons Report 2020 - United States Department of State' 3 <https://www.state.gov/trafficking-in-persons-report/> accessed 11 October 2020. This report alludes to the problem of human trafficking becoming an issue of great concern in the 1990s after the fall of the Soviet union and Sex trafficking of women and girls being one of the largest forms of profits.

3. 'ICAT-IB-04-V.1.Pdf' 1 <<https://icat.network/sites/default/files/publications/documents/ICAT-IB-04-V.1.pdf>> accessed 15 September 2020.

4. 'More Action Needed to Stop Human Trafficking, Exploitation in Armed Conflict: UNODC Launches Latest Global Report on Trafficking in Persons' (*United Nations: Office on Drugs and Crime*) <[http://www.unodc.org/unodc/en/frontpage/2019/January/more-action-needed-to-stop-human-trafficking--exploitation-in-armed-conflict\\_-unodc-launches-latest-global-report-on-trafficking-in-persons.html](http://www.unodc.org/unodc/en/frontpage/2019/January/more-action-needed-to-stop-human-trafficking--exploitation-in-armed-conflict_-unodc-launches-latest-global-report-on-trafficking-in-persons.html)> accessed 11 October 2020.

5. Donna M Hughes, 'The "Natasha" Trade: Transnational Sex Trafficking: (527932006-003)' 625-651 <<http://doi.apa.org/get-pe-doi.cfm?doi=10.1037/e527932006-003>> accessed 11 October 2020.

6. 'Wcms\_494314.Pdf' 5-11 <[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-suva/documents/publication/wcms\\_494314.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-suva/documents/publication/wcms_494314.pdf)> accessed 13 September 2020.

7. Joy Watson and Christine Silkstone, 'Human Trafficking as a Form of Gender-Based Violence: Protecting the Victim' [2006] *Agenda: Empowering Women for Gender Equity* 110, 112 <<http://www.jstor.org/stable/4066741>> accessed 11 October 2020.

lack of employment opportunities and lack of control over financial resources exacerbates women's and girls' vulnerability to sex trafficking.<sup>8</sup> Further, women and girls are more susceptible to sex trafficking when cultural norms normalize violence against them. This, coupled with migration and labour laws that do not take into account the gendered and human rights dimensions of labour in society may increase women's access to employment in unregulated and informal sectors thereby increasing their chances of exploitation.<sup>9</sup> Similarly, in Africa, the trafficking of women and girls for sexual exploitation is influenced by historical and structural power imbalances between women and men.<sup>10</sup> These structural imbalances exist in varying degrees across all countries.<sup>11</sup> They are related to women's limited power and control, as well as to the social norms that prescribe men and women's roles in society and condone abuse.<sup>12</sup> These vulnerabilities are heightened during natural calamities, migration and conflicts, where traffickers, working in elaborate networks take advantage.<sup>13</sup> It is not surprising that a majority of women and girls trafficked for sexual exploitation are migrants, refugees or those that are internally displaced.<sup>14</sup>

Although Kenya has taken significant steps to address gender inequality and the systemic discrimination against women and girls, these steps have been

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8. As above 112.

9. Michael Chibba, 'Human Trafficking and Migration: Concepts, Linkages and New Frontiers' 10 <<https://www.globalpolicyjournal.com/sites/default/files/Chibba%20-%20Human%20Trafficking%20and%20Migration%2C%20Concepts%2C%20Linkages%20and%20New%20Frontiers.pdf>>.

10. Carol Allais, 'An Overview of Human Trafficking in Sub-Saharan Africa' 16, 3.

11. Allais above 3

12. 'Prostitution, Harm and Gender Inequality: Theory, Research and Policy' (*Routledge & CRC Press*) 1 <<https://www.routledge.com/Prostitution-Harm-and-Gender-Inequality-Theory-Research-and-Policy/Coy/p/book/9781138268203>> accessed 11 October 2020.

13. 'Prostitution, Harm and Gender Inequality: Theory, Research and Policy Maddy Coy (Ed.) - Tina Jiwatram-Negron, 2014' Vol No. 3 <<https://journals.sagepub.com/doi/abs/10.1177/1468017313492743>> accessed 11 October 2020.

14. 'Trafficking in Thailand and Their Impacts on Women and Children from Burma' <<http://thailawforum.com/articles/Trafficking-in-Thailand%20.html>> accessed 11 October 2020.

undermined by the lack of tangible measures. Women and girls still suffer from discrimination in law and practice despite legal frameworks that guarantee their protection. At the national level, women's leadership is still negligible as compared to men, with women representing a meagre 22% of elected and 18% of the nominated officials in the National Assembly elected in the 2017 election.<sup>15</sup> Sexual and other forms of gender-based violence remain high, with studies indicating that 32 per cent of young women aged 18–24 have experienced some form of sexual violence before the age of 18.<sup>16</sup>

## Issues for discussion

This paper examines Kenya as one of the countries with robust legal and policy frameworks for the protection of victims of all forms of violations. The Constitution of Kenya, hailed as progressive due to its expansive provisions in the Bill of Rights, articulates a transformative justice system that centres the adherence to the rule of law. Indeed, the Constitution of Kenya provides for a comprehensive framework for the protection of women and girls by calling for equality and non-discrimination.<sup>17</sup> Institutions such as the judiciary, police, and national human rights commissions complement the provisions of the Bill of Rights to ensure the protection of all persons.<sup>18</sup> Kenya, like many States around the world, has ratified the Palermo Protocol which provides for a comprehensive victims protection framework and the homegrown continental women's rights Protocol which adopts a three-prong strategy calling for the prevention, protection of victims and the prosecution of those found culpable.<sup>19</sup>

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15. 'A Gender Analysis of the 2017 Kenya General Elections | National Democratic Institute' <<https://www.ndi.org/publications/gender-analysis-2017-kenya-general-elections>> accessed 30 November 2020.

16. 'Shining a Light on Gender-Based Violence in Kenya: Why We Must Do More' <<https://www.unaids.org/en/resources/presscentre/featurestories/2018/may/gender-based-violence-in-kenya>> accessed 15 September 2020.

17. Article 27 of the Constitution of Kenya, 2010.

18. Chapter 10 of the Constitution of Kenya, 2010.

19. Article 4 (g) Maputo Protocol.

## The State Obligation to Protect

Although the obligation to protect was first articulated in the case of economic and social rights, it is now a well-established principle that is applicable across all categories of human rights.<sup>20</sup> A state's obligation to protect relates to its duty to regulate the conduct of private parties, whether individuals or other entities. Consequently, this also requires that governments put in place measures to ensure that laws govern some actions. In instances where these laws are violated, those in violation of the statutes face the force of the law, and victims of their crimes access justice.<sup>21</sup> Indeed, accountability for crimes is a critical element of the obligation to protect human rights. Remedies, both judicial and administrative, must be available and sufficient to guarantee access to justice for all victims.<sup>22</sup> This adage restores people's confidence in the judicial system and the legal system as a whole.

Despite comprehensive legal provisions in international, regional and national laws that seeks to end sex trafficking, Kenya still falls shorts in its obligation to protect women and girls from sex trafficking. In 2019, the Government of Kenya identified 853 victims of trafficking – 271 adult females, 351 girls, and 227 boys which was a significant increase from the numbers in 2018.<sup>23</sup> During this time, the Government relied on NGOs to provide care and support to the women and girls victims of sex trafficking due to the lack of government-run shelters, a situation which has sometimes led victims to be placed in refugee camps.<sup>24</sup> The lack of shelters, unavailability of trained personnel offering trauma counselling, inadequate medical support and inability of the rescue officers to understand the complexity of a victim of sex trafficking reduces the chances for the prosecution

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20. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by a group of international experts in Maastricht, 22-26 January 1997.

21. '8.-Exhaustion-of-Domestic-Remedies-UN-Treaty-Bodies.Pdf' 5–8 <<https://ijrcenter.org/wp-content/uploads/2018/04/8.-Exhaustion-of-Domestic-Remedies-UN-Treaty-Bodies.pdf>> accessed 13 September 2020.

22. 'Training9chapter15en.Pdf' 784 <<https://www.un.org/ruleoflaw/files/training9chapter15en.pdf>> accessed 13 September 2020.

23. Note 2 above 293.

24. Note 2 above 293.

of sex trafficking cases.<sup>25</sup> Also, due to the lack of awareness for the protection of victims by law enforcement, victims are often prosecuted for the crimes in which they were compelled to commit by their traffickers.<sup>26</sup> In some instances victims are charged with immigration offences, detained and later deported to their countries without proper coordination with the governments of their countries of origin.<sup>27</sup>

The Counter-Trafficking in Persons Act grants permission to foreign nationals who are victims of trafficking to remain in the country indefinitely if it is believed they would face retribution in their countries of origin.<sup>28</sup> Witnesses' names and photos have been revealed by the media, further complicating their cases. In contrast, some are forced to testify in criminal cases against traffickers against the victims' will, violating the victims' right to dignity and to give consent to their participation in their cases throughout the investigation and criminal proceedings.<sup>29</sup> Although the courts provide opportunities for the concealing of the trafficking witnesses' identities during trial, sometimes witnesses can be intimidated or disappeared.<sup>30</sup> This inevitably leads to the non-conviction of traffickers due to lack of evidence to sustain their prosecution. Lastly, the approach adopted by the Government of Kenya in addressing sex trafficking appears disjointed. The Counter Trafficking Advisory Committee,<sup>31</sup> which is

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25. This depends on the jurisdiction of the human trafficking victims. Whilst in Kenya, it is now noted that there is a comprehensive victims protections framework, in other jurisdictions, challenges to prosecution may include the lack of coordination amongst law enforcement. See also, '238795.Pdf' <<https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf>> accessed 30 November 2020.

26. Indeed, in 2019 10 women and girl victims of sex trafficking were charged for publishing pornographic materials in a Mombasa court.

27. As above note 23 294.

28. Counter Trafficking in Persons Act Section 18 (3).

29. Constitution of Kenya Article 28.

30. 'Improving Witness Safety and Preventing Witness Intimidation in the Justice System: Benchmarks for Progress, Office of Justice Programs' <<https://www.ojp.gov/library/publications/improving-witness-safety-and-preventing-witness-intimidation-justice-system>> accessed 30 November 2020.

31. Counter Trafficking in Persons Act Section 19 Part IV.

the inter-ministerial Committee charged with the mandate of coordinating counter-trafficking in persons efforts in Kenya, is yet to be constituted since the passing of the law in 2010. Lastly, in the 2018 – 2019 fiscal year, the Government allocated a budgetary provision to the National Trust Fund for Victims of Human Trafficking.<sup>32</sup> Despite this, the fund has not been operationalized because there are no trustees to administer the fund on behalf of the victims.<sup>33</sup>

## Republic Versus Asif Amirai Alibhai Jetha, Unreported

The observations noted in this paper are based on the experience I gathered as a lawyer providing legal advisory services on different sex trafficking cases in Malawi, Uganda and Nigeria as well as my practice as a litigation lawyer in Kenya. The criminal case identified for purposes of this study involved a wealthy businessman charged with human and child trafficking of 12 Nepali women and girls into Mombasa, Kenya.<sup>34</sup> The prosecution alleged that the accused person, jointly with other actors in Asia, trafficked 12 women and girls to Kenya with the promise of jobs as dancers in an exclusive night club, where they were also exploited sexually. At the time of the victims' rescue, the investigators treated the victims as criminals and photos of the victims were splashed on the national daily newspaper in Kenya contrary to the provisions of the Counter-Trafficking in Persons Act.<sup>35</sup> The victims were also later detained at a police station for close to one week, without the benefit of a lawyer or the provision of counselling.

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32. Counter Trafficking in Persons Act Section 22 (1) establishes the Victims Fund.

33. Counter Trafficking in Persons Act Section 24 (1) establishes the Board of Trustees.

34. Republic versus Asif Amirai Alibhai Jetha Criminal Case Unreported. In this case, the alleged perpetrator trafficked 12 women and girls from Nepal into Kenya. The women and girls, all coming from poor backgrounds in Nepal were destined for Kenya with the promise of jobs as dancers in an exclusive club in Mombasa. Eventually, the girls were also exposed to sexual exploitation by the customers. The trafficker, who worked with others in India and Kenya, limited the girls' movements in Kenya and Tanzania and were only allowed to leave at the behest of the trafficker. He also purported to send the money to their families in Nepal, although the girls had no way of verifying this as they were not allowed to communicate with them.

35. Counter Trafficking in Persons Act Section 11 (3) provides for the confidentiality of victims of human trafficking



Due to the language barrier, evidence was not adequately obtained with a lot of crucial evidence lost in translation. An analysis of the witness statements also demonstrated the lack of clarity and understanding by the investigations officer of the manifestation of sex trafficking as none of the statements pointed to any form of exploitation, rather victims essentially spoke to their illegal presence in the country and little about their exploitation. However, one could easily identify the elements of sex trafficking based on the actions of the alleged trafficker and the victims. The case also illustrates how the lack of knowledge about the effective prosecution and coordination of counter-trafficking hampers the successful prosecution of human trafficking cases. Although the trafficking victims denied any involvement in prostitution, anecdotal evidence I obtained from the victims as well as Nepali aid workers pointed to their participation in prostitution.<sup>36</sup>

## Addressing sex trafficking in Kenya

Addressing the sex trafficking of women and girls requires a comprehensive approach involving a wide range of actors. Firstly, preventive measures to address the vulnerability that leads to exploitation is critical. As long as gender inequality and discrimination continue to persist, traffickers will always enslave women and girls for sexual exploitation. Eliminating these barriers is an essential step to advancing the rights of women and elevating their status within their communities.<sup>37</sup> Secondly, the courts have a significant role to play in the protection of victims of sex trafficking. Judicial officers require capacity building on the legal and policy frameworks as well as regarding the care and protection of victims of sex trafficking. More often, courts do not understand the psyche of victims of sex trafficking and their relationship with their perpetrators, which

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36. A Nepalese aid worker noted that, culturally, the Nepali girls would not admit to prostitution for fear of reprisal in their country. This is also complicated by the difficult position in which the trafficker has imposed on their freedom.

37. The CEDAW Committee has noted that “gender-based violence against women as being rooted in gender related factors, such as the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour.

often leads to these victims' continued violation.<sup>38</sup> Sex trafficking cases need to be finalized in time: victims need to be adequately informed of their role and scope of engagement and their concerns presented and considered.

Further, investigators and prosecutors need to be adequately trained on trauma management and support during rescue and trial processes. This is a glaring concern and is coupled with the fact that there exist no shelters for victims of sex trafficking in Kenya. Indeed, where victims are treated as criminals, it becomes challenging to guarantee their cooperation, and this leads to the acquittal of many traffickers in criminal cases.<sup>39</sup> This is further complicated by the fact that the Counter-Trafficking in Persons Act provides for fines in lieu of imprisonment for sex trafficking offences, fines that are not commensurate with other crimes such as rape.<sup>40</sup> There is also a need to provide a comprehensive witness protection programme for the prosecution of sex trafficking cases. This would include increased budgetary allocation to the victims fund, provision of safe shelters, trauma support and counselling, reintegration or resettlement as well as free legal aid in a language that the victims understand. For this to happen, the government must also operationalize the Counter-Trafficking Advisory Committee as well as the National Trust Fund for Victims of Human Trafficking as these are the main vehicles for the mobilization of funds and other activities aimed at caring for and protecting victims of sex trafficking.

## Conclusion

Through an analysis of a criminal case involving Nepali victims of sex trafficking discussed in the preceding section, this paper delves into the role of the law enforcement in protecting victims, from criminal investigations to court

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38. In 2019 in the case of sex trafficking in Malawi, the Court granted bail to the accused person, an alleged trafficker, after the victim indicated that she was the accused persons wife. In this case, it is possible that the foreign victim trafficking felt isolated after the accused person was taken into custody or that she was afraid of reprisal if she testified against the trafficker.

39. Warpinski Sarah "'Know Your Victim: A Key to Prosecuting Human Trafficking Offenses' <<https://digitalcommons.law.msu.edu/king/222/>> accessed 11 October 2020.

40. Article 7, 8 and 9 of the Counter Trafficking in Persons Act No. 8 of 2010.

hearings and finally the need to provide comprehensive support (including food, shelter and psychological support in the form of counselling). From the preceding analysis, although the Counter-Trafficking in Persons Act offers a comprehensive approach for victims of sex trafficking protection, there are no established institutional mechanisms to realize those provisions. Consequently, there is a need for a holistic approach involving a partnership between different Government and non-governmental organizations each working towards the prevention, protection and prosecution to address sex trafficking in Kenya. An analysis of the Nepali case as well as the recommendations provided in this paper will provide an informed understanding to legal professionals, NGO and justice sector actors towards an informed approach to addressing sex trafficking in Kenya.

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'Trafficking in Persons Report - United States Department of State' <<https://www.state.gov/trafficking-in-persons-report/>> accessed 11 October 2020

'Trafficking in Thailand and Their Impacts on Women and Children from Burma' <<http://thailawforum.com/articles/Trafficking-in-Thailand%20.html>> accessed 11 October 2020

'Training9chapter15en.Pdf' <<https://www.un.org/ruleoflaw/files/training9chapter15en.pdf>> accessed 13 September 2020

Watson J and Silkstone C, 'Human Trafficking as a Form of Gender-Based Violence: Protecting the Victim' [2006] Agenda: Empowering Women for Gender Equity 110 <<http://www.jstor.org/stable/4066741>> accessed 11 October 2020

'Wcms\_494314.Pdf' <[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-suva/documents/publication/wcms\\_494314.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-suva/documents/publication/wcms_494314.pdf)> accessed 13 September 2020

## Legal Statutes

1. Constitution of Kenya, 2010
2. Counter Trafficking in Persons Act No. 8 of 2010
3. Evidence Act Cap 80 Laws of Kenya
4. Penal Code Cap 63 Laws of Kenya

## Chapter 12

# An Appraisal of the Legal Framework on Sexual Harassment at the Place of Work and Schools in Cameroon

Gladys Fri Mbuya

### Introduction

Non-discrimination, equal opportunity and treatment are essential human rights fundamental for social justice and sustainable development. Yet for many women and girls in Cameroon, sexual harassment and gender discrimination at work and in school continue to impose barriers to full participation in the labor force and education, contributing negatively to their economic empowerment. Sexual harassment is a discriminatory practice that runs counter to the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) and other human right treaties. It violates women's human rights, impedes gender equality and inhibits women's ability to realize their full potential. Sexual harassment is defined as "any unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behavior of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment..."<sup>1</sup> Discrimination is defined "as any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin,

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1. Secretary-General's bulletin: Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, United Nations, 11 February 2008, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No8/238/36/PDF/No823836.pdf?OpenElement> (accessed 11 November 2020)

sexual orientation.... Discrimination... may manifest itself through harassment or abuse of authority.”<sup>2</sup>

To ensure that women and girls realize their rights, and to achieve the Sustainable Development Goals (SDGs) which are the blueprint to achieve a better and more sustainable future for all, states must put an end to sexual harassment,<sup>3</sup> Goal 1 of the SDGs calls on all nations to “end poverty in all its forms everywhere” by the year 2030.<sup>4</sup> Sexual harassment stalls progress for most women and girls thereby undermining their ability to contribute to the achievement SDG 1. Goal 5 of the SDGs is to “achieve gender equality and empower all women and girls.”<sup>5</sup> This goal too cannot be achieved if sexual harassment is not eradicated.

This paper aims to show gaps in the domestic laws in Cameroon which make the country lacking in the fulfillment of its obligations under the Maputo Protocol and impedes women and girls’ ability to realize their full potential. The paper seeks to analyze the extent to which the existing legal framework is inadequate for the protection and prevention of sexual harassment in Cameroon and argues that Cameroon needs to make adequate provision in its laws for the protection of women and girls. The paper will highlight how Cameroon’s failure to translate its obligations under the Maputo Protocol into action facilitates discrimination against women and girls, especially in the area of sexual harassment at the workplace and in schools. It will highlight the fact that strategic litigation which could be used to promote human rights in Cameroon is often met with challenges. The paper will discuss provisions of the Maputo Protocol on sexual harassment, discrimination and Cameroon’s obligations under the protocol. The Paper will then offer recommendations on policy and legal measures necessary to stamp out sexual harassment.

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2. Secretary-General’s bulletin (citation 1 above)

3. Sustainable Development Goals, United Nations, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 11 November 2020)

4. Sustainable Development Goals (citation 3 above)

5. Sustainable Development Goals (citation 3 above)

Cameroon is a state party to the Maputo Protocol, having deposited its instrument of ratification on 17 August 2015.<sup>6</sup> Cameroon ratified the Maputo Protocol with a reservation outlining that its acceptance of the protocol was not an endorsement, encouragement or promotion of homosexuality, non-therapeutic abortion, genital mutilation or practices that were inconsistent with African ethical and moral values.<sup>7</sup> Cameroon is equally a state party to similar continental and international treaties guaranteeing women equality with men. As a state party to these treaties and the Maputo Protocol, Cameroon has signaled its commitment to combat all forms of discrimination against women through appropriate legislative, institutional and other measures and ensure these measures are implemented. This is further stressed under Article 2 (1) (c) of the Maputo protocol which specifically enjoins states parties to integrate gender perspectives in their policy decisions, legislation, development plans and programs.

Despite ratifying the Maputo Protocol, Cameroon is yet to initiate the reforms necessary to bring its national laws in conformity with the treaty. In her presentation on the Status of Implementation of the Maputo Protocol at the 60<sup>th</sup> Session of the Commission on the Status of Women (CSW) the then Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor argued that the “lack of real political will” was the main reason why many countries, including Cameroon, had ratified but had not yet implemented the Maputo Protocol.<sup>8</sup>

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6. Cameroon Ratifies the Protocol, African Court of Human and Peoples' Rights, 1 September 2020, <http://www.african-court.org/pt/index.php/news/press-releases/item/41-cameroon-becomes-29th-au-member-state-to-ratify-protocol-on-establishment-of-the-african-court> (accessed 11 November 2020)

7. Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 18 March 2016, <https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed 11 November 2020)

8. Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (citation 7 above)



## Sexual Harassment in Cameroon

There is no readily available data on sexual harassment in Cameroon, but findings through complaints received and interviews indicate that sexual harassment occurs daily. This part of the paper provides some reasons why sexual harassment continues to occur, its consequences and why it is important to eradicate it.

The author could not find readily available documentation on the prevalence of sexual harassment at the workplace or schools in Cameroon. However, complaints received in the International Federation of Women Lawyers (FIDA Cameroon) office from women and girls indicate that sexual harassment is rife in the country. FIDA Cameroon received information that students of one university were allegedly being sexually harassed by a lecturer and that the Vice Chancellor of the university had the written complaints from some students on his desk, information that prompted FIDA Cameroon to issue an open letter to the Vice Chancellor demanding to know why he had not opened an investigation into the matter. In a newspaper interview on the subject, the Vice Chancellor admitted receiving such complaints but said he had not yet opened investigations because the school was closed due to restrictions instituted at the start of the COVID-19 pandemic.<sup>9</sup> FIDA Cameroon looked into some of the complainants who confirmed the fact that the accused lecturer had a history of demanding sex in exchange of grades from almost all female students in his class. Attempts by FIDA Cameroon to have these complaints investigated and prosecuted was met with resistance from the complainants who were afraid of retaliation from the accused lecturer.

This one instance of sexual harassment goes to show the challenges that human rights defenders and victims face when trying to seek justice. Additionally, the case shows the institutional forces at play in shielding perpetrators of sexual violence from any form of accountability, putting victims and other students at risk of even further abuse. Other institutional factors include lack of sexual harassment policies, policies that would provide for mechanisms for women and girls to report instances of sexual harassment in the workplace or at school.

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9. See the Vice Chancellor of University of Buea's interview on allegations of sexual harassment in his university published in the Sun Newspaper of Monday, May 18, 2020 at page 10.

Culturally, sexual violence is still viewed as a taboo topic, with most of the stigma directed at female victims of sexual violence. Thus, most survivors of sexual harassment remain silent about their experience out of the fear of retaliation, shame or lack of awareness about what options exist to protect their rights. The same lack of awareness about what constitutes sexual harassment and what access to justice for victims and survivors of sexual violence looks like can be observed in the justice system, with police officers, prosecutors and judicial officials unable or unwilling to carry out justice on behalf of victims and survivors. The criminal justice system is particularly harsh on victims and survivors of sexual violence, who are required to provide evidence such as DNA and other forensic evidence, as well as corroborating evidence, in order to sustain a successful case. These high standards, which are in many cases higher than what is required to sustain a successful prosecution of a crime in other instances, discourages victims and survivors of sexual harassment to report the crime in the first place, let alone work with police investigators, prosecutors and judges in securing justice.

The relative economic disenfranchisement between men and women also contributes to how women and girls navigate their own experiences of sexual harassment. As sexual harassment in the workplace and in school involves male perpetrators who are in a more powerful economic position than their female victims, many women may simply decide to tolerate sexual harassment or find ways of avoiding perpetrators as much as they can, in order to be able to keep their jobs or attend school.

The institutional, cultural and economic factors outlined in the foregoing are also underscored by the fact that the Cameroonian legal regime on sexual harassment provides only for a broad definition of sexual harassment which restricts what is criminalized to the workplace and in schools. Such a broad definition may in certain instances not take into consideration the fact that sexual harassment occurs in diverse settings.

The consequences of sexual harassment range from economic, emotional, psychological, and physical. These are not only felt directly by the victims but by other persons closely associated with the victims as well, particularly those who work in a place where sexual harassment is commonplace. Victims of sexual harassment suffer psychological effects, including anxiety, depression, headaches, sleep disorders, weight loss or gain, nausea, lowered self-esteem

and sexual dysfunction.<sup>10</sup> They experience job loss, decreased morale, decreased job satisfaction and irreparable damage to interpersonal relationships at work.<sup>11</sup> In the higher education setting, student victims of sexual harassment may feel pressured to drop a class, change their major or minor, and experience physical and psychological distress. Overall, sexual harassment causes a tense and unproductive working and learning environment.<sup>12</sup>

Separate and apart from school settings, harassed women in some workplaces risk losing the chance for a promotion and other opportunities to advance in their career. Sexual harassment also inhibits women's ability to assert themselves within the workplace and reinforces stereotypes of women employees as sex objects.<sup>13</sup> Sexual harassment makes the working condition and environment hostile and unpleasant putting indirect pressure on women to leave their jobs. Sometimes, the sexually harassed employee is so traumatized by the harassment that she suffers serious emotional and physical consequences and very often, becomes unable to perform her job properly.<sup>14</sup>

Sexual harassment constitutes a significant barrier to the economic empowerment of women. Employees who resist sexual advances in the office may suffer a loss of wages which usually entails loss of other job benefits, such as pension contributions, medical benefits, overtime pay, bonuses, and leave pay.<sup>15</sup>

Sometimes a company responds to an employee's complaint of sexual harassment by transferring that person somewhere else in the company and leaving the harasser unpunished or by transferring the harasser and putting

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10. McLaughlin, H., Uggen, C., & Blackstone, A. (2017). The Economic and Career Effects of Sexual Harassment on Working Women. *Gender & Society*, 31(3), 333–358. <https://doi.org/10.1177/0891243217704631>

11. McLaughlin, et al. (citation 12 above)

12. Fredrik Bondestam & Maja Lundqvist (2020) Sexual harassment in higher education – a systematic review, *European Journal of Higher Education*, 10:4, 397-419, DOI: 10.1080/21568235.2020.1729833

13. McLaughlin, et al. (citation 12 above)

14. McLaughlin, et al. (citation 12 above)

15. McLaughlin, et al. (citation 12 above)

other groups at risk. This forced reassignment of a victim of sexual harassment is another form of job-connected injury, and it may be compounded if it results in a loss of pay or benefits or reduced opportunities for advancement.<sup>16</sup>

The empowerment of women is critical to the strength of any nation. Ensuring women and girls have equal opportunities at the workplace and in schools matters for individual women, families, and entire economies. When women excel at work, they improve the lives of their families and community. Ending sexual harassment will ensure that the rights of women are promoted, protected and realized.

## Sexual Harassment and the Maputo Protocol

The Maputo Protocol has a range of provisions aimed at addressing, among other challenges, the entrenchment of sexual harassment in many African societies. Although Article 13 (c) specifically addresses itself to sexual harassment in the workplace, obligating states to take measures against the practice, other provisions of the protocol create a viable legal framework for the prohibition of all forms of sexual harassment, wherever they happen. The first is its prohibition of discrimination under Article 1 (f). This provision, which prohibits actions and omissions aimed at destroying or compromising “the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life” clearly prohibits sexual harassment which both causes and is an effect of sexual harassment.

Although Article 1 (f) of the Maputo Protocol outlaws discrimination in all aspects of life and can be construed to outlaw the occurrence of sexual harassment in the same vein, the provision is at odds with the limited way in which the Penal Code of Cameroon shows a deficiency in its definition which can be construed as limiting discrimination only to cases of employment.

The Maputo Protocol defines violence against women in Article 1 (j) to include “...sexual, psychological, and economic harm.” Considering the elements that constitute it, sexual harassment and its consequences fall squarely within this

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16. McLaughlin, et al. (citation 12 above)

definition. Under Article 2, the Maputo Protocol obligates states to enact and implement appropriate laws and measures to combat discrimination against women and to guarantee equality between women and men. In addition, the Maputo Protocol obligates states parties under Article 3 (4) to adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence. The obligation of the state party to enact laws and adopt measures to protect and prevent violence is reiterated in Articles 4(2) (a) and (b) of the protocol.

Cameroon can combat sexual harassment by fully domesticating the Maputo Protocol. Domesticating the protocol in this case would involve drafting a raft of laws aimed at aligning statute with the treaty's provisions. The Maputo Protocol also provides legal and advocacy pathways for civil society organizations to push for legal reforms at the national level. One of the main ways in which this can be achieved is through strategic litigation.

The state of Cameroon in its 1<sup>st</sup> Report to the African Commission relating to the Maputo Protocol, in trying to show that judges in Cameroon have a mastery of the Maputo Protocol, cited just one case in which the treaty was referred to in a judgment.<sup>17</sup> The unreported case of *The People and "Crédit du Sahel SA" (Mora Branch) vs Mrs Apsatou Salki Bouba Bebe* saw a judge release a pregnant woman who had been detained, by evoking Articles 14 and 24 of the Maputo Protocol which oblige states parties to protect pregnant women and guarantee women's right to health respectively. No mention of any sexual harassment case was made in the report.

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17. Single Report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1<sup>st</sup> Reports relating to the Maputo Protocol and the Kampala Convention <https://www.achpr.org/public/Document/file/English/Cameroon%204th-6th%20Periodic%20Report,%202015-2019-ENG.pdf> (accessed 11 November 2020)

## The Cameroon Legal System

Cameroon has a bi-jural legal system: received French Laws (civil law) enacted before 1<sup>st</sup> January 1960 are applicable in the French- speaking part of Cameroon, whilst received English Laws (common law) in force in England on the 1<sup>st</sup> of January 1960, are applicable in the English- speaking part of the country. Cameroon has a strong centralized system of government dominated by the President.<sup>18</sup> The President has the constitutional powers to appoint, dismiss, promote, transfer and discipline judicial officers, especially judges and prosecutors.<sup>19</sup> The president's vast judicial powers have led to political interference and limiting the independence of the judiciary and also the effectiveness of the separation of powers. There is a bicameral Parliament, the main legislative authority, made up of the National Assembly and the Senate.<sup>20</sup> However, the executive arm of government also has the constitutional power to issue regulations to complement parliamentary legislation under Article 27 of the Constitution. Additionally, under Article 28 (1), Parliament may, “empower the President of the Republic to legislate by way of ordinance for a limited period and for given purposes.”

The Constitution of Cameroon provides a legal framework for the direct application of the provisions of the Maputo Protocol at the national level. Article 45 of the Constitution provides that “duly approved or ratified treaties and international agreements shall, following their promulgation, override national laws.” Although Article 43 states that treaties relating to the powers reserved for parliament (in this case, the “fundamental rights, guarantees and obligations of the citizen”) must be authorized by parliament, the Maputo Protocol was ratified and entered into by the executive branch of government and therefore falls squarely in the purview of Article 45.

The constitutional framework of Cameroon is a radical departure from that of other countries, where the majority of treaties that the executive branch

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18. Fombad, Charles M, Update: Researching Cameroonian Law, Hauser Global Law School Program, [https://www.nyulawglobal.org/globalex/Cameroon1.html#\\_The\\_Cameroon\\_Legal](https://www.nyulawglobal.org/globalex/Cameroon1.html#_The_Cameroon_Legal) (accessed 11 November 2020)

19. Fombad, Update: Researching Cameroonian Law (note 34 above)

20. Fombad, Update: Researching Cameroonian Law (note 34 above)

enters into must undergo a domestic ratification process in parliament before they become applicable nationally. Additionally, the domestication and implementation of human rights treaties, as has been the experience of countries such as Kenya and others, has been hotly contested through litigation, whereby the courts are invited to interpret human rights treaties that a country has entered into and then give orders to the executive branch of government to interpret them.<sup>21</sup> Indeed, in such jurisdictions, international treaty law is interpreted in concert with constitutional provisions, statute and case law and may be considered lower in the hierarchy of sources of interpretation, if it is considered at all.<sup>22</sup>

## Cameroon's Domestic Laws on Sexual Harassment

As the supreme law of the land, the Constitution of Cameroon provides the principle legal basis for other legal efforts aimed at combatting sexual harassment. The constitution does this by guaranteeing equal rights and obligations under Section 1 of its Preamble. Article 25 of the Constitution guarantees all citizens of either sex the rights and freedoms in the Preamble.

Section 302-1 of the Penal Code of Cameroon prohibits sexual harassment. This provision defines sexual harassment as harassment of another “using order, threats, constraint or pressure in order to obtain sexual favors.” A penalty of 6 months to a year of incarceration or a fine of 100,000 Central African Francs (about 200 US Dollars) upon conviction is reserved for cases where both the victim and the perpetrator are adults. In cases where the victim is a minor, imprisonment upon conviction is set at between 1 to 3 years and 3 to 5 years where the offender is in charge of the education of the victim.

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21. J.B. Ojwang and J.A. Otieno-Odek (1988). The Judiciary in Sensitive Areas of Public Law: Emerging Approaches to Human Rights Litigation in Kenya. *Netherlands International Law Review*, 35, pp 29-52 doi:10.1017/S0165070X00007464

22. Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 *Hastings L.J.* 185 (1993). Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol44/iss2/1](https://repository.uchastings.edu/hastings_law_journal/vol44/iss2/1)

A cursory look at the above makes it clear that the Penal Code description of what behavior can constitute sexual harassment is narrow and further gives the wrong impression that sexual harassment can be perpetrated only by a person higher in rank than the victim. Additionally, these provisions address themselves in criminal law and although they convey the seriousness of sexual harassment by criminalizing it, criminal law in this regard cannot fully address the systematized nature of sexual harassment, including its roots in rape culture, institutional practices, and its long-term effects on victims and survivors. Indeed, the provision does not address itself to instances in which victims of sexual harassment experience consequences for rebuffing this harassment. Section 242 of the Penal Code, which criminalizes wrongful dismissal of a person on protected grounds (including on grounds of sex), would be extremely difficult to apply in the prosecution of a case of sexual harassment. Additionally, the provision does not apply to cases where victims are harassed in schools. This provision satisfies Cameroon's obligation under Article 13 (c) of the Maputo Protocol but the law reform is inadequate.

## Challenges In Strategic Litigation In Cameroon;

As discussed in the foregoing, Cameroonian constitutional provisions provide for a more direct way for interpretation, allowing international treaties that the state has entered into to supersede statute. In the case of sexual harassment, where no litigation has been brought before a national court in Cameroon, the provisions of the Maputo Protocol outlined above are even more persuasive, providing for an avenue for the introduction and ultimate interpretation, of some of the best practices when it comes to combatting sexual harassment. Litigators can conceivably bring a test case on sexual harassment, as well as a myriad of human rights issues, and argue them from the basis of constitutional and treaty law alone, an unprecedented opportunity for strategic litigation.

In practice, however, lawyers have not taken the approach outlined above and rarely make reference to ratified treaties in litigation. In turn, the courts rarely refer to international human rights treaty provisions in their judgments. In certain instances, courts have shown hostility to litigators who seek to use strategic litigation as a law reform tool: cases filed by public interest litigators



are often dismissed on the grounds that the litigator lacks the locus standi. In other instances, the court will not list the matter for hearing. The author of this paper abandoned a public interest case which she filed challenging the constitutionality of the law on marriage age in Cameroon out of frustration after trying in vain for over four years to get it listed for hearing. In another petition challenging the constitutionality of the 194 days internet shutdown which occurred in Cameroon in the year 2017, the Constitutional Council ruled that the action was inadmissible for lack of locus standi.<sup>23</sup> In another suit challenging discriminatory admission criteria put in place by the University of Buea, the judge dismissed the case on grounds that the plaintiff lacked locus standi since he was not a student in the said university.<sup>24</sup>

Clearly, the Cameroonian legal system is a mixed bag when it comes to opportunities and challenges for strategic litigation in the country, with certain constitutional provisions providing an avenue for important litigation that could improve the lives of many women and girls, but with the issue of locus standi blocking this path.

## Conclusion

Despite ratifying the Maputo Protocol, Cameroon is yet to actualize the rights contained in the treaty. The state of Cameroon is yet to meet up fully with its obligations to guarantee to its female citizens' equal protection of the law. There is lack of jurisprudence in Cameroon on sexual harassment, although constitutional and treaty law avenues provide for some of the most straightforward avenues for legal reforms through judicial interpretation of any country. The attitude of the courts towards public interest cases is unfriendly, however, with litigators having to contend with the question of locus standi whenever they bring strategic litigation cases. There is a clear need to address

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23. Petition No 001/G/SCT/CC/2018, between Global Concerns Cameroon VS. the ministry of telecommunication, Cameroon telecommunications and the state of Cameroon. (unreported)

24. No HCF/02/OS/04-05; Barrister Ajong Stanislaus Anu vs The University of Buea (Unreported)

the question of locus standi in the Cameroonian legal system once and for all, in line with reforms seen in other countries. Unless the state of Cameroon initiates the reforms necessary to harmonize national legislation with the provisions of the Maputo Protocol – including by more clearly defining sexual harassment, mandating sexual harassment policies in any area that women and girls may be at risk, and working to change cultural concepts that encourage or trivialize sexual harassment – women in Cameroon will continue experiencing sexual harassment. The government, policy makers, NGOs and women's human rights advocates should work together to raise awareness about the harms caused by sexual harassment, collect data on the prevalence of sexual harassment in order to inform policy, provide avenues for victims to report cases of harassment and ensure that such cases are investigated and prosecuted to the fullest extent by competent justice sector actors, as well as provide support to victims and survivors of sexual violence.

## Chapter 13

# Examining the Role of the South Sudan Judiciary in Advancing the Rights of Women and Girls Enshrined in Article 6 (b) of the Maputo Protocol

Josephine Chandiru Drama

### Executive Summary

South Sudan is a country practically guided by a cultural autonomy where access to justice and rule of law is the least service provided to the citizens. The country has a plural justice system comprised of statutory courts presided over by some well-trained judges and trained legal personnel and customary courts presided over by chiefs and elders. It has signed but not ratified the Maputo Protocol and hence there is no citation of the Protocol in the judgments of national courts to date. There is no national law which provides for the minimum age of marriage. Article 17 (4) of the Transitional Constitution of 2011 and the interpretation Section 5 of the Child Act of 2008 only define a child as a human being under the age of 18 years. The judiciary has been silent on the question of the minimum age of marriage in South Sudan. Despite having ratified the Convention on the Rights of the Child (CRC) and CEDAW, which according to Article 9(3) of the Transitional Constitution, such treaties shall be an integral part of the Bill of Rights in the Constitution once applied, South Sudan has not applied these laws in any courts or judicial systems. This laxity in the enforcement of the available laws has exacerbated gender inequality which is the root cause of child marriages in both stable and crisis contexts.<sup>1</sup> In order for the national judiciary under its statutory court to advance women's rights, it ought to uphold the principle of non-discrimination against women on the basis of sex and gender. Article 6 of Maputo Protocol provides for one such non-discriminatory clause as it regards women and men as equal partners

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1. South Sudan, Girls Not Brides (undated), <https://www.girlsnotbrides.org/child-marriage/south-sudan/> (accessed 11 November 2020)

in marriage. As a remedy, there is need for the government of South Sudan to urgently ratify Maputo Protocol; clearly fix the minimum age of marriage to be 18 years and above; pay particular attention to the national judiciary through proper facilitation and monitoring of judicial work, especially as it pertains women's rights cases; bolster the independence of the judiciary; and work with CSOs to continue to push for protection of women's rights.

## Introduction

South Sudan is a very unique and the youngest country in Africa having attained its independence in 2011. The country has 5 Vice Presidents, one of whom is a female. It has over 64 tribes, with a cultural autonomy where 'access to justice and rule of law is the least service provided to the citizens. The country has a plural justice system comprised of statutory courts presided over by judges and trained legal personnel and customary courts presided over by chiefs and elders.<sup>2</sup> Whereas a statutory court may refer a case involving a violation of a woman's rights to the customary courts, these customary courts are known for their inability to protect women and girls due to their patriarchal interpretation of customary laws.

South Sudanese and international human rights organisations have investigated various aspects of the justice system over the years identifying systemic weaknesses and specific abuses; including inconsistencies within the system.<sup>3</sup> The numerous gaps that the South Sudan judiciary faces such as the unresolved conflict between statutory and customary law has led to lots of laxity of judicial officers in handling women's rights cases. If the judiciary continues to neglect the performance of its key role of protecting rights under the law, their actions amount to violence against women and girls.

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2. See, Cherry Leonardi et al. (2010) Local Justice in Southern Sudan, United States Institute of Peace (USIP), available at: <http://www.usip.org/publications/local-justice-in-south-ern-sudan> (accessed 11 November 2020) See also, David K. Deng (2013) Challenges of Accountability: An assessment of dispute resolution processes in rural South Sudan, SSSL and Pact, available at: <https://www.pactworld.org/challenges%20of%20accountability> (accessed 11 November 2020)

3. Justice in Practice: South Sudan, Justice Africa [https://blogs.lse.ac.uk/jsrp/files/2015/05/FINAL\\_JA-SouthSudanSpring2015.pdf](https://blogs.lse.ac.uk/jsrp/files/2015/05/FINAL_JA-SouthSudanSpring2015.pdf) (accessed 11 November 2020)

This paper will thus examine the role the national judiciary ought to play upon full ratification of the Protocol to advance women's and girls' rights in South Sudan. In particular, the paper seeks to reflect on the role the national judiciary ought to play in advancing the right to equality in marriage through the prohibition of child and forced marriage as enshrined in Article 6(b) of the Maputo Protocol. The paper will conclude with recommendations on how judicial officers, law makers, litigators, civil society and the larger public can work with the South Sudan judiciary with a view of enhancing its ability to guarantee justice for women and girls.

## Discriminatory treatment of women in the context of marriage by the plural justice system

Rapid reforms have advanced and entrenched South Sudan's pluralistic legal system, an environment that presents numerous challenges for legal practitioners and citizens.<sup>4</sup> The South Sudan plural justice system consists of statutory courts presided over by judges and trained legal personnel and customary courts presided over by chiefs and elders. Whereas statutory courts are mainly accessible only in urban areas, customary courts are found at every level of local government in South Sudan.<sup>5</sup> South Sudan's justice system remains weak, with both the customary and civil justice systems handling cases of GBV. These systems in essence have failed to protect women and girls because 'the customary courts are far from appreciating the character and degree of women's rights.'<sup>6</sup> And yet customary courts continue to be valued as crucial to the delivery of justice in South Sudan.

Among other things, the customary courts emphasize reconciliation and community harmony intended to preserve the family unit and community

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4. Justice in Practice: South Sudan (note 3 above)

5. Rens Willems & Deng David, (2015). Justice and Conflict in South Sudan Observations from a pilot survey. Briefing paper. Intersections of Truth, Justice and Reconciliation in South Sudan.

6. Mediel Hove, Enock Ndawana, (2017), Women's Rights in Jeopardy: The Case of War-

relations at the expense of protection mechanisms designed to redress the violation of women's rights. Male tribal chiefs with the power to interpret customary laws are more likely to consider the rights of men to the detriment of women's rights.<sup>7</sup> The Transitional Constitution attempts to transform this position by defending the rights of women in theory, but in practice, cultural practices that undermine women's rights remain the norm.

Each of South Sudan's 64 tribes has its own customary laws and traditions, especially in respect to marriage and other forms of social relationships. Child marriages are widely practiced in South Sudan with the UNICEF 2020 Campaign launched to end Child marriage by 2030, the current data indicates that 52% of girls in South Sudan are married off before their 18<sup>th</sup> birthday.<sup>8</sup> The prevalence of child marriages is very high among ethnic communities in South Sudan. This is because many communities regard marriage as an institution of critical importance, which—perhaps more than any other aspect of life—shapes a woman's experience, status, and security. In marital disputes, customary courts place the emphasis on preserving marriages, even if doing so is to the detriment of a woman's safety and well-being. In most cases of child marriages in South Sudan, the bride is far much younger than the groom. This reinforces the patriarchal power structures at the expense of women and girls. Under all of South Sudan's customary law in both written and unwritten codes, marriage involves the payment of a bride price by a man and his family to a woman's family. The culture of bride price is thus the driving force of child marriages with the primary intention of acquiring wealth for the family. Chiefs often overstress the importance of bride price and a husband's resulting rights over his wife upon paying it. Marriage is thus the focus in this conversation that needs to be understood in order to advance women and girl's rights.

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Torn South Sudan.

7. Gender and Conflict Note: South Sudan (2012) <https://land.igad.int/index.php/documents-1/countries/south-sudan/gender-5/984-gender-and-conflict-in-south-sudan-2012/file> (accessed 11 November 2020)

8. South Sudan launches campaign against child marriage, AA, (6 October 2020) <https://www.aa.com.tr/en/africa/south-sudan-launches-campaign-against-child-marriage/1996772> (accessed 11 November 2020)

## The laxity of national judiciaries in advancing the rights of women and girls enshrined in Article 6 (b) of the Maputo Protocol

The role of the judiciary is generally to interpret, defend and apply the law the way it is. However, the Judiciary in South Sudan has been playing a minimal role in advancing the rights of women and girls. The statutory court system has very few civil law courts and structures across the country and few citizens have genuine familiarity and understanding of the civil law.<sup>9</sup> Many of the cases that are taken to the civil court by affected women are referred to the customary chiefs by the judge. The same phenomenon is observed across the justice system, with police officers reluctant to record or investigate cases of GBV.<sup>10</sup> A clear test of lack of judicial role is found in Article 15 of the Transitional Constitution on the right to marry and found a family. It states that “every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry.”

To begin with, the protection afforded to women under this Constitution has been taken away by the very law. The age of marriage is not stipulated in any law in South Sudan and the provision on “respective family laws” literally means in accordance with each of the cultural marriage practices of more than the 64 tribes. Customary law continues to perpetrate gender inequalities and yet remains the dominant body of law in most parts of the country and is one of the sources of legislation.<sup>11</sup> The constitutional requirement of the free and full consent of the man and woman intending to marry has been violated by the practice of child and forced marriage. This is contrary to Articles 16 (4) of CEDAW and 6(b) of the Maputo Protocol prescribing 18 years as the minimum age for marriage. And these treaties according to Article 9(3) of the Transitional

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9. Stern, O. (2011). “This is how marriage happens sometimes”: Women and marriage in South Sudan. In F. Bubenzer & O. Stern (Eds.), *Hope, pain & patience: The lives of women in South Sudan* (pp. 1-23). Johannesburg, South Africa: Jacana Media.

10. M. Hove and E. Ndawana, *Women’s Rights in Jeopardy* (note 6 above)

11. Article 5(5), Transitional Constitution, 2011.

Constitution when ratified shall be an integral part of the Bill of Rights in the Constitution. “Marriageable age” is thus not defined by any of the laws of South Sudan and the judiciary is silent in setting the minimum age of marriage through case law. This makes women and girls vulnerable to child marriage. Stating consistently that women deserve to be safe and that perpetrators will be subject to sanctions would be a powerful role for the legal system to play.<sup>12</sup> In order for the national judiciary under its statutory court to advance women’s rights, it ought to uphold the principle of non-discrimination against women on the basis of sex and gender.

The continuous search for justice by women and girls who are willing to bring cases forward is the testament of their bravery. Where the law and the judiciary fail to act as a deterrent to would be perpetrators of violence against women and girls makes the victims voiceless, powerless and second-class citizens. For example, the Penal Code Act of South Sudan (2008) legalises marital rape, yet it is common knowledge that women and girls are the majority of victims being affected by such a provision.<sup>13</sup>

In South Sudan, Section 247(2) of the Penal Code Act, 2008 regards such marriages of children as rape, but the judiciary continues to condone child marriages by referring to them as sensitive and hence, the cases are referred to the customary courts or to be dealt with at family level. To date, only one child marriage case has been resolved in the history of the South Sudan judiciary, in the case of **Regina Lauren Joseph v Marino Losike Lochoto & 2 Others**.<sup>14</sup> The victim in this case was a 16 year old girl (represented by a guardian) who was married off to the third accused person in the case, in a “marriage” that was overseen by the first and second accused persons in the case. The first accused person was the father of the victim. The second accused person in the case was the uncle of the victim and third accused person in the case was the proposed “husband” of the

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12. Kelly, Liz (1999), *Domestic Violence Matters: an evaluation of a development project*, Research Study 193, Home Office, London.

13. Article 247(3) of the Penal Code Act, 2008. To avoid the lacuna in the law, South Sudan has continued to use the laws enacted after the signing of the Comprehensive Peace Agreement, 2005 that ushered the country into Southern Sudan.

14. Criminal Case No. 781/2019 High Court Sitting at Kapoeta State (then).



victim. In December 2018, in Paringa village, Kapoeta State, South Sudan, the third accused person approached the first accused person to ask the hand of the victim in marriage. The first accused person then proceeded to inform the second accused person and other relatives about the intension of third accused person. In May 2019, the family of the first accused person and the third accused person organised a ceremony to negotiate for the bride price. It was on that day that the victim was informed by the first accused person about the intension to marry her off to the third accused person, a proposal which she immediately objected to. The two families agreed that the bride price would be 60 heads of cows, to be brought to the family of the victim during the rainy season. At the end of the traditional marriage ceremony, the victim was handed over as a wife to the third accused person by the first and second accused persons. The victim spent 2 days at the home of the third accused person and escaped on the third day. Thereafter she returned to Kapoeta town where she opened a case against the 3 accused persons. The first and second accused persons were charged with early and forced marriage under Section 23 of the Child Act and the third accused person was charged with rape under Section 247 of the Penal Code Act.

In its judgement, the court found the defendants guilty under the provisions outlined above but convicted them under a suspended sentence. The court also barred the first and second defendants from attempting to remarry the victim before she attained the age of 18 years, Lastly, the third defendant was granted permission to reclaim the bride price if it had already been paid.

## Challenges faced by the judiciary in advancing women's rights in South Sudan

The complexity of existing conflict between customary law and constitutional law in theory and practice underlies the everyday injustices that women face. The majority of cases in South Sudan, including murder and rape, are dealt with in the customary courts around the country with political and traditional elites influencing outcomes of cases.<sup>15</sup> Judicial authorities continue to refer women's

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15. Musila, Godfrey (2018) The Rule of Law and the Role of Customary Courts in Stabilizing South Sudan, Africa Center for Strategic Studies, <https://africacenter.org/spotlight/the-rule-of-law-and-the-role-of-customary-courts-in-stabilizing-south-sudan/> (accessed 11 November 2020)

rights cases to families for mediation, out of their own reluctance to deal with cases of this nature. For those cases involving sexual violence, the victims end up marrying their perpetrators with the support of both families. There is a significant body of literature that indicates women in these circumstances are likely to be re-victimized, intimidated, and abused by the men with whom they are in mediation.<sup>16</sup> South Sudan has not fully ratified the Maputo Protocol as the treaty is awaiting the signature of the President. To date, there is no family law regulating marriage, divorce and succession to property. The draft law has stalled before parliament since 2017.<sup>17</sup> There is a draft Anti-GBV Bill that is currently under review by the Ministry of Justice.<sup>18</sup> An SGBV Court in Juba established with support from the United Nations Development Programme (UNDP) to handle cases of violence against women has so far filed 259 SGBV cases but with no prosecution, a situation that is due to lack of resources to kickstart prosecutions as well as the fact that key staff such as investigating officers are yet to be recruited.<sup>19</sup> In addition to lack of resources for anti-SGBV law enforcement, many survivors face social pressures against reporting their experience of SGBV including fear of further violence by the perpetrator, their family, or the community and because of the harmful stigmas attached victims of sexual violence.

## Recommendations for Uplifting the Role of South Sudan Judiciary

Visible opportunities exist to accelerate the role of the judiciary in furthering the promotion of women's rights such as the signing of the Revitalised Agreement on the Resolution of Conflict in South Sudan (R-ARCISS) laying the basis for

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16. Krieger, Sarah (2002), Note: The Dangers of Mediation in Domestic Violence Cases, 8 *Cardozo Women's Law Journal*, 235.

17. Women's Security and the Law in South Sudan, Small Arms Survey, [https://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_3562.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3562.pdf) (accessed 11 November 2020)

18. The Anti-GBV Bill was drafted by UNFPA in collaboration with the Ministry of Gender, Child and Social Welfare and was presented to the National Parliament in late 2019.

19. According to information obtained from Focal Point of the Special Court for Gender-based Violence and Juvenile Cases in Juba on 10 July 2020.

peace and justice to flourish. The suggested recommendations should thus be viewed as part and parcel of the implementation of the peace process which is the current priority for the country.

There is an urgent need by the government of South Sudan to ratify the Maputo Protocol and thereafter ensure its domestication and implementation through the fast-tracking of the draft family law and Anti-GBV Bill. Both bills provide for the minimum age of marriage as 18 years. In the alternative, the judiciary should immediately set the minimum age of marriage to 18 years through case law without exception. This will remedy the conflict between statutory and customary in regard to age of marriage and reduce child marriage a great deal. Setting the minimum age of marriage to 18 years is a step in the right direction to reform the national laws and is in conformity with international standards. The full ratification of the Protocol is considered the government's commitment to protect and uphold women and girls' human rights which is in line with the Transitional Constitution.

The Government of South Sudan should re-invest in the training for judges and prosecutors on instruments that protect women's human rights. This training could be jointly conducted with civil society organisations (CSOs) as well as with judiciaries from other jurisdictions with fairly replicable judicial systems and a longer track record of using the justice system to promote the rights of women and girls. There is also a need for the government to develop clear procedural guidelines on civil and criminal procedures for officials to promote consistent and reliable service. These guidelines can also be bolstered by laws that explicitly bar the settling of certain crimes (such as rape and forced marriage) from being adjudicated by traditional courts. Ultimately, this form of capacity support and legal reforms must also be coupled with increased investment in the infrastructure and personnel of the judiciary, meaning that more judicial officials, prosecutors and law enforcement must be hired, and more courts must be built to serve all parts of the country.

The Judiciary should develop a culture of documentation of women's rights cases for students, academics and the general public to use. Documentation also helps to better understand whether and how the system is evolving and identify the various ways in which legal practitioners administer justice.<sup>20</sup> Cultivating the

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20. Justice in Practice: South Sudan (note 3 above)

culture of documentation is to appreciate the efforts so far made. It is an indicator of accountability to the public on what has or has not been done and how to build on the available efforts. The establishment of a case law reporting mechanism, which can be accessed on the internet as well as in regularly published law reports, would be a good start to these documentation efforts.

## Conclusion

Although South Sudan has not fully ratified the Maputo Protocol, the rights of women and girls under Article 6(b) of Maputo Protocol still needs to be fully recognised like their male counterparts while entering into marriages. When such rights seem far from being achieved, it is the role of the judiciary to step in to implement the law in letter and spirit and in a way that promotes the rights of women and girls as already articulated by the Transitional Constitution. When the judiciary fails to perform its key role of protecting rights under the law, especially for women and girls who come forward seeking legal remedy, this is violence against women and girls in and of itself. The forces of change that the government, judicial officers, litigators, civil society and the public need for uplifting the South Sudan judiciary should be with a view of enhancing its ability to guarantee justice for women and girls. The interventions intended must focus on whether women and girls are safer and whether perpetrators are held accountable. Measures of success may be more women accessing the statutory courts and customary courts less, reduced judicial bias, increased penalties for violence, records of cases are maintained, judiciary is more independent and less interfered with, and civil society actors are able to challenge existing laws, policies and practices through strategic litigation.

## Chapitre 14

# L'efficacité de l'utilisation des litiges pour la promotion et la réalisation des droits des femmes garantis par le Protocole de Maputo

Claire-Lise HENRY

### RESUME

Les Etats signataires du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Femmes encore appelé Protocole de Maputo, s'engagent et sont déterminés à assurer la promotion, la réalisation et la protection des droits des femmes afin de leur permettre de jouir pleinement de tous leurs droits humains.

Dans le respect des engagements contenus dans le Protocole de Maputo, il a été élaboré par l'Etat béninois les textes de loi suivants : la loi portant prévention et répression des violences faites aux femmes, la loi contre le harcèlement sexuel, la loi portant code des personnes et de la famille, la loi portant répression de la pratique des mutilations génitales féminines en République du Bénin, la loi relative à la santé sexuelle et à la reproduction, la loi portant code de l'enfant en république du Bénin. Ces lois prises en application des dispositions du Protocole de Maputo ratifié par le Bénin, ont rendu possible l'utilisation des litiges pour permettre aux femmes béninoises de bénéficier des droits consacrés dans le Protocole. Nous verrons à travers des exemples, comment les membres de l'Association des Femmes Avocates du Bénin utilisent les litiges comme moyen de promotion des droits de la femme.

Par ailleurs, les magistrats nationaux sont impliqués de plus en plus dans la promotion des droits des femmes et des filles. Des décisions sont rendues et sont parfois sévères contre les auteurs des violences faites aux filles.

Mais force est de constater que la peur des représailles comme la peur d'être répudiée par le mari auteur des violences, et de se voir rejetée par la belle famille,

surtout lorsque le mari fait l'objet de poursuites pénales et de condamnation à une peine d'emprisonnement, la peur des injures et humiliations de la part des membres de sa propre famille, continuent de réduire l'utilisation des litiges. C'est à ce niveau qu'il est recommandé aux associations de défense des droits des femmes de se substituer aux victimes pour engager des procédures judiciaires, en leur lieu et place. Il est recommandé aussi aux acteurs de la société civile d'utiliser les contentieux stratégiques pour permettre aux femmes et aux filles de bénéficier des dispositions relatives à la promotion et la protection des droits des femmes contenues dans le Protocole.

Si le litige est un moyen à utiliser pour bénéficier des avantages du Protocole de Maputo, des réticences à l'utilisation des litiges persistent et se traduisent par : la priorité donnée au règlement à l'amiable des affaires par les victimes elles-mêmes ou leurs parents, lorsqu'il s'agit des filles, le faible engagement de certains officiers de police judiciaire à mettre en œuvre les poursuites judiciaires, le manque de structure de prise en charge des victimes, qui sont quelques-uns des principaux facteurs qui contribuent à cet état de fait.

En Outre, il ne suffit pas d'élaborer des lois. Les Etats doivent prendre leurs responsabilités pour rendre efficace la promotion et la protection des droits des femmes et des filles en prenant des mesures nécessaires à l'exécution des décisions de justice prises en faveur des femmes ou filles victimes. Il faut aussi que nos Etats créent des structures d'accueil et de prise en charge des femmes et filles victimes de violence et/ou d'abus.

## INTRODUCTION

Pratiquement 52% de la population du Bénin est constitué de femmes. Le Bénin a adopté le Protocole de Maputo le 11 juillet 2003 et l'a ratifié le 28 janvier 2005. Mais pendant longtemps, cet important instrument juridique a été méconnu, mais réapproprié grâce aux actions de vulgarisation et de formation organisées par les organisations de la société civile telles que Equality Now à l'endroit des Avocats et des magistrats.

Pour que le Protocole de Maputo ne soit pas un instrument de plus et puisse répondre aux attentes, il est préconisé d'utiliser les litiges pour promouvoir et réaliser les droits des femmes aux fins de leur permettre de bénéficier des acquis

du Protocole relatif aux droits des femmes. Il est constaté, en effet que, malgré les multiples actions de sensibilisation pour faire connaître au public les droits des femmes, les comportements des hommes violents ne changent pas à l'égard de la couche vulnérable que sont les femmes et les filles. Les abus et violations augmentent de plus en plus. Pour y remédier, il faut faire intervenir la justice pour punir les auteurs des agressions.

Nous montrerons dans un premier chapitre comment l'utilisation des litiges peut contribuer à la promotion et à la défense des droits des femmes, en citant quelques affaires pour mettre en évidence, d'une part, que de nos jours, les femmes et les filles qui sont victimes de violences et d'abus sexuels savent désormais qu'elles peuvent saisir la justice contre les auteurs des agressions, même lorsque les mis en cause sont des parents proches à elles. Montrer d'autre part, que les magistrats, contrairement à un passé proche, prennent désormais des décisions qui condamnent les auteurs des violences et des violations des droits des femmes. Dans le second chapitre nous ferons ressortir les difficultés liées à l'utilisation des litiges et proposerons des solutions.

## LE LITIGE OU LE CONTENTIEUX STRATEGIQUE COMME OUTIL DE PROMOTION ET DE PROTECTION DES DROITS DES FEMMES

### LE LITIGE STRATEGIQUE OU CONTENTIEUX STRATEGIQUE

Le contentieux est l'ensemble des litiges (contestations en justice) pendantes entre deux parties.

En droit de l'homme le contentieux stratégique « est un processus par lequel des cas soigneusement sélectionnés sont soumis aux tribunaux dans le but d'apporter des changements importants au droit, à la pratique, et à la perception du public. »<sup>1</sup>.

Selon les experts en contentieux stratégique de l'IHRDA, le but de ce contentieux est d'obtenir la justice pour un groupe de personnes qui se trouvent dans une

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1. Définition donnée par les experts de IHRDA lors des formations organisées par Equality Now au Avocats à Cotonou

situation similaire à la victime, malgré que l'étape principale soit de présenter un cas particulier»<sup>2</sup>.

## L'EXPERIENCE DES FEMMES AVOCATES DU BENIN (AFAB) DANS L'UTILISATION DES LITIGES AU BENEFICE DES DROITS HUMAINS DES FEMMES

Ces services d'aide juridique et d'assistance judiciaire consistent, d'une part, en des consultations pour les femmes victimes de violence, ou dont les droits humains ont été violés, ainsi que pour les parents ou tuteurs d'enfants victimes de violence ou en situation de conflit avec la loi. D'autre part, AFAB entreprend également des procédures judiciaires, représentant et défendant les intérêts des femmes et des filles victimes devant les tribunaux. A cet égard, AFAB Bénin a choisi d'utiliser le contentieux pour promouvoir les droits des femmes.

L'AFAB est membre du réseau WILDAF-BENIN, mais a aussi noué des partenariats avec plusieurs autres ONG spécialisées dans la protection et la défense des droits des femmes et des filles, comme l'association des femmes juristes du Bénin, qui nous envoient des femmes victimes qui ont besoin d'assistance juridique et judiciaire.

En 2019, cinq cent trente et une (531) femmes ont bénéficié de consultations gratuites assurées par l'AFAB. Six cent quatre-vingt-neuf (689) dossiers ont été suivis devant les tribunaux et soixante-quatre (64) dossiers concernant les femmes défendues ont été vidés en faveur des femmes. L'association a assisté et défendu 712 jeunes filles mineures victimes de violences devant les tribunaux. Parmi ces cas, 363 ont été finalisés avec des jugements rendus, et 343 cas sont toujours en attente devant les différents tribunaux de première instance et cabinets d'instruction.

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2. *Communication IHRDA à Cotonou*



## QUELQUES CAS DE LITIGES TRAITES

**CAS DE MINEURS VICTIMES DE VIOLENCES SEXUELLES :** les parents des enfants victimes de violences ou agressions sexuels n'hésitent plus et ne sont plus gênés de porter plainte contre les agresseurs de leurs enfants. Ceci est dû au fait que les victimes sont encouragées par les ONG qui les soutiennent et les aident à déposer plainte dans les unités de police ou à saisir directement le Parquet. De même, l'association des femmes Avocate assure aux victimes une assistance juridique et judiciaire gratuite devant les juridictions. Plusieurs décisions sont rendues contre ces agresseurs. Nous citons ci-dessous quelques affaires défendues par notre association :

1. Affaire MP et BOUKARI Kadidja C/ KOU DJO Henri : Le lundi 27 novembre 2017, la mère de la fillette de 05 ans nommée KADIDJA était allée vendre de la nourriture au sieur KODJO Henri à son domicile. Profitant de l'inattention de sa mère, la petite entra dans la chambre du sieur KODJO dans l'intention de regarder la télévision. C'est ainsi que le prévenu s'est accaparé de sa proie et abusa d'elle. Il a reconnu les faits à l'enquête préliminaire ainsi que devant le juge correctionnel des Flagrants délits.

Par jugement N° 42/1FD-18 du 08 Mars 2018, le tribunal l'a condamné à **12 mois d'emprisonnement ferme et à 100.000 F CFA de dommages-intérêts.**

2. Affaire MP et ALAVO Grâce C/ HOKPON Richard : La fillette âgée de 16 ans nommée Grâce ALAVO a été abordée par le sieur HOKPON Richard, âgé de 25 ans qui a entretenu avec elle et à plusieurs reprises des rapports sexuels non protégés. Les malaises constatés chez leur fille ont alerté ses parents qui l'ont amenée aux soins et les textes médicaux ont révélé une grossesse. Le mis en cause a reconnu les faits.

Par jugement N° 1113/3FD-18 du 18 mai 2018 le tribunal a retenu le prévenu dans les liens de la prévention d'excitation de mineur à la débauche et l'a condamné à **04 mois d'emprisonnement ferme et 50.000 FCFA d'amende. Pour les dommages-intérêts, le franc symbolique, selon la demande des parents de la victime.**

3. Affaire MP et TOSSOU Sabine C/ TOHOSSOU Modeste : Alors que la fillette TOSSOU Sabine âgée de 12 ans allait aux toilettes, le nommé TOHOSSOU Modeste l'a rejointe et immobilisée pour entretenir des relations sexuelles forcée avec elle. Voulant reprendre les mêmes faits le 04 mars 2017, il a été surpris par la maman de la fillette. Interpellé, il n'a pas reconnu les faits. **Le Tribunal l'a néanmoins condamné à 12 mois d'emprisonnement assorti de sursis et à 50.000 FCFA d'amende ferme, après l'avoir retenu dans les liens de la prévention de violences et voies de fait.**
4. Affaire MP et Dorcas YEHOUE TOME C/ Bruno YEHOUE TOME : La fillette Dorcas âgée de 14 ans a été victime d'agression sexuelle de la part de son père YEHOUE TOME Bruno. Malgré la résistance farouche de la petite Dorcas, son père a fini par avoir raison d'elle et ainsi se plaisait à abuser d'elle. Le dossier a été dans un premier temps orienté en cabinet d'instruction par le Parquet de Cotonou lors du déferrement du 10 Avril 2014, puis a été renvoyé devant la 1<sup>ère</sup> Chambre des Citations directes.

A l'audience du 17 Août 2018, le Tribunal de Cotonou statuant en matière correctionnelle des Citations Directes a requalifié les faits en exploitation sexuelle et a retenu le prévenu YEHOUE TOME Bruno dans les liens de la prévention d'exploitation sexuelle, l'a condamné à **cinq (5) ans d'emprisonnement ferme et à 2.000.000 de Francs CFA d'amende. Le Tribunal a réservé les intérêts civils, du fait de l'absence de la victime**

Le prévenu n'a pas fait appel contre la décision.

Pourquoi certaines des peines infligées aux prévenus sont légères ?

Le viol est sévèrement puni par le code pénal<sup>3</sup>. Mais la majorité des affaires de violence ou agression sexuelle sur mineurs comme celles citées ci-dessus

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3. Le viol est puni de la réclusion criminelle à temps de cinq (5) ans à 10 ans. Lorsqu'il aura été commis sur une personne vulnérable en raison d'un état de grossesse, d'une maladie, d'une infirmité ou d'une déficience physique ou mentale, soit sur un enfant de plus de 13 ans, soit sous la menace d'une arme, soit par deux ou plusieurs auteurs ou complices, le viol sera puni de la réclusion criminelle à temps de dix (10) ans à vingt (20) ans. Lorsque le viol est commis sur un enfant de moins de 13 ans, il est puni de la réclusion à perpétuité. Les peines encourues sont portées à la réclusion de quinze (15) à vingt (20) ans et à une amende de cinq cent mille (500.000) à cinq millions (5.000.000) de francs CFA si, le viol est le fait d'un ascendant légitime, naturel ou adoptif de la victime... (code pénale, article 553)

ont été jugées devant le tribunal correctionnel des Flagrants Délits, parce que les faits venaient d'être commis et ont été correctionnalisés. Il existe plusieurs autres affaires d'agression sexuelle qui ont été jugées devant les Cours d'Assises, lorsqu'une instruction est nécessaire. Dans ces affaires, la sanction est lourde contre les auteurs reconnus coupables de crime de viol. Les affaires criminelles sont préalablement instruites devant le juge d'instruction avant de connaître un verdict final rendu par la Cour d'Assises. L'instruction des affaires criminelles peut prendre plusieurs années pendant lesquelles le suspect reste en détention provisoire. Les magistrats des parquets évoquent cette lenteur de l'instruction des affaires criminelles pour expliquer les raisons pour lesquelles ils ne retiennent pas d'office le viol, selon les faits, mais ils retiennent les infractions connexes comme l'excitation de mineur à la débauche, le proxénétisme, les violences et voie de faits, ou la séquestration selon les cas, pour poursuivre les auteurs d'agression sexuelle. Les peines prévues par la loi pour punir ces infractions correctionnelles ne sont pas aussi élevées qu'en cas du crime de viol<sup>4</sup>. Ils justifient ce fait par le besoin d'impacter la société par la sanction immédiate des auteurs des violences arrêtés dans la période de survenance des faits. L'intention est donc de sensibiliser et d'éduquer la population. Selon eux, en retenant la qualification de viol qui est une infraction criminelle, l'instruction peut prendre plusieurs années et la sanction intervient au moment où les faits ne sont plus d'actualité et sont déjà oubliés par les populations. La sanction, aussi sévère soit-elle, ne produit donc pas l'effet escompté qu'est la réduction, voire l'éradication des violences faites aux femmes.

Il faut noter aussi qu'il arrive que les victimes subissent des pressions et intimidations de la part des parents et amis des mis en cause, si bien qu'au tribunal, elles demandent la clémence du juge en faveur du prévenu.

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4. L'excitation de mineur à la débauche est punie d'un emprisonnement de deux (2) ans à cinq (5) ans et d'une amende de trois-cent mille (300.000) à quatre millions (4.000.000) de francs (article 557 du code pénal), selon les cas cités par le code.

## CAS DE FEMMES VICTIMES DE VIOLATION DE LEURS DROITS ET QUI ONT OBTENU DES DECISIONS FAVORABLES

### 1. Affaire dame AGBAYAHOUN Brigitte. C/ le sieur AKPAKI Augustin

#### Sur les faits et la procédure :

Le sieur AKPAKI M. Daniel, mari de dame AGBAYAHOUN Brigitte est décédé des suites d'un accident de la circulation survenu courant 2015. Suite au décès, le beau-frère de dame Brigitte a réussi à la séparer de ses enfants, malgré l'opposition de la veuve. Par la suite, Le beau-frère a saisi la chambre civile, Etat des Personnes du Tribunal d'Abomey pour engager la procédure de désignation de liquidateur de la succession du défunt. En droit successoral béninois, la succession est administrée par un ou plusieurs liquidateurs.

Dame Brigitte a demandé devant le tribunal à être désignée comme liquidatrice de la succession de son défunt mari.

En effet, depuis l'avènement du code des personnes et de la famille en 2004, au Bénin, les successions sont dévolues aux enfants et descendants du défunt, à ses ascendants, à ses parents collatéraux et à son conjoint survivant selon la lignée et le degré des héritiers. Lorsque le défunt laisse des enfants, le conjoint survivant a droit au quart de la succession (articles 604 et 632 du code des personnes et de la famille).

En application de ces textes, le Tribunal de première Instance d'Abomey, a par Ordonnance portant Désignation de Liquidateur de Succession N° 87/15-5<sup>ème</sup> F/ Ord, en date du 29 octobre 2015, désigné comme Liquidateur de la succession du défunt, son frère AKPAKI K. Augustin et Liquidatrice Adjointe la veuve Brigitte AGBAHOUN.<sup>5</sup>

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5. Dossier Numéro ABOM/2015/RG/00661 dans l'affaire : Succession de feu AKPAKI Mahoussi Daniel C/ Qui de droit, dans laquelle, par Ordonnance portant désignation de liquidateur de succession N° 87/15-5<sup>ème</sup> F/Ord. du 29 octobre 2015, la veuve a été désignée liquidatrice adjointe de la succession de son défunt mari.

Malgré le fait que la veuve Brigitte ait été nommée liquidateur adjoint aux côtés de son beau-frère, ce dernier s'est opposé à ce qu'elle ait des contacts avec ses propres enfants. Il lui a même refusé le droit de rendre visite à ses enfants. La veuve Brigitte a donc demandé au juge des enfants du tribunal des mineurs la mise sous tutelle de ses enfants. Le juge du tribunal des mineurs a accédé à sa demande d'être tutrice des enfants. Dans son ordonnance, le juge a expliqué qu'en cas de décès de l'un des conjoints, la tutelle revient en principe au parent survivant, surtout si les enfants vivaient déjà avec le parent survivant.<sup>6</sup>

#### **Les arguments développés :**

Lors de la 1<sup>ère</sup> audience ayant donné lieu à l'ordonnance de nomination des liquidateurs de la succession N° 87/15-5è F/ord du 29 octobre 2015, dame Brigitte soutenait que ses droits de veuve de son mari avaient été violés par sa belle-famille, alors qu'elle a droit à la succession de son mari et devait donc être nommée liquidatrice de la succession. Ceci est conforme aux articles 604, 630, 632 et 690 du Code des personnes et de la famille du Bénin qui accordent le droit de succession au conjoint survivant contre lequel il n'existe pas de jugement de séparation ou de divorce passé en force de chose jugée (article 604). L'article 632 stipule que lorsque le défunt laisse des enfants, le conjoint survivant a droit au quart de la succession. Ainsi, les frères et sœurs du défunt ne viennent pas à la succession lorsque ce dernier a laissé des enfants et une femme.

La seconde démarche, au cours de laquelle le juge des enfants a rendu l'ordonnance de tutelle n° 28/17/Ch. Civ. Mineurs en date du 12/07/17, met en application les dispositions de l'article 20 (b) du Protocole de Maputo. Le point positif de cette affaire est que la veuve a bénéficié de ses droits en vertu du Protocole relatif aux droits des femmes, malgré la réticence de la belle-famille et la rigueur de la coutume. Elle a pu également obtenir la garde de ses enfants. Il est à noter que le juge n'a pas cité le Protocole de Maputo dans sa décision. Les juges béninois se contentent d'appliquer les lois nationales qui ont intégré les

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6. *Le juge des mineurs du Tribunal de première instance d'Abomey a nommé la veuve à qui la belle-famille a arraché illégalement ses enfants, sans droit de visite, comme tutrice de ses enfants, par ordonnance N° 28/17/Ch. Civ. Mineurs du 12/07/17. Dossier N° ABOM/15/RG/01967 dans l'affaire : Dame AGBAYAHOUN Brigitte C/ AKPAKI Augustin.*

dispositions du Protocole et ne se réfèrent plus spécifiquement aux articles du Protocole.

## 2. Affaire KIKI Ophélie C/ AHOUANSON Oscar

**Sur les faits et la procédure :** dame KIKI Ophélie a saisi le tribunal de première instance de Cotonou statuant en matière civile matrimoniale et de l'enfance pour obtenir la garde des enfants communs et le paiement d'une pension alimentaire mensuelle. Au soutien de sa demande, elle expose qu'en raison de l'hostilité de sa belle-famille, elle est devenue objet de mépris de la part de son concubin.

A l'audience du 21 janvier 2020, le tribunal a confié la garde des enfants à leur mère et a condamné le sieur AHOUANSON Oscar au paiement d'une pension alimentaire évaluée à 75.000 FCFA par mois.

## LE ROLE DES MAGISTRATS ET L'EFFICACITE DES LITIGES

Le Protocole de Maputo a été incorporé dans la législation béninoise à travers plusieurs lois nationales. Ainsi, au Bénin, les magistrats disposent d'un arsenal juridique sur lequel ils peuvent fonder leurs décisions, et ils n'hésitent pas à appliquer ces textes de loi, notamment, en matière de droit successoral, et en matière correctionnelle, en cas de violences faites aux femmes et aux filles.

Les Avocats au Bénin n'ont généralement pas de difficulté lorsqu'ils se retrouvent devant les magistrats pour demander que justice soit rendue aux femmes ou aux filles victimes d'abus de toutes sortes, lorsque que ces abus sont réprimés par la loi.

Les formations données aux magistrats et aux Avocats par les des experts de la société civile tels que Equality Now nous ont beaucoup aidé, car, avant ces formations, plusieurs magistrats et Avocats ignoraient, non seulement l'existence du Protocole de Maputo, mais aussi ne connaissaient pas les lois nationales qui protègent les femmes contre les violences et les abus.

Sans la volonté des juges d'entendre les affaires et d'appliquer la loi de manière compétente, notre association n'aurait pu atteindre efficacement ses objectifs qui sont la protection et la défense des droits des femmes et des filles à travers les litiges

devant les juridictions étatiques. Aujourd'hui, plusieurs magistrats nous envoient des femmes victimes pour les aider et leur apporter une assistance judiciaire.

L'efficacité du contentieux dans la protection des droits des femmes se traduit par le nombre élevé de décisions de justice condamnant les auteurs de violations des droits des femmes. De plus en plus de femmes victimes sont encouragées par les jugements rendus contre les auteurs d'abus sexuels et de violences de toutes sortes à l'encontre des femmes, et acceptent de porter plainte, ce qui n'était pas le cas dans un passé récent.

L'efficacité du contentieux réside également dans le fait que les femmes sont de plus en plus conscientes de leurs droits et ont la satisfaction de voir les auteurs de violations de leurs droits punis, même si des difficultés persistent quant à l'exécution des décisions rendues. Il y a une satisfaction morale et un sentiment d'être protégées. Cependant, le Protocole de Maputo est peu mentionné dans les décisions rendues par nos tribunaux, car les dispositions du Protocole sont déjà intégrées dans les lois nationales du Bénin.

## LES DIFFICULTÉS LIÉES À L'UTILISATION DU LITIGE POUR LA PROMOTION DES DROITS DES FEMMES ET LES PROPOSITIONS DE SOLUTIONS

### Les difficultés

Au Bénin, les femmes issues de milieux défavorisés n'ont pas facilement accès aux tribunaux, qui sont souvent situés très loin de leurs localités. Les victimes de violence à l'égard des femmes sont obligées de parcourir de longues distances pour accéder aux tribunaux. Elles abandonnent très tôt les procédures en raison du temps nécessaire pour se rendre au tribunal, du coût de ce déplacement et du fait qu'elles doivent se rendre fréquemment au tribunal pendant une longue période, parfois des années en raison de la durée de traitement des affaires.

En outre, la situation d'extrême pauvreté des femmes issues de milieux défavorisés constitue un défi de taille. Un litige est une entreprise coûteuse qui implique des frais juridiques, des frais liés au tribunal et à la participation

aux séances du tribunal pendant une longue période. En outre, de nombreuses femmes sont non seulement trop pauvres pour assumer ces frais mais, en raison de leur pauvreté, elles ne peuvent pas se permettre de s'absenter de leur travail pour participer pleinement aux procédures judiciaires.

Il faut noter aussi que la culture du litige n'est pas encore généralisée au Bénin. L'action en justice exercée par la femme est considérée comme un affront, une humiliation. Il y a aussi la rigueur de la coutume et des traditions qui constituent un frein à l'utilisation des litiges.

L'analphabétisme est aussi un facteur qui freine l'utilisation des litiges chez nous. Les litiges impliquent une connaissance du système juridique d'un pays ainsi que des concepts, informations et connaissances juridiques de base qui ne sont pas facilement accessibles aux groupes plus marginalisés tels que les femmes.

Les groupes marginalisés tels que les femmes peuvent ne pas être au courant de processus tels que la préservation de preuves qui seraient utiles pour poursuivre une infraction pénale ou gagner une affaire civile.

## Les propositions de solutions

Il faut rapprocher la justice des justiciables pour rendre la justice accessible aux femmes. Il faut rapprocher la justice de la population afin de la rendre accessible aux femmes victimes. Cela peut se faire en construisant des locaux supplémentaires pour accueillir les tribunaux dans les régions éloignées et loin des villes, et en formant davantage de magistrats pour travailler dans ces tribunaux.

L'aide juridique ou l'assistance judiciaire peuvent être rendues plus efficaces et efficaces en vue d'aider les femmes victimes qui en ont besoin. L'Etat doit organiser une aide financière aux femmes victimes issues de milieux défavorisés qui engagent une procédure judiciaire. Les magistrats devront statuer rapidement sur les dossiers afin d'encourager les femmes à suivre les procès qu'elles initient. Par ailleurs, devant l'ampleur des cas de violences et d'abus sexuels à l'encontre des jeunes filles, il est proposé d'aider financièrement les parents des victimes en rendant gratuites les consultations médicales en cas de viols de jeunes filles, ce qui contribuerait beaucoup à la préservation des preuves.



La sensibilisation aux protections des droits de l'homme et à l'accès à la justice doit se poursuivre auprès des femmes en général et de celles issues de milieux défavorisés en particulier. Cela améliorerait considérablement l'accès à la justice ainsi que la participation des femmes au processus de justice, tant civile que pénale. Ces efforts seraient fortement renforcés par l'augmentation de la scolarisation des filles dans l'enseignement formel, sans exception, au moins jusqu'à la fin de l'école primaire. En effet, l'éducation formelle enseigne également les bases du système juridique d'un pays, fournissant des connaissances et des informations indispensables tout au long de la vie des femmes et des filles.

Rendre effective et efficace l'assistance judiciaire ou l'aide juridictionnelle, pour aider les femmes victimes démunies. L'Etat doit organiser une assistance financière aux femmes victimes des milieux défavorisés qui engagent une procédure judiciaire. Pour encourager les femmes à suivre les procès qu'elles engagent, il faut que les magistrats rendent les décisions comme en cas d'urgence. Par ailleurs, Vu l'ampleur des affaires de violences sexuelles et d'abus contre les filles, je propose qu'une aide financière soit apportée aux parents des victimes en rendant les consultations médicales gratuites en cas de viol sur filles, pour préserver les preuves ;

Continuer les sensibilisations des femmes en général et celles des milieux vulnérables en particulier sur leurs droits et sur la possibilité qui leur est donnée de saisir les tribunaux pour obtenir que ces droits soient respectés.

Rendre effectif la scolarisation de toutes les filles, sans exception, au moins jusqu'à la fin du cours primaire.

Amener les Etats à mettre en œuvre les moyens nécessaires à l'exécution des décisions de justices rendues en faveur des droits des femmes.

L'Etat doit mettre en place des structures d'accueil pour les filles victimes de violences.

L'Etat doit mettre en place des mesures appropriées pour protéger les femmes qui ont utilisé le litige, contre les représailles des personnes de leur milieu.

Les décisions des magistrats doivent être sévères au regard de la gravité des faits et être accompagnées de l'interdiction de troubler, dans sa quiétude, la femme qui a gagné le procès.

Le plaidoyer doit se poursuivre pour inciter les États à mettre en place les moyens nécessaires à l'application des décisions juridiques rendues en faveur des droits des femmes. Ce plaidoyer doit viser des objectifs concrets et mesurables, par exemple amener les États à créer et à maintenir des refuges et d'autres programmes d'hébergement et d'assistance à l'intention des femmes et des filles victimes de violence. Les États doivent mettre en place des mesures appropriées pour protéger les femmes ayant eu recours à la justice contre les représailles de personnes de leur milieu. De plus, la sévérité des décisions des magistrats doit être proportionnelle à la gravité des faits et être accompagnée d'ordonnances de protection des femmes visées par les jugements.

## CONCLUSION

Le Bénin dispose d'un arsenal juridique visant à protéger les droits de des femmes grâce à l'intégration du Protocole de Maputo dans la législation nationale. L'application effective de ses instruments juridiques par les juridictions constitue un moyen utile de promotion et de protection des droits de la femme. En effet, malgré les actions de sensibilisation des femmes et de la société sur les droits des femmes, force est de constater que les femmes sont encore victimes de violations de leurs droits. Vu son efficacité comme moyen d'éducation et de changement de comportement, l'Association des Femmes Juristes du Bénin a choisi le contentieux comme outil permettant d'atteindre ses objectifs de protection des droits des enfants et des femmes. Plusieurs femmes et enfants ont bénéficié de l'assistance juridique et judiciaire gratuite offerte par l'AFAB qui a porté leurs dossiers devant les juridictions civiles et pénales de notre pays. Plusieurs décisions de justice ont été rendues en faveur des victimes. Il y a quelques années, l'absence d'instruments juridiques en matière de protection des droits des femmes et des enfants rendait ce travail difficile et les décisions de justice leur étaient rarement favorables. Cependant, avec l'entrée en vigueur du Protocole de Maputo, le Bénin a adopté plusieurs lois visant à protéger les droits des femmes et des enfants dans le cadre de la mise en œuvre des dispositions du Protocole. Le recours au contentieux a permis d'atteindre les objectifs de l'association.

Le rôle et l'implication des magistrats dans l'utilisation des litiges est appréciable dans ce processus, à travers le revirement de la jurisprudence qui n'était pas favorable à cette couche vulnérable que représentent les enfants et les femmes.

Le contentieux stratégique est également un outil efficace, dans la mesure où il permet aux gouvernements de prendre des mesures ou de renforcer les mesures existantes pour protéger les droits des femmes et des enfants. Cependant, l'utilisation du contentieux n'est pas sans difficulté pour les femmes issues de milieux défavorisés. Ces femmes sont généralement moins éduquées sur le système juridique du pays et ont du mal à initier des procédures judiciaires par elles-mêmes sans l'appui d'avocats. De plus, la plupart des femmes béninoises sont économiquement faibles et n'ont pas les moyens financiers de s'offrir les services d'un avocat pour engager une procédure judiciaire. Par ailleurs, la lenteur de la justice est également l'une des causes du découragement, qui conduit à l'abandon des procédures judiciaires. La pression sociale reste également très forte contre les victimes qui osent dénoncer leurs agresseurs.

Pour pallier à ces difficultés, il est nécessaire que notre gouvernement prenne des mesures pour rendre effectif l'assistance judiciaire ou l'aide juridictionnelle aux couches vulnérables, d'une part, et que la justice soit rapprochée des justiciables. Nous pensons également que les modes alternatifs de règlement des litiges, telles que la médiation, sont un terrain à explorer pour la promotion des droits des femmes.

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## Chapter 14

# The Effective Use of Litigation for the Promotion and Realization of the Rights of Women Enshrined in the Maputo Protocol

Claire-Lise HENRY

### ABSTRACT

The states parties to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, also called the Maputo Protocol, commit to and are determined to ensure the promotion, realization and protection of women's rights to enable them to fully enjoy all their human rights.

In line with the commitments contained in the Maputo Protocol, the State of Benin has enacted laws preventing and prohibiting violence against women, prohibiting sexual harassment, on the code of persons and the family, prohibiting female genital mutilation, on sexual and reproductive health and on the rights of children. These laws, aimed at implementing the provisions of the Maputo Protocol as ratified by Benin, made it possible to use litigation to allow the women of Benin to benefit from the rights enshrined in the Protocol. We will see some examples of how members of the Association of Women Lawyers of Benin, use litigation as a means of promoting women's rights.

Furthermore, judges of national courts are increasingly involved in promoting the rights of women and girls, rendering decisions that are sometimes harsh against the perpetrators of violence against women and girls.

However, it must be noted that women and girls may sometimes be less willing to engage in the justice process where their husbands and other male relatives are the perpetrators. The reason for this is that women fear the social, cultural and economic consequences of speaking out against their male relatives, including insults and humiliation from relatives and the community at large, the loss of a

breadwinner or material provider as well as other vulnerabilities that may arise from the absence of a husband or father. It is at this point that women's rights associations are needed to defend victims by initiating legal proceedings on their behalf. It is also recommended that civil society stakeholders use strategic litigation to enable women and girls to benefit from the provisions relating to the promotion and protection of women's rights contained in the Protocol.

While litigation is a means to accessing the benefits of the Maputo Protocol, reluctance to use litigation persists and is reflected in the priority given to the amicable settlement of cases by the victims themselves or their parents as well as other representatives. When it comes to girls, the weak commitment of some criminal justice actors (such as police officers, prosecutors and judicial officers) to initiate and sustain legal proceedings and the lack of a victim support structure, are some of the main factors contributing to lower rates of participation in the criminal justice system by girls and their parents or guardians.

Besides, it is not enough to just pass laws. States must assume their responsibility to make the promotion and protection of the rights of women and girls effective by taking the necessary measures to enforce court decisions made in favour of women or girl victims. States also need to create safe houses and other structures to support women and girls who are victims of violence.

## INTRODUCTION

In Benin, women make up 52% of the population. Benin adopted the Maputo Protocol on July 11, 2003 and ratified it on January 28, 2005. Following its adoption and ratification, this important legal instrument was however ignored for a long time and only re-appropriated thanks to the popularization and training initiatives targeting lawyers and judges organized by civil society organisations such as Equality Now.

In order to ensure that the Maputo Protocol is not just another instrument, it is recommended that litigation be used to promote and realise women's rights to enable them to benefit from its provisions. It was noted that, despite the many awareness-raising activities on women's rights, the behaviour of violent men does not change towards the vulnerable group of women and girls. Abuses and

violations are increasing. In an effort to remedy them, it is important to intervene through the justice system and bring perpetrators to book.

In the first section of this paper, we will show how the use of litigation can contribute to the promotion and defence of women's rights, citing a few cases to highlight the fact that today, women and girls who are victims of sexual violence and abuse now know that they can file cases against the perpetrators, even when the perpetrators are close relatives. Such action will on the other hand show that judges, unlike in the recent past, now render decisions that condemn the perpetrators of violence and violations of women's rights. In the second section of this paper, we will highlight the difficulties associated with the use of litigation and propose solutions.

## LITIGATION OR STRATEGIC LITIGATION AS A TOOL FOR THE PROMOTION AND PROTECTION OF WOMEN'S RIGHTS

### STRATEGIC LITIGATION

Litigation is the totality of disputes pending between two parties that are brought before a competent judicial authority. In the context of human rights, strategic litigation "is a process in which carefully selected cases are filed in court in order to make significant changes to the law, practice, and public perception."<sup>1</sup> According to IHRDA's strategic litigation experts, the aim of this litigation is to obtain justice for a group of people who find themselves in a situation similar to that of the victim to whom a specific case relates, although the main step is to present that specific case.<sup>2</sup>

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1. Definition given by IHRDA experts during the training sessions organised by Equality Now for lawyers in Cotonou

2. *IHRDA Communication in Cotonou*

## THE EXPERIENCE OF WOMEN LAWYERS IN BENIN (AFAB) IN THE USE OF LITIGATION FOR THE BENEFIT OF WOMEN'S HUMAN RIGHTS

The membership of the Association of Women Lawyers of Benin (AFAB) comprises only women lawyers registered with the Bar Association of Benin. Its main objective is to defend the rights of women and children. To achieve these objectives, AFAB provides legal aid, judicial assistance and consultation services for needy women from disadvantaged backgrounds. These legal aid and judicial assistance services consist, on the one hand, of consultations for women victims of violence, or whose human rights have been violated, as well as parents or guardians of child victims of violence or children in conflict with the law. On the other hand, AFAB also undertakes legal proceedings, representing and defending the interests of women and girl victims before the courts. In this regard, AFAB Benin has opted to use litigation to promote women's rights.

AFAB is a member of the WILDAF-BENIN network, but has also forged partnerships with several other NGOs specializing in the protection and defence of the rights of women and girls, such as the Association of Women Jurists of Benin, who refer female victims in need of legal and judicial assistance. In 2019, five hundred and thirty-one (531) women benefited from free consultation provided by the AFAB. Six hundred and eighty-nine (689) cases were followed up before the courts and sixty-four (64) cases concerning where women had been charged were successfully defended in favour of women. The association assisted and defended 712 underage girls who were victims of violence before the courts. Among these cases, 363 were finalized with judgments issued, and 343 cases are still pending before the various trial courts and investigating offices.

### A FEW LITIGATED CASES HANDLED

**CASES OF MINORS WHO WERE VICTIMS OF SEXUAL VIOLENCE:** parents of child victims of violence or sexual assault are now less likely to hesitate to file a complaint against the abusers of their children. This is because victims are encouraged by NGOs who support and assist them in filing complaints with the police or directly with the Public Prosecutor's Office. Similarly, AFAB provides victims with legal aid and judicial assistance before the courts. Several decisions have been made against these offenders. Below are some of the cases defended by AFAB:

1. MP and BOUKARI Kadidja versus KOUDJO Henri: On Monday 27 November 2017, the 5-year-old girl named Kadidja and her mother had gone to Mr. KODJO Henri's home to sell him food. While her mother was not looking, the little girl entered Mr. KODJO's room with the intention of watching television. This is how the accused person took advantage of the situation and molested the child. He admitted the facts at the preliminary investigation and before the magistrates' court for serious offences.

Through judgment No. 42/1FD-18 of 08<sup>th</sup> March 2018, the court sentenced him to **12 months in prison and fined him 100,000 CFA francs in damages and interest.**

2. MP and ALAVO Grace versus HOKPON Richard: A 16-year-old girl named Grace ALAVO was approached by Mr. HOKPON Richard, aged 25 years. The young man then had unprotected sex with her on several occasions. Her parents noticed their daughter's discomfort and took her to hospital where medical tests revealed that she was pregnant. The respondent acknowledged the facts. Through judgment No. 1113/3FD-18 of 18<sup>th</sup> May 2018, the court found the accused guilty of the offence of incitement of a minor to engage in debauchery and sentenced him to **4 months in jail plus a fine of FCFA 50,000 in exemplary damages, in accordance with an application made by the victim's parents.**
3. MP and TOSSOU Sabine versus TOHOSSOU Modeste: While TOSSOU Sabine, a 12-year-old girl, was going to the toilet, a man named TOHOSSOU Modeste followed her and grabbed her and had forced sex with her. While attempting to repeat the same offence on 4th March 2017, he was caught by the girl's mother. When questioned about the incident, he denied the facts. **The Court nevertheless sentenced him to 12 months in jail with a suspended sentence and a fine of 50,000 CFA francs, after having held him on charges of violence and assault.**
4. MP and Dorcas YEHOUE TOME versus Bruno YEHOUE TOME: 14-year-old Dorcas was sexually assaulted by her father YEHOUE TOME Bruno. Although little Dorcas fiercely resisted her father's advances, he eventually succeeded in overpowering her and he began to abuse her repeatedly. The case was initially referred to the examining magistrate's office by the Cotonou Public Prosecutor's Office during the trial on 10 April 2014, and was then referred to the 1<sup>st</sup> Chamber of Direct Citations. At the hearing



of 17<sup>th</sup> August 2018, the Cotonou Court ruling on the criminal case of the Direct summons reclassified the offence as sexual exploitation, convicted the accused YEHOUETOME Bruno of the charges of sexual exploitation and sentenced him to **five (5) years in jail plus a fine of 2,000,000 CFA Francs. The Court reserved the civil interests, due to the absence of the victim.** The accused person did not appeal the decision.

Rape is severely punished by the Penal Code.<sup>3</sup> However, most cases of violence or sexual assault of minors such as those mentioned above have been tried before the Serious Offences (Criminal) Court. Several other cases of sexual assault are tried before the Assize Courts, when an investigation is necessary. In these cases, those convicted of the crime of rape are punished severely. Criminal cases are first investigated by the investigating judge before a final verdict is handed down by the Assize Court. Investigating criminal cases may take several years, during which time the suspect remains in pre-trial detention. Prosecutors cite the slow nature of the investigation of criminal cases to explain why they do not automatically convict persons accused of rape, based on the facts alone. However, they hold perpetrators of related offences such as inciting a minor to debauchery<sup>4</sup>, procuring, assault and battery, or unlawful confinement to be prosecuted for sexual assault. The custodial sentences provided by law for these punishable offences are not as harsh as those applied to charges of rape. Prosecutors justify this by the necessity to make an impact on the society by punishing perpetrators of violence immediately when they are arrested at the time of occurrence of the facts. The intended outcome is therefore to raise awareness and educate the population. According to them, when rape is classified as a criminal offence, the investigation can take several years, and the punishment can come at a time when the facts are no longer relevant and are

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3. *R Rape is punishable by five (5) to ten (10) years' imprisonment. When it is committed against a person who is vulnerable because of pregnancy, illness, infirmity, physical or mental disability, or against a child aged more than 13 years, or when a weapon is used to threaten the victim, or when committed by two or more perpetrators or accomplices, rape is punishable by a prison term of ten (10) to twenty (20) years. When rape is committed on a child under 13 years of age, it is punishable by life imprisonment. The penalties are increased to fifteen (15) to twenty (20) years in prison and a fine of five hundred thousand (500,000) to five million (5,000,000) CFA Francs if the rape is committed by a legitimate, natural or adoptive relative of the victim... (Penal Code, Article 553)*

4. *The incitement of a minor to debauchery is punishable by a prison term of two (2) to five (5) years and a fine of three hundred thousand (300,000) to four million (4,000,000) francs (article 557 of the penal code), as provided for in the cases cited by the code.*

already forgotten by the population. The punishment, however severe, does not therefore produce the desired effect of reducing, or even eradicating violence against women. It should also be noted that victims are sometimes subjected to pressure and intimidation by relatives and friends of the accused, so that the said victims ask the judge for clemency in favour of the defendant when they appear in court.

## CASES INVOLVING WOMEN WHO HAVE BEEN VICTIMS OF THE VIOLATION OF THEIR RIGHTS AND WHO HAVE OBTAINED FAVOURABLE RULINGS:

### 1. AGBAYAHOUN Brigitte. versus Mr. AKPABI Augustin

#### Facts and procedure:

Mr. AKPABI M. Daniel, husband of Mrs. AGBAYAHOUN Brigitte died from a motor accident which occurred in the course of 2015. After her husband's death, Brigitte's brother-in-law succeeded in separating her from her children, despite the widow's objection to this. The brother-in-law then referred the matter to the Civil Division of the Court of Abomey to initiate the process of appointing the executor of the estate of the deceased person. In the Beninese law of succession, such an estate can be administered by one or more executors.

Ms. Brigitte applied to the court to be appointed executor of her late husband's estate. Since the enactment of the Persons and Family Code in 2004, matters of succession estates devolve upon the children and descendants of the deceased, relatives in the ascending line of the deceased, his or her collateral relatives and the surviving spouse, based on the lineage and status of the heirs. When a deceased person leaves children behind, the surviving spouse is entitled to a quarter of the estate (articles 604 and 632 of the Code of Persons and Family Law). In application of these texts, the Court of First Instance of Abomey, through Order No. 87/15-5ème F/ Ordonnance dated 29 October 2015, appointed the deceased person's brother, AKPABI K. Augustin Executor of the Estate of the deceased, and the widow, Brigitte AGBAHOUN as Deputy Liquidator.<sup>5</sup>

5. File No. ABOM/2015/RG/00661 in the case: Estate of the late AKPABI Mahoussi Daniel versus Who is entitled, in which, by Order No. 87/15-5 F/Ord. of 29 October 2015 appointing the liquidator of the estate, the widow was appointed deputy liquidator of her late husband's estate.

In spite of the fact that Brigitte had been appointed deputy executor alongside her brother-in-law, the latter objected to her having any contact with her own children. He even denied her the right to visit her children. The widow therefore made an application for custody of her children before the juvenile court judge. The Juvenile Court judge granted her request to be the children's guardian. In his order, the judge explained that in the event of the death of one of the spouses, custody of the children normally reverts to the surviving parent, especially if the children were already living with the surviving parent.<sup>6</sup>

#### **Arguments developed:**

At the 1<sup>st</sup> hearing that resulted in the order appointing the executors of the estate (No. 87/15-5th F/ord of October 29, 2015), Ms. Brigitte argued that her rights as her husband's widow had been violated by her in-laws, even though she was entitled to her husband's estate and should therefore have been appointed executor of the estate. This is in accordance with articles 604, 630, 632 and 690 of Benin's Code of Persons and Family, which grant the right of succession to the surviving spouse against whom there is no final judgment of separation or divorce (article 604). Article 632 stipulates that when the deceased leaves children behind, the surviving spouse is entitled to a quarter of the deceased person's estate. Accordingly, the brothers and sisters of the deceased person do not have a share in the estate when the deceased person has left a wife and children behind.

The second step, in which the Children's Judge granted custody of the children (order No. 28/17/Ch. Civ. Minors dated 12/07/17), enforces the provisions of article 20 (b) of the Maputo Protocol. The positive aspect of this case is that the widow was granted her rights under the Women's Rights Protocol, despite the reluctance of the in-laws and the pressure imposed by tradition. She was also able to obtain custody of her children. It should be noted that the judge did not cite the Maputo Protocol in his decision. Benin judges simply apply national laws that have incorporated the provisions of the Protocol and no longer refer specifically to articles of the Protocol.

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6. *The juvenile judge of the Court of First Instance of Abomey appointed the widow to whom the in-laws illegally snatched her children, without visitation rights, as her children's guardian, by order No. 28/17/Ch. Civ. Minors of 12/07/17. File N° ABOM/15/RG/01967 in the case: Dame AGBAYA-HOUN Brigitte versus AKPABI Augustin.*

## 2. KIKI Ophélie versus AHOANSOU Oscar

The facts and the case: Ms. KIKI Ophelia filed a lawsuit before the Court of First Instance of Cotonou with jurisdiction over civil matrimonial matters and children, seeking custody of their shared children and the provision of monthly support. In support of her request, she explained that due to the hostility of her in-laws, she had become the object of contempt of her partner's concubine. At the hearing of 21<sup>st</sup> January 2020, the court awarded custody of the children to their mother and ordered Mr. AHOANSOU Oscar to pay a maintenance allowance estimated at 75,000 FCFA per month.

### THE ROLE OF THE JUDICIARY AND THE EFFECTIVENESS OF LITIGATION

The Maputo Protocol has been incorporated into Benin's legislation through several national laws. Therefore, in Benin, magistrates have a legal arsenal on which they can base their decisions, and they do not hesitate to apply these laws, especially in matters relating to succession law, and in criminal matters as well as cases of violence against women and girls.

Lawyers in Benin generally have no difficulty in demanding justice for women or girls who are victims of all kinds of abuse when they find themselves before judges, because these are punishable by law.

The training provided to magistrates and lawyers by civil society organisations such as Equality Now has been greatly beneficial, considering that before these training sessions, not only were many magistrates and lawyers unaware of the existence of the Maputo Protocol, but they also did not know the national laws that protect women against violence and abuse.

Without the willingness of judges to hear cases and apply the law competently, our association would not have been able to effectively meet its objectives of protecting and defending the rights of women and girls through litigation in state courts. Today, several magistrates send women victims to AFAB for support and legal assistance.

The effectiveness of litigation in protecting women's rights is reflected in the significant number of court decisions that have been handed down to

perpetrators of women's rights violations. More and more women victims have been encouraged by the judgments rendered against perpetrators of sexual abuse and violence of all kinds against women, and are willing to press charges, which was not the case in the recent past.

The effectiveness of litigation is also attributable to the fact that women are increasingly aware of their rights and enjoy the satisfaction of seeing the perpetrators of violations of their rights punished, even though challenges persist as far as the enforcement of the decisions rendered is concerned. There is a moral satisfaction and a sense of being protected. However, little mention is made of the Maputo Protocol in the decisions rendered by our courts, since the provisions of the Protocol are already incorporated into Benin's national laws.

## CHALLENGES IN USING LITIGATION TO PROMOTE WOMEN'S RIGHTS AND PROPOSED SOLUTIONS

### Challenges

In Benin, women from disadvantaged backgrounds have limited access to courts, which are often located far from their places of residence. Victims of violence against women are forced to travel long distances to access courts. They drop out of the court process early because of the time it takes to get to court, the cost of travel, and the fact that they must attend court frequently over a long period of time, sometimes for years because of the length of time it takes to process cases.

Additionally, the situation of extreme poverty among women from disadvantaged backgrounds is a significant challenge. Litigation is an expensive undertaking that includes legal fees, court fees, and costs associated with attending court sessions over a long period. Moreover, many women are not only too poor to afford these fees; owing to their poverty, they cannot afford to miss work to participate fully in the litigation process.

It should also be noted that the culture of litigation is not yet widespread in Benin. Legal action by women is considered an affront and a shame by their communities. There is also the rigidity of custom and tradition, which hinders the use of litigation.

Illiteracy is also a deterrent to the use of litigation in our country. Litigation presupposes knowledge of a country's legal system as well as of basic legal concepts. This information and knowledge may not be readily accessible to more marginalized groups such as women. Such marginalized groups may not be aware of processes such as the preservation of evidence that would be useful in prosecuting a criminal offence or winning a civil case.

## Proposed Solutions

There is a need to bring justice closer to the people to make it accessible to female victims. This can be achieved by building additional premises to house the courts in remote areas and those that are far from cities, and by training more magistrates to work in these courts.

Legal aid or judicial assistance can be made more effective and efficient to help needy women victims. The State must organise financial assistance for women victims from underprivileged backgrounds who initiate legal proceedings. To encourage women to follow through with the trials they initiate; magistrates must expeditiously issue rulings on cases. Furthermore, given the scale of cases of sexual violence and abuse against girls, it is proposed that parents of victims be assisted financially by providing medical consultations free of charge for girls who are raped. Such a move that would greatly contribute to the preservation of evidence.

Awareness-raising about human rights protections and access to justice must continue among women in general and those from vulnerable backgrounds in particular. This would greatly improve access to justice as well as the participation of women in the justice process, both civil and criminal. Such efforts would be bolstered greatly by increasing the enrolment of girls in formal schooling, without exception, at least until the end of primary school. This is because through formal education, the basics of a country's legal system are taught, and this provides much needed knowledge and information that is relevant throughout the life of women and girls.

Advocacy must continue with a view to urging states to establish the necessary means to enforce legal decisions rendered in support of women's rights. Such

advocacy must focus on tangible and measurable goals such as getting states to establish and maintain shelters and other housing and assistance programs for women and girl victims of violence. States must put in place appropriate measures to protect women who have used litigation against reprisals by people from their milieu. Additionally, the severity of the decisions rendered by magistrates must be commensurate with the seriousness of the facts presented and be accompanied by restraining orders protecting the women to whom the judgements relate.

## CONCLUSION

Benin has a legal arsenal for the protection of women's rights through the incorporation of the Maputo Protocol into national legislation. In particular, Article 8 of the Maputo Protocol obligates governments to provide access to justice to women by taking appropriate measures such as access by women to judicial and legal services, including legal aid. The effective application of its legal instruments by the courts of law is a useful means of promoting and protecting women's rights. In fact, despite actions to raise awareness of women and society on women's rights, it must be noted that women are still victims of violations of their rights. Considering its effectiveness as a means to educate and bring about a change in behaviour, the Association of Women Lawyers of Benin has chosen litigation as a tool to achieve its objectives of protecting the rights of children and women. Several women and children have benefited from free legal and judicial assistance from AFAB, which has taken their cases before civil and criminal courts in our country. Several court decisions have been handed down in favour of the victims. A few years ago, the lack of legal instruments for the protection of women and children's rights made this work difficult and court decisions were rarely favourable to them. However, with the entry into force of the Maputo Protocol, Benin has passed several laws aimed at protecting women and children's rights as part of the implementation of the Protocol's provisions, and the use of litigation has made it possible to achieve the association's objectives.

The role and involvement of magistrates in the use of litigation is commendable in this process, through the reversal of jurisprudence that was not favourable to this vulnerable group of children and women.

Strategic litigation is also an effective tool, insofar as it makes it possible for governments to take measures or to strengthen existing measures to protect the rights of women and children. However, the use of litigation is not without difficulty for women from disadvantaged backgrounds. These women are usually less educated about the country's legal system and experience difficulties in initiating legal proceedings on their own without the support of lawyers. Additionally, most Beninese women are economically weak and lack the financial means to afford the services of lawyers to initiate legal proceedings. Moreover, the slowness of justice is also one of the causes of discouragement, which leads to the abandonment of the court processes. Social pressure also remains very strong against victims who dare to denounce their abusers.

To mitigate these challenges, it is necessary for our government to take measures to make legal aid available or effective for vulnerable groups, and to bring justice closer to those who are subject to legal proceedings. We also believe that alternative dispute resolution methods, such as mediation, are an area to be explored for the promotion of women's rights.

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