APPROACHING REPRODUCTIVE RIGHTS THROUGH A POSITIVE CULTURAL CONTEXT: THE INTERDEPENDENCE OF ARTICLES 14 AND 17 OF THE MAPUTO PROTOCOL

A dissertation submitted in partial fulfilment of the requirements of the degree LLM (Sexual and Reproductive health and rights in Africa)

By

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PLAGIARISM DECLARATION

I, **PACHALO MWENELUPEMBE**, declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

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Date:

Supervisor:

Signature

DEDICATION

This work is dedicated to my two children, Seirra-Alice and Untwampoki-Wilkinson. You are the perfect embodiment of my reproductive autonomy, choice and freedom.

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LIST OF ACRONYMS AND ABBREVIATIONS

African Commission	African Commission on Human and Peoples Rights
ACHPR	African Commission on Human and Peoples Rights
AU	African Union
CAL	Coalition of African Lesbians
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
HRC	Human Rights Committee
IPPF	International Planned Parenthood Federation
Maputo Protocol	Protocol to the African Charter on Human Rights and Peoples Rights on the Rights of Women
UN	United Nations

CHAPTER 1 – INTRODUCTION

1.1 Background

Reproductive health rights for women remain "one of the weakest areas of human rights on the African continent"[1] due to many factors. These factors are notably "Africa's unmet contraceptive needs, high levels of unsafe abortion, high incidence of early or coerced marriages, and to a great extent, laws and customary practices that discriminate on the grounds of gender".[2] Further to this, many African states have been slow in prioritizing reproductive health issues. At the centre of this are the moral, cultural, legal and religious issues that intersect with reproductive health rights. It has been suggested that "countries opposing sexual and reproductive issues often use religious and cultural arguments, mixed with other sentiments, including anti-western or populist ones. This is particularly the case for most African governments; who often argue that SRHR particularly LGBTI rights originate from the West and are 'un-African'".[3] This is because "sexual and reproductive rights touch upon delicate topics such as sexuality, gender-based violence, power relations between men and women, which cut to the core of how culture is defined and societies are organized".[4] In addition to this, "women's reproductive health raises sensitive issues for many legal traditions because the subject is related to-sexuality and morality".[5] This resistance to women's reproductive rights is reflected in laws, policies and practices of a particular state. For the realization of reproductive rights, positive cultural values, attitudes and policies must be encouraged and adopted, while retrogressive laws, policies and practices must be modified to suit the present needs of African societies, or completely eliminated or outlawed.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) is one of the major instruments of the African Union (AU), supplementing the African Charter on Human and Peoples' Rights (African Charter). The Maputo

[1] Legal Grounds III, 'Reproductive and sexual rights in Sub Saharan African Courts' (2017) foreword para 5.
[2] Legal Grounds III (n 1 above) para 5.
[3] M Cense & others 'Culture, Religion and Sexual and Reproductive Health & Rights' (2018), https://www.rutgers.international/sites/rutgersorg/files/PDF/knowledgefiles/Culture-Religion-SRHR.pdf

[4] United Nations Populations " Frameworks and Policies on Sexual and Reproductive Health" (2009) www.unfpa.org
[5] R Cook, 'International Human Rights and Women's Reproductive Health' (1993) *Studies in Family Planning* 73-86.

Protocol, a treaty that came into force by 25 November 2005, provides unique and specific rights for women in Africa. Reproductive health rights are provided under article 14 of the Maputo Protocol. These include "the right for women to control their fertility, the right to decide whether to have children, the number of children and the spacing of children, the right to choose any method of contraception, the right to self-protection and to be protected against sexually transmitted infections, including HIV, as well as the right to medical abortion in instances of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus". The rights under article 14 apply to all women including girls. Furthermore, the Maputo Protocol includes other specific rights that are tailored for African women and their living realities. This includes article 5, which imposes an obligation on states to prohibit and condemn all harmful practices, and article 17, which provides for the right to live in a positive cultural context. These provisions are crucial to women attaining and maintaining their autonomy especially over their reproductive lives.

The spirit of the Maputo Protocol as expressed in the preamble, "firmly convinced that any practice that hinders or endangers the normal growth, and affects the physical and psychological development of women and girls should be condemned and eliminated"[6] and by further being "determined to ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights"[7], imposes an obligation on states to work towards ensuring that women exist in a context that encourages growth and development of women and girls in all aspects. States are further called to uproot all practices, laws and policies that negatively impact this context.

1.2 Problem Statement

The Maputo Protocol has been hailed to be "particularly strong on women's reproductive rights, and is a tool for ensuring universal access to reproductive health and the creation of an enabling environment. It goes beyond other binding treaties, such as CEDAW, in outlining reproductive rights".[8] However, despite such a progressive tool for African women, the realization of these rights for African women is still a distant reality and most African states continue to deny or

[6] Preamble Maputo Protocol para 13.
[7] Preamble Maputo Protocol para 14.
[8] L Gerntholtz and others, 'The African Women's Protocol: Bringing Attention to Reproductive Rights and the MDGs' (2011) 8 *Plos Medicine* 1.

restrict women's rights to reproductive health through restrictive and prohibitory laws and policies. Further to this, cultural and other practices prevalent across the continent contribute greatly to the failure for women to realize their reproductive health rights. To begin with, only 36 countries have signed and ratified the Maputo Protocol. 15 have signed but not ratified, and three have neither signed nor ratified,[9] with several states ratifications followed with reservations especially to article 14(2) (c) which provides for abortion.[10] Reading through the reservations made by these states, the context, whether cultural or legal, from which the state is operating from influenced its decision to make the reservation. Kenya for example made such a reservation because article 26(4) of the Kenyan Constitution specifically prohibits abortion by stating that "abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law".[11]

For African women, the denial of rights is also rooted in gender inequality and deep patriarchal attitudes. Because of this, women have been unable to take charge and control of their reproductive selves. As the Committee on Economic, Social and Cultural Rights has stated, "in all countries, patterns of sexual and reproductive health generally reflect social inequalities in society and unequal distributions of power based on gender, ethnic origin, age, disability and other factors".[12] The prevailing attitudes towards reproductive health matters have therefore further perpetuated the denial of these rights for women. For women in Africa therefore, the restrictive and prohibitory laws and the attitudes against reproductive rights due to negative practices, policies, beliefs and values can be mitigated through the mutual application and interpretation of articles 14 and 17 of the Maputo Protocol. The latter provision provides for the right of women to live in a positive cultural context and the freedom to determine what a positive cultural context is. The freedom to

[9] African Commission on Human and Peoples Rights, 'Ratification Table: Protocol to the African Charter on Human and Peoples rights on the rights of women in Africa' 2019 at www.achpr.org/instruments/wome-protocol/ratification

[10] Rwanda, Uganda and Kenya entered reservations to article 14(2) (c), for Kenya and Uganda because abortion was not permitted under its domestic law. For Rwanda, no reason was given for the reservation by L Asuagbor, 'Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' 2016. However, Rwanda lifted its reservation on article 14(2) (c) in 2012 https://reproductiverights.org/press-room/rwandan-government-takes-critical-step-in-recognizing-women's-fundamental-human-rights

[11] Article 26(4) of The Constitution of the Republic of Kenya 2010.

[12] ESCR General Comment No. 22 (2016) on the right to Sexual and Reproductive Health.

determine what a positive cultural context is can be exercised collectively or individually, guided by and within limitations set by the law.

"The right to sexual and reproductive health is indivisible and interdependent with other human rights".[13] Of the other rights guaranteed in the Maputo Protocol, this dissertation explores the unique link between reproductive health rights and the right to live in a positive cultural context under article 17 of the Maputo Protocol. Article 17(1) provides that "women have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies". Article 17(2) further provides that "a state shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels". Bearing in mind the close connection between reproductive health matters and cultural context, and how cultural practices, attitudes and policies have been a constraint for many women from enjoying their reproductive health rights, this paper will argue that the realization of the right to live in a positive cultural context for women encompasses reproductive health rights, and that the realization of the rights to reproductive health depends, on a great part, upon the fulfilment of the right to live in a positive cultural context. This argument finds support in the Maputo Protocol, which specifically calls for the prohibition and condemnation of all forms of harmful practices that negatively affect the human rights of women, and which are contrary to recognized international standards. States are further enjoined to take all necessary legislative and other measures to eliminate such practices.

There is a similar provision in article 5(a) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which provides that states "shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women". This buttresses the point that for the realization of women's rights, there is a need for social and cultural attitudes or policies to be closely examined and modified where necessary to suit the needs of women. More important is that women must be in the forefront of this movement of redefining and modifying their cultural contexts to suit their various needs. Article 17(2) of the Maputo Protocol recognizes

[13] Committee on Economic, Social and Cultural Rights General Comment No. 22 (2016) on the right to sexual and reproductive health.

that women are not the "passive receptors or transmitters of culture, but rather active participants in cultural systems".[14]

It is also important to state that article 17(2) of the African Charter provides that "every individual has the right to freely take part in the cultural life of his or her community". Article 17(3) further provides that "the promotion and protection of the morals and traditional values recognized by the community shall be the duty of the state". The African Commission has elaborated that "the right to culture includes the freedom from interference with the enjoyment of cultural life, the freedom to create and contribute to culture, and the freedom to manifest ones culture". The African Commission has also stressed that "the right to culture protects *positive African values* consistent with international human rights standards and implies an obligation on the state to ensure the elimination of harmful traditional practices that negatively affect human rights".[15]

Reproductive issues are culturally sensitive issues such that the role which culture plays in the realization of sexual and reproductive rights cannot be overlooked. Recognizing this barrier, the African Commission in its General Comment No. 2 on article 14(1) (d) and (e) [16] has urged state parties to "take all appropriate measures towards the elimination of all barriers to women's enjoyment of sexual and reproductive health and that specific efforts be made to address harmful cultural practices, patriarchal attitudes, discriminatory laws and policies".[17] However, the African Commission has not defined what these positive African values are and what the right of women to 'live in a positive cultural context' means. Considering that the realization of reproductive rights is interdependent on the right to live in a positive cultural context, this dissertation will attempt to define this right and link it to reproductive rights and how it can be subsequently used to realize the latter right for African women.

1.3 Research Questions

This dissertation seeks to answer the following questions:

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[14] J Mukoro, 'The need for culturally sensitive sexuality education in a pluralised Nigeria: But which kind?' 2017 *Sex Education* page 1.

[15] African Commission on Human and Peoples' rights 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights' adopted in November 2010 at the 48th Session.

[16] African Commission on Human and Peoples Rights, General Comment on Article 14(1) (d) and (e) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

[17] CESCR General Comment No. 22 (n 12 above) para 46.

1. What is the right to live in a positive cultural context?
2. What is the link between reproductive rights and the right to live in a positive cultural context (articles 14 and 17 of the Maputo Protocol)?
3. In what ways can the interdependence of articles 14 and 17 of the Maputo Protocol promote the realization of reproductive rights under article 14?

1.4 Objectives of the Study

The objectives of this study shall be to reveal how the cultural contexts contributes to, or affects the realization of reproductive rights of African women, and to further show that reproductive rights under article 14 are interdependent on the right to live in a positive cultural context under article 17 of the Maputo Protocol. The dissertation will therefore firstly critically analyse and attempt to define what the right 'to live in a positive cultural context' is under article 17 of the Maputo Protocol. In doing so, the concept of 'positive African values' shall be examined and there shall be a further discussion on various laws and practices; and how the African Commission and some African jurisdictions have interpreted cases involving cultural practices and women's rights.

Secondly, the paper will link the right to live in positive cultural context and reproductive rights. In doing so, I will critically examine the organic and related interdependent nature of the two rights, the nature of obligations a state has regarding the right to live in a positive cultural context and how these obligations can be used to realize reproductive rights. The paper will go further to advance the argument that in the interpretation of laws, practices or any aspect that may constitute a culture of people, and especially in connection to women's reproductive rights, our constitutions, most of which contain various human rights guarantees, must inform the basis of what we accrue as reproductive rights for women in our culturally and morally diverse communities. Finally, the paper will discuss the challenges inherent in the right to live in a positive cultural context in lieu of reproductive rights. It will conclude by making recommendations for the advancement of reproductive rights.

1.5 Methodology

The dissertation will employ desk-based research, with a focus on among others, an analysis of primary and relevant secondary sources such as international human rights treaties, national laws, and the opinions of the African Commission and national courts, General Comments, and journal articles. A human rights approach and a feminist approach shall be directed towards understanding

the role of women in deciding what a positive cultural context implies as per article 17(2) of the Maputo Protocol. The author shall also use international human rights standards in the analysis of several practices and courts decisions impacting reproductive health and rights of women in Africa.

the right to live in a positive cultural context having not been adequately interpreted, reliance shall be on the existing literature of the African Commission as well as judicial pronouncements where the right has been referred to in order to expound the right and apply it accordingly in answering research questions posed herein,

1.6 Literature Review

Reproductive rights are guaranteed in the Maputo Protocol and other international treaties. "Broadly speaking, however, reproductive rights encompass two principles—the right to reproductive health care and the right to reproductive self-determination".[18] Reproductive health care includes measures to promote safe pregnancy and delivery; prevent and treat HIV/AIDS and other STIs; and offer abortion, infertility treatments, and a full range of quality contraceptive methods including emergency contraception to all women and girls. The right to reproductive self-determination on the other hand encompasses the "right to physical integrity, the right to privacy, the right to plan one's family, and the right to be free from all forms of violence and coercion that affect a woman's sexual or reproductive life".[19]

More definitively, the Maputo Protocol has included a list under article 14 of recognized reproductive health rights, these are : "the right for women to control their fertility; the right to decide whether to have children; the number of children and the spacing of children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually transmitted infections, including HIV, as well as the right to medical abortion in instances of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus". The list under article 14 of the Maputo Protocol is however not exhaustive. Violations of women's reproductive rights

[18] Centre for Reproductive Rights, 'Gaining Grounds: A tool for reproductive rights reform Legal Advocacy' chap 1 2006 https://reproductiverights.org/document/gaining-ground-a-tool-for-advancing-reproductive-right-law-reform

[19] Centre for Reproductive Rights (n 18 above) 14.

therefore includes unsafe abortion, maternal deaths, female genital mutilation, and child marriage and these experiences and practices are widely tolerated and accepted as either natural and inevitable or customary and necessary. "When viewed through a reproductive rights lens, however, these experiences are rights violations that governments have a duty to address".[20]

It is undeniable that "a woman's right to control her reproductive life is inextricably connected to other rights in civil, political, economic, and social areas. To be able to control her reproductive life, a woman requires reproductive autonomy".[21] Unfortunately, such is not possible for many African women as they live in communities which restrict such autonomy through various laws, policies and practices. From a feminist perspective, and as Tamale argues, "regulating and controlling women's sexuality is essential for the survival of patriarchy and capitalism because it represents a vital and necessary way of instituting and maintaining the domesticity women"[22]. "It works to delineate gender roles and to systematically disenfranchise women from accessing and controlling resources. These laws and practices are used by patriarchal states as a mechanism of regulation and control".[23] "Through the reproductive and sexual control of women's bodies, their subordination and continued exploitation is guaranteed".[24]

When women can exercise their reproductive autonomy, they have independence and means to exercise decisions as to whether to have sex, whether to have children, the number and spacing of children, and whether to carry a pregnancy to term. "Thus, reproductive autonomy is determined by the existing and operative laws in the society in which an individual resides".[25] These need not be only formal legislation but could include traditional practices and other cultural or political attitudes towards women. Such laws, traditional and other practices hinder women from exercising their reproductive autonomy and accessing reproductive health services. This has been further coupled with, "lack of political will and poor implementation, inadequate allocation of resources

[20] Centre for Reproductive Rights (n 18 above) 16.
[21] F Adjetey, 'Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture' (1995) 44 *American University Law Review* 1351-1381.
[22] S Tamale, 'Exploring the contours of African sexualities: Religion, law and power' (2014) *African Human Rights Law Journal* 169.
[23] S Tamale, 'Controlling women's fertility in Uganda' (2016*) International Journal on Human Rights* 123.
[24] S Tamale (n 22 above) 123.
[25] Adjetey (n 21 above) 1352.

to reproductive health issues"[26] have all derailed progress in the realization of reproductive health and rights for African women. It is important to note that "commitments made by governments to respect, protect and fulfil sexual and reproductive health under human rights instruments as well as non-treaty global and regional consensus statements are meaningless without effective implementation at the domestic level".[27] It is at this domestic level that the cultural context comes into play and contributes greatly to a state's failure to implement reproductive rights. As such, despite all the commitments and efforts made towards the fulfilment of reproductive health rights, the context which is characterized by countless legal, social and cultural obstacles, continues to hinder progress.

Nevertheless, it is important to recognize that what is known as culture in African societies today is a mixture of many different value systems. African societies have moved from pre-colonial periods, the coming of the missionaries, colonial rule, dictatorships and now an era of human rights, all of which have shaped and influenced what cultural values are.[28] This dissertation therefore uses the word culture in the most expansive way possible. It can mean for example "the various ways that social business is conducted and mediated through language, symbols, rituals and traditions and influenced by issues such as race, ethnicity, religion, material base, and so forth."[29] And as Mukoro adds, "cultural systems are part of a larger space, which encompasses nature's continuing evolution, and humankind's attempts to survive within it, sometimes through adaptations that leave footprints on cultural systems".[30]

It has been argued that "culture is a double-edged sword that can be wielded creatively and resourcefully to enhance women's access to justice. The social legitimacy that "culture" enjoys around the African continent is an indicator to all feminist activists of its importance and possibilities".[31] The cultural context in which individuals operate in has a great influence on how they approach certain societal ills or injustices. The same value systems, beliefs and policies which prevail can be used to curb the ills or further perpetuate them depending on how they are applied.

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[26] C Ngwena & E Durojaye (ed) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014).
[27] Ngwena & Durojaye (n 26 above) 1.
[28] Adjatey (n 21 above) 1351.
[29] S Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2007) *Sex Matters* 148.
[30] Mukoro (n 14 above) 2.
[31] Tamale (n 29 above) 164.

As Tamale has further argued, "for many African women the sustainable solutions to their oppression, exploitation and subordination hardly lie in vague, alien legal rights, but in a careful and creative deployment of the more familiar cultural norms and values".[32] The notion of familiar cultural norms and values should be understood to include the values enshrined in domestic constitutions and other legally binding instruments such as the Maputo Protocol. Surely, it would be laughable to argue that the values and norms enshrined in national constitutions are alien as they are conceived from the common goals and beliefs held by the people.

This is perhaps why the African Charter and the Maputo Protocol, realizing the importance of culture for Africans, have called for the promotion of positive African values, and the inclusion of the right to live in a positive cultural context determined by women themselves. "Culture facilitates the classification of various forms of practices as either traditionally acceptable or not acceptable".[33] It has been argued that "when cultural changes occur, they impact on sexual practices and even conceptions, thereby freeing space for the emergence of other, sometimes very different, sexual cultures".[34] It is undeniably true that African cultures are constantly going through various changes due to many factors such as modernization of societies and change in political waves. Our cultural context must therefore be informed with the changes and adapt accordingly to best suit current needs. In other words, "culture needs to be approached in a dynamic and ritualized fashion, examining the linkages between its positive aspects and the emancipation of women".[35]

In as much as many African states have ratified the Maputo Protocol and other international treaties guaranteeing women's reproductive rights such as CEDAW, "the persistence of deep-rooted adverse patriarchal attitudes and firmly entrenched stereotypical behaviour with respect to the role of women and men in the family and society limit the full implementation of the human rights of women".[36] The continuing existence of retrogressive colonial laws and harmful traditional practices in African states affect the equal right of women to reproductive health rights.

[32] As above.
[33] Mukoro (n 14 above) 2.
[34] Mukoro (n 14 above) 2.
[35] Tamale (n 29 above) 164.
[36] M Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) *Journal of African Law* 51.

The right to live in a positive cultural context under the Maputo Protocol is a unique avenue for the realization of many rights in the Protocol. As Tamale argues, "the provision recognizes and validates African women's agency in challenging culture as a concept of power/ authority and reshaping it so that it connects with rights. Rather than condemning culture, the provision recognizes its positive potential, and underlines the necessity for the full and equal participation of women in determining what these should be".[37]

From the discussion above, this dissertation will contribute towards expanding the idea of positive African values and making a connection to reproductive rights. It is contended throughout the paper that the deep connection that reproductive health and rights issues have with laws, practices and traditions that seek to regulate calls for the simultaneous realization of reproductive rights and the right to a positive cultural context. The promotion of reproductive rights has dwelled on its linkage to the right to health, which is a socio-economic right, the justiciability of which is still contentious in many African jurisdictions. Further to this, it is a right to be progressively realized; hence states use this as an excuse for the slow progress in implementing the right. The right to live in a positive cultural context however is a right that requires immediate realisation as a justiciable right by virtue of article 25 of the Maputo Protocol, which imposes an obligation on states to provide judicial, administrative, and legislative remedies to any women whose rights recognised in the Maputo Protocol are violated. Therefore, this dissertation shifts the focus from the interdependency of reproductive rights on the right to health to the right to live in a positive cultural context and reproductive rights.

1.6 Overview of Chapters

In the next chapter, I get into the discussion on the right to live in a positive cultural context. This shall involve analysing the idea of positive African values. Because positive African values have been said to be those that are compliant with international human rights standards and do not include harmful traditional practices, I shall further discuss the applicable international human rights standards and the harmful practices and how different cultural practices have been approached and interpreted by some selected jurisdictions in Africa. The next chapter ends with a

[37] Tamale (n 29 above) 158.

discussion on the right to live in a positive cultural context by making an analysis on how states obligations to respect, protect and fulfil translate when it comes to this particular right.

Chapter 3 shall involve a discussion on the interdependence of articles 14 and 17 of the Maputo Protocol by firstly discussing the principle of interdependence of human rights. Interdependence is discussed as being organic and or related interdependence. From this discussion, I proceed to analyse how articles 14 and 17 are interdependent by examining the various cultural contexts and how they influence the realization of reproductive health rights. The chapter is concluded by proposing that constitutions across Africa hold the moral and legal standard on reproductive rights and that the liberal and purposeful interpretation of provisions of constitutions guarantees and safeguards all reproductive health rights.

The last chapter contains a discussion on the challenges in the application of the right to live in a positive cultural context in lieu of reproductive rights. Recommendations are then made on how to utilize article 17 for the purpose of recognition and enforcement of reproductive rights. Specifically, I discuss the use of strategic litigation and constitutional recognition of reproductive rights as tools appropriate for the necessary cultural or legal shift towards a context that guarantees reproductive rights for women in Africa.

CHAPTER 2 – THE RIGHT TO LIVE IN A POSITIVE CULTURAL CONTEXT

2.1 Introduction

In this chapter, a critical analysis will be made of the right to live in a positive cultural context as provided under article 17 of the Maputo Protocol. This shall involve an attempt to define what positive African values are and what informs them using recognised principles under the African Charter, the Maputo Protocol and recognized and applicable international human principles. Further discussions shall be on identifying and analysing harmful practices which relate to reproductive rights and how such practices have been interpreted by various African domestic jurisdictions.

2.2 The concept of positive African values

The right to culture is provided under article 17(2) of the African Charter and it states that "every individual may freely take part in cultural life of his community". The African Commission has stated that "the right to culture protects positive African values which are consistent with international human rights standards, and implies an obligation on the state to ensure the eradication of harmful traditional practices that negatively affect human rights".[38] While the African Commission makes such a bold statement, it has not gone further to define what positive African values are. The notion of positive African values is further mentioned in article 29(7) of the African Charter where a duty is imposed on an individual "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society".

The scope of positive African values is subject to debate and while the African Commission has not interpreted this provision, just as it has been argued that "progressive and liberal construction of the Charter seems to leave no room for the discriminatory treatment of women"[39], the interpretation of positive African values leans towards values that are not discriminatory and advance the rights of all including women's rights. In spite of such a lacuna in interpretation, these positive African values can be identified through an elimination process as

[38] ACHPR Principles and Guidelines on the implementation of Social Economic and Cultural Rights in the African Charter on Human and Peoples Rights 2011, 38 para 75.
[39] M Ssenyonjo (n 36 above) 44.

the qualification provided in the African Commission's Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter is that such values must be consistent with international human rights standards and do not include harmful traditional practices. It follows therefore that positive African values are those that are consistent with international human rights standards and excludes harmful traditional practices.

However, a recent decision by the African Commission to withdraw observer status previously granted to the Coalition of African Lesbians (CAL) at the request of the Executive Council of the AU indicates that the idea of positive African values is political and does not reflect the standard set out in the guidelines.[40] The AU Executive Council[41] expressly requested that the African Commission "take into account the fundamental African values, identity and good traditions and to withdraw the observer status of NGOS who may attempt to impose values contrary to African values."[42] In line with those African values, which the Executive Council did not mention, it requested that the observer status granted to CAL be withdrawn. It is a confusing and contradictory decision considering resolution 275 of the African Commission,[43] which condemns violence against persons based on their imputed or real sexual orientation. The resolution specifically calls for the protection of sexual minorities from such violence and "calls on state parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities." The African Commission's decision contradicts steps taken by itself to ensure that the rights of sexual minorities are protected and contributes to perpetuating stigma against NGOs working in the field of sexual minorities' rights. It is unimaginable that such a decision can be aligned with positive African values which the Executive Council seeks to protect and promote.

[40] African Commission on Human and Peoples Rights Final Communique of the 24th Extraordinary Session of the African Commission on Human and Peoples Rights par 8(I) 8 August 2018.
[41] Decision of the 38th Activity Report of the African Commission on Human and Peoples Rights Doc.Ex.CL/921 (XXVII) EX.CL/105(XXXIII).
[42] African Commission (n 40 above) para 7.
[43] African Commission on Human and Peoples Rights, Resolution 275 on Protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity 2014.

2.2.1 International human rights standards

Human rights principles and standards are generally contained in national constitutions and laws and regional and UN human instruments. These principles and standards help give direction to government agencies, individuals and institutions on the appropriate shaping of policies and practices.[44] The term human rights standard is also used to refer to the level or quality of life that must be met by states and such standards should be seen as the minimum required level which states should not go below. International treaties have established rules and standards of how states should treat people and how people should treat one another. International human rights standards are explicitly recognized under article 60 of the African Charter as an important point of reference for the African Commission to draw inspiration from in the interpretation of the provisions in the African Charter. Article 60 specifically mentions "international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present African Charter are members".

When it comes to reproductive rights, therefore, a positive cultural context should be characterized by positive laws and values that are not harmful, and are recognized and established international human rights standards relating to reproductive rights. Globally and regionally, there are established international human rights standards on reproductive health and rights. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which is the earlier treaty concerning women's rights and which came into force in 1981 contained vague provisions relating to reproductive rights. Reproductive health rights were conceived as maternal and family planning matters and the idea of reproductive autonomy was not really reflected. For instance, article 5(b) of CEDAW requires states parties to ensure that family education includes a proper understanding of maternity as a social function. There are also several other provisions

[44] R Cook *et al* Reproductive health and human rights: Integrating medicine, ethics and law (2003) 148; V Balogun & E Durojaye *et al* 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 368.

relating to provision of maternity leave, prohibiting dismissal of women based on pregnancy[45] and ensuring that rural women have right to access health care facilities including family planning[46] and the prohibition of discrimination against women in all matters concerning marriage and family relations.[47] However, subsequent interpretations of the convention by the CEDAW Committee through General Comments and Concluding Observations has provided a strong legal framework for the development of reproductive rights.

The explicit international recognition of reproductive rights can be traced to the International Conference on Population and Development (ICPD) of 1994, where reproductive rights were defined. As one expert writes, "the reproductive health and rights approach adopted at ICPD is premised on a view that values women intrinsically and is genuinely concerned about their health and well-being".[48] She further opined that women's reproductive capacity had been transformed to a matter of women's empowerment and an exercise of their bodily autonomy in relation to their sexual and reproductive health within their social, economic and political contexts. The recognition of reproductive rights at the ICPD conference has further inspired and informed legal instruments' interpretation of reproductive rights.

General Comment Number 22 by the Committee on Economic, Social and Cultural Rights (CESCR) on the right to sexual and reproductive health admits that the adoption of the Programme of Action at the ICPD Conference "highlighted reproductive and sexual health issues within the human rights framework"[49] and that this has led to, the evolution of international and regional human rights standards and jurisprudence related to the rights to reproductive health. One of the recognized elements of the right to reproductive health is acceptability and the Committee explains that "all facilities, goods, information and services related to reproductive health must be respectful of the culture of the individuals and communities and be sensitive to gender and age among others". The Committee further explains that "this requirement to respect culture of the individuals

[45] Article 11(2) CEDAW.
[46] Article 14 CEDAW.
[47] Article 16 CEDAW.
[48] C Shalev, 'Rights to Sexual and Reproductive Health – the ICPD and the Convention on the Elimination of all forms of Discrimination against Women' paper presented at the International Conference on Reproductive Health, Mumbai India 15-19th March 1998 accessed at www.un.org on 9 June 2019.
[49] Committee on Economic, Social and Cultural Rights, 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) par 1.

cannot be used to justify the refusal to provide tailored facilities and services to specific groups".[50] This element directly relates to issues of cultural context in different ways such as where states deny contraceptives or sex education to adolescents on the ground that it is a taboo to introduce adolescents to such issues at an early stage.

The Maputo Protocol came into existence post the ICPD conference and it is not surprising that it contains more definitive provisions on reproductive rights including the right to safe abortion. The Maputo Protocol, like CEDAW, has also affirmed that "administrative discriminatory laws, policies, procedures, practices must be removed so that women can effectively claim and enjoy their reproductive freedom and rights and that state parties must imperatively take all necessary measures to remove socio-cultural structures and norms that promote and perpetuate gender-based inequality".[51] Further to this, State parties are required to "provide a legal and social environment that is conducive to the exercise by women of their sexual and reproductive rights and that this involves revisiting, if necessary, restrictive laws, policies and administrative procedures relating to family planning/ contraception and safe abortion in the cases provided for in the Protocol, as well as integrating the provisions of the said legal instrument into domestic law".[52]

The Maputo Protocol is cognizant of the unique realities of African women and this has been considered through various provisions in the Protocol. So, in as much as "many principles enshrined in the Maputo Protocol are based on existing international human rights standards, in many others it significantly advance international human rights standards and specifically enhance the protection and promotion of women and girls' rights in Africa".[53] The explicit recognition that women have the right to live in a positive cultural context together with all the other rights in the Maputo Protocol is a clear demonstration of the unique needs that women in Africa have.

[50] Committee on Economic, Social and Cultural Rights (n 49 above) 6.
[51] 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.
[52] ACHPR General Comment No. 2 (n 51 above) para 46.
[53] S Omondi et al, 'Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of women and girls in Africa' 2018 www.equalitynow.org

2.2.2 Harmful Practices

The Maputo Protocol defines harmful practices as "all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".[54] By this definition, it is clear that the term is not restricted to cultural practices and it can extend to laws and policies as long as they have a negative impact on the rights of women and girls. Article 5 of the Maputo Protocol specifically prohibits harmful practices by stating that "states parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards". It is of paramount importance to recognize that every practice that negatively affects women's rights and is not line with recognized international human rights standards cannot be said to be acceptable by the Maputo Protocol. However, the only practices that have been specifically prohibited by the Maputo Protocol are Female Genital Mutilation (FGM) and child marriage under article 5(b) and 6(b) respectively. While the Maputo Protocol does not prohibit polygamy, article 6(c) encourages monogamous forms of marriage but still guarantees the promotion and protection of rights of women in polygamous marital relationships.

The CEDAW Committee and the Committee on the Rights of the Child have defined harmful practices as "persistent practices and behaviours that are grounded on discrimination on the basis of sex, gender, age and other grounds as well as multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering"[55]. The Committees have come up with a test for determining harmful practices, among which are that "the practice should be traditional, re-emerging or emerging practice that is prescribed and kept in place by social norms that perpetuate male dominance and inequality of women and children based on sex, gender and other intersecting factors and that they are imposed on women and children by family, community members or society at large, regardless of whether the victim provides or is able to provide full, free and informed consent". The Committees have expressly recognized child marriage, FGM and polygamy as harmful practices and have called for

[54] Article 1 (g) Maputo Protocol.

[55] Joint General recommendation/General Comment No. 31 of the Committee on the elimination of discrimination against women and No. 18 of the Committee on the Rights of the Child on harmful practices.

their elimination.[56] By the criteria set by the Committees above, the practice of bride price can also be considered harmful as it perpetuates male dominance and inequality of women based on sex.

Most cultural practices recognized as harmful by international human rights bodies such as polygamy, child marriage, FGM and bride price are practices dominant in Africa. Others have defined harmful cultural practices as a "term increasingly employed in the last three decades by organizations working within a human rights framework to refer to certain discriminatory practices against women in the Global South, especially in Africa and Asia".[57] It is no surprise therefore that the practices are still being practiced in Africa and there are attempts to even modify them to suit the political climate.[58] Criticisms of such practices is looked at as the influence of western nations by those in support of maintaining such traditional practices.[59] Whatever the case, it is clear that "harmful traditional practices emanate from the deeply entrenched discriminatory views and beliefs about the role and position of women in society and that the role differentiation and expectations in society relegate women to an inferior position from birth throughout their lives".[60] In order to protect and promote the welfare of women everywhere in Africa, such practices must be abolished. It is not surprising therefore that the African Commission has stated that the "right to culture further implies an obligation on the state to eradicate harmful traditional practices that negatively affect human rights".[61]

Article 5 of the Maputo Protocol laces an obligation on states to "prohibit, condemn, enact legislation and take all measures to eradicate and eliminate all forms of harmful practices that negatively affect women's rights and contradict international standards".[62] To protect vulnerable groups such as girls who are victims of different harmful social and cultural practices, the state must eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: "customs and practices prejudicial to the health or

[56] Joint General Recommendation/General Comment No.31 of the Committee on the elimination of discrimination against women and No. 18 of the Committee of the Rights of the child on harmful practices.
[57] C Longman and T Bradley (ed), *Interrogating Harmful Cultural Practices, Gender Culture and Coercion* (2015) 1.
[58] In the case of FGM for example, there has been a rise in what is called medicalized FGM where the cutting is done by professional doctors.
[59] Longman & Bradley (ed) (n 57 above) 1.
[60] N Wadesango, 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13 *Anthropologist* 121 129.
[61] African Commission Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights para 75.
[62] Article 5 Maputo Protocol.

life of the child; customs and practices discriminatory to the child on the grounds of sex/gender or other status and prohibit child marriage and the betrothal of girls".[63]

In as much as the Maputo Protocol and the African Commission have taken such a clear and bold stand against harmful practices, this has not been further defined or elaborated. The Maputo Protocol has been criticized in this regard, for instance, "the Maputo Protocol does not explicitly prohibit the practices of *lobolo* (bride price) or leviratic marriages (the practice of inheriting a wife). While the Protocol does require that no marriage shall take place without the free and full consent of both parties, the failure to explicitly address the practices may be interpreted as allowing them to continue".[64] In this regard, certain practices that have been termed harmful by the Human Rights Committee (HRC) and the CEDAW Committee still enjoy legitimacy in many African countries. These are practices such as polygamy and bride price. On polygamy, the HRC has stated that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist".[65] Regardless of this, polygamy still exists in Africa and the Maputo Protocol only contains a lesser obligation to discourage polygamous marriages. Therefore, apart from the explicitly prohibited harmful cultural practices such as FGM, the Maputo Protocol as well as the African Commission is yet to make a pronouncement on the other cultural practices that are thriving but yet considered harmful. As for polygamy, article 6(c) of the Maputo Protocol provides that monogamy is to be encouraged as the preferred form of marriage, however, rights of women polygamous marital relationships are equally protected and promoted.

The CEDAW Committee[66] noted that some states "allow marriage to be arranged for payment or preferment" and that this is a violation of a woman's right to freely choose her spouse. The Committee further defined payment or preferment to mean "transactions in which cash, goods or livestock are given to the bride or her family by the groom or his family; or a similar payment is

[63] Joint General Recommendation/General Comment (n 55 above) para 76.
[64] K Davis, 'The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination' (2009) 42 *Vanderbilt Journal of Transnational Law* 949.
[65] Human Rights Committee General Comment No. 28, Equality of Rights between Men and Women (Article 3) UN Doc CCPR/C/21/Revi/Add 10 (2000), para 24.
[66] CEDAW General Recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (2013).

made by the bride or her family to the groom or his family".[67] While the Committee did not call for the elimination of the practice, it was recommended that the practice should not be a requirement for a valid marriage. This was further recognized in the joint general recommendation of the CEDAW and CRC Committee, that the payment of dowries and bride prices may increase vulnerability of women and girls to violence and to other harmful practices.

2.2.3 National courts pronouncements on cultural practices

African states have passed national laws pertaining to cultural practices and have had a chance to adjudicate on such issues and whether such practices conflict with women's rights. The Supreme Court of Uganda has, for example, adjudicated on payment of bride price and its compatibility with women's rights. In the Ugandan case of *Mifumi v Attorney General,*[68] the Supreme Court of Uganda found that the payment of bride price does not violate women's equality. In her ruling, Judge EN Mpagi-Bahigeine, JA went further to state that "the term bride price is a misnomer coined by the colonialists who did not appreciate the meaning and significance of certain cultural rites and ceremonies which include exchange of intrinsically unique gifts which are merely symbolic as a sine quo of a marriage". In as much as the court agreed with the contention that in some cases men view bride price as "consideration for their entitlement to the woman's labour, obedience, sexual availability and fertility and that such attitude could contribute to domestic violence", it found that the abuse of the custom by some men was not sufficient to declare that the custom and practice of demand of bride price promotes inequality and violence in marriage. The court insisted that there were valid reasons for people to still value the custom of bride price since it is considered as a token for gratitude to the bride's family for the girl's nurture and upbringing. However, in his dissenting opinion, Twinomujuni JA agreed that "the practice of bride price violates the right to equality and dignity of women and that it subjects women to slavery and servitude when it makes it impossible for her to move out of an abusive marriage". He found the practice to be unconstitutional. The majority holding in the *Mifumi case* is contrary to the Joint General Recommendation of the CEDAW Committee and the Committee on the Rights of the

[67] CEDAW (n 66 above) para 33.
[68] *Mifumi v Attorney General* https://ulii.org/ug/judgment/supreme-court-uganda/2010/2

Child on Harmful Practices which specifically notes that the payment of bride price could increase vulnerability of women and children and that it should be abolished.[69]

In some court cases, I have noted that courts gave a modern interpretation of a traditional practice that are potentially harmful. I believe with the intention of still maintaining the practice and bringing it in line with modern day legal systems. In the South African case of *Nvumeleni Jezile v The State*,[70] the appellant sought to rely on the traditional practice of *ukuthwala* as a defence for criminal proceedings against him. The practice of *ukuthwala* involves the 'mock abduction' of a girl for purposes of marriage. The High Court of South Africa found that in the real practice, the parties give consent and that the abduction is merely a ceremony. The court further found that practices associated with the aberrant form of *ukuthwala* could not secure protection under the law and that the appellant could therefore not rely on the practice as a defence to the criminal proceedings brought against him. The court in this case shielded a practice that can potentially be abused, as consent to participate in such a practice can be obtained in various coercive and forceful ways, considering the unbalanced power dynamics in favour of males which already exist in most African communities. As such the consent obtained, if at all, is questionable. This approach by courts to romanticize practices that are potentially harmful is not isolated. A critic of Judge Le Roux decision in the *Mthembu* case, a case on customary rules of intestate succession, which favoured males, stated that "in the case of *Mthembu*, Judge Le Roux relied on outdated anthropological and romantic Africanist idealizations that glossed over the well-documented disadvantages faced by women living in rural communities by emphasizing theoretically protective and reciprocal elements of African patriarchy".[71]

In Malawi, the Maputo Protocol was ratified in 2007 and the state has taken steps towards domesticating some of its provisions through the Gender Equality Act. One of the provisions reflected in the Act is the prohibition of harmful practices, specifically prohibited under section 5(1) of the Gender Equality Act.[72] The provision states that "any person shall not commit, engage, subject another person to, or encourage the commission of any harmful practice". The Act does not provide an exhaustive list of harmful practices. However, it defines harmful practice as "a

[69] CEDAW & CRC Joint General Comment No. 31 (n 55 above) 24.
[70] 2015 (2) SACR 452 (High Court of South Africa).
[71] Davis (n 64 above) 973.
[72] Act No. 3 of 2013.

social, cultural or religious practices which on account of sex, gender or marital status does or is likely to; undermine the dignity health or liberty of any person or result in physical, sexual, emotional or psychological harm to any person".

By not listing down specific practices, the Act leaves room for each practice to be considered case by case as was done in the case of *Republic v Aniva*[73] where the Resident Magistrate court found that the practice of *fisi* (having sexual intercourse with a widow or widower, or a young girl upon coming of age) is a harmful practice and that contravenes section 5 of the Gender Equality Act.

The courts in Malawi have also adjudicated on polygamy, a practice which CEDAW has classified as harmful. In the case of *Brenda Mwananga v Malamulo Mission Hospital*,[74] the applicant sued for compensation for unfair dismissal because she married a polygamist. The court found that the respondent's actions violated the applicant's right to marry and found a family as guaranteed under section 22(3) of the Constitution; and that all forms of marriages are protected as per section 22(5) of the Constitution of Malawi. The court further found that the respondent had discriminated against the applicant due to her marital status, which is contrary to section 24 (1) of the Constitution of Malawi. While this was primarily a labour matter, the court affirmed that polygamy is a form of marriage protected by the Constitution of Malawi.

It can be concluded therefore that the approach adopted by national courts as discussed above on issues of cultural practices impacting reproductive rights is a protective approach that seeks to salvage practices that are considered contrary to human rights, particularly those of women. For practices such as *ukuthwala*, payment of bride price, and polygamy, where there is a lot of room for abuse, courts must take bold steps to condemn and call for the prohibition of such practices. Unfortunately, it appears as if in the interpretation of such practices, the courts do not consider the potential harm that these practices inherently possess against women's rights.

2.3 THE RIGHT TO LIVE IN A POSITIVE CULTURAL CONTEXT

The right to live in a positive cultural context is provided under article 17 of the Maputo Protocol. Article 17(1) states that "women shall have the right to live in a positive cultural context and to

[73] Criminal Case No. 87 of 2016.
[74] IRC 124 OF 2003 pronounced on 23rd February 2005.

participate at all levels in the determination of cultural policies". Article 17(2) further provides that "states parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels". Three core concepts can be deduced from this provision.

First, that women have the right to live in a positive cultural context. Secondly, women must participate in the determination of cultural policies. Finally, the state should enhance the participation of women in the formulation of cultural policies at all levels.

2.3.1 To live in a positive cultural context

Human rights impose three obligations, which are to respect, protect, and fulfil. Regarding the right to live in a positive cultural context, the obligation to respect requires the state to refrain from hindering, directly or indirectly, women's right to live in a positive cultural context. A state's direct participation in hindering this right can include maintaining laws that are discriminatory against women. By maintaining laws that for example deny or restrict women's reproductive rights, a state fails to respect this right. Denying women or restricting their access to abortion exposes them to unsafe abortion which often leads to death or disability, thereby not only infringing their right to reproductive health, but other rights as well such as life and dignity. The state is therefore under an obligation to review its laws and ensure that all reproductive rights of women are respected.

The obligation to protect requires state parties to take necessary measures to prevent third parties from interfering with the enjoyment of women's rights. The state must actively guard women and their interests by ensuring that third parties do not interfere with enjoyment of their rights. This means that the state must take active measures against persons that for example encourage and continue the practices that are harmful for women's reproductive rights. This includes introducing criminal law that deals with any persons engaged in such practices. For example. Kenya passed the Prohibition of Female Genital Mutilation Act in 2011 which criminalizes female genital mutilation and imposes criminal sanctions such as life imprisonment where the carrying out of FGM causes death. The Act goes as far as criminalizing any person who takes another person outside of Kenya to perform FGM. In Malawi, the state has legally banned child marriages by raising the minimum age of marriage to 18. Malawi specifically amended its Constitution to provide 18 as the minimum age for marriage in 2018 with the view of eliminating early marriages

and protecting girls.[75] This ensures that young girls are not exposed to early marriages and early child bearing which often leads to death or other complications such as fistula. This, in turn, fulfils reproductive rights of women, as such conditions enable women to exercise their sexual and reproductive rights regarding family planning/contraception and safe abortion.

The obligation to fulfil the right to a positive cultural context requires the state to create legal, economic and social conditions that have a positive impact on the lives of women. In relation to reproductive rights, this includes provision of health facilities with trained personnel who are able to tend to the various reproductive needs of women, ensuring that reproductive health services are accessible to all and rolling out programs targeted at reducing maternal mortality rates and other avoidable birth complications. In the case of *Millicent Awuor Omuya alias Maimuna Awuor & Another v. The Attorney General*,[76] the Kenyan High Court found that the duty to fulfil further includes providing affordable reproductive health services especially for those who cannot afford the health services. Prohibitive fees in health facilities result in exclusion of poor women in accessing reproductive health services and this does not reflect a positive cultural context. The obligation further extends to a states recognizing and affirming certain practices as harmful and being in conflict with a positive cultural context. For example in the case of *The state v Thomas Chirembwe*,[77] in confirming the conviction and sentence, the High Court of Zimbabwe stated that women have the right to live in a positive cultural context in terms of article 17 of the Maputo Protocol and that rape is a form of gender based violence that emanates from cultural attitudes towards women that permit the use of sex as an instrument of power and control.

2.3.2 Participate in determination of cultural policies

At the core of the right to live in a positive cultural context, the state must not isolate women in the determination of cultural policies. The state must ensure that women participate and also work on enhancing the participation of women. This provision requires that women are included in activities that determine cultural policies. This should start from the grass roots level all the way

[75] Constitutional Amendment Act No. 36 of 2017
[76] Petition No. 562 of 2012 Kenya, High Court, Constitutional and Human Rights Division (2015).
[77] The state v Thomas Brighton Chirembwe HH162-15 CRBB NO. R 1006/12.

to the legislature. It is important that women's voices are present at each step of the process that determines cultural policies.

Enhancing participation of women may involve taking direct and deliberate measures aimed at increasing women's presence at decision making platforms. This obligation includes affirmative actions on the part of the state to ensure that women are represented at all levels. Several African states have taken such measures to increase women's participation in decision making. In the Rwandan post-genocide constitution, 24 out of 80 seats in the lower house of parliament are reserved for women, and 6 out of 20 seats in the upper house are reserved for women. As a result, women now constitute over 49% of the country's political representation.[78]

For some countries, this attempt to increase women's visibility and participation has miserably failed despite clear legal provisions. For example, under section 11(1) of the Gender Equality Act[79] of Malawi, it is provided that appointing authorities shall ensure that either sex makes up not less than 40% and no more than 60% in a department in the public service. Despite having such a clear provision, appointing authorities have not complied.[80] Furthermore an attempt was made to amend the laws to include 26 permanent seats in parliament for women, however, this did not succeed. The Maputo Protocol is "clearly based on the presumptions that women's rights may not be given effective legal protections unless women participate in the development, interpretation, and enforcement of the law".[81] The failure for women to be included in various key positions in most African states has therefore negatively contributed towards the visibility of women's rights and issues, as well as their resolution.

However, a downside of this right is its functionality as an individual or collective right. The majority if not all of the harmful practices that violate and derail the realization of reproductive rights are practices that are done by a group rather than individuals. Therefore, isolated and individual claims to the right to live in a positive cultural context in lieu of reproductive rights may only be effective in as far as for example getting certain practices banned or criminalized but not

[78] African Commission (n 61 above).
[79] Act No.3 of 2013.
[80] For example, the cabinet appointments made by President Peter Mutharika on 19th June 2019, out of 24 ministers, only 5 were women, which is way below the 40% statutory requirement.
[81] Davis (n 64 above) 980.

eradicated. The right to live in a positive cultural context must be collectively claimed. To this end, the practicality of the right seems moot.

2.4 CONCLUSION

A positive cultural context not only refers to the prevailing cultural and traditional practices, but to the laws, policies and attitudes existing. The right to a positive cultural context has been widely construed and even applied in criminal matters by some national courts.[82] The need for women to participate in the determination of a positive cultural context as provided under article 17(2) has been stressed above. As such, it is imperative that states do take necessary measures, including affirmative actions, to ensure that women are represented all decisions, policies, and law making.

From the discussion above, a positive cultural context refers to a situation where practices, laws, and policies are not harmful and are in line with international human rights standards. Regarding women, such practices must advance the well-being of women. African women have the right to live in a positive cultural context, the struggle lies in defining what constitutes and what can be part of a positive cultural context. As discussed above, different African jurisdictions have considered different traditional practices that are regarded as harmful elsewhere and have a position regarding the same. Whether the decisions of courts or parliaments can be said to reflect the wishes of women as such right belongs to them is moot.

[82] *The State v Thomas Chirembwe* (n 30 above) 6.

CHAPTER 3 – THE INTERDEPENDENCY OF ARTICLES 14 AND 17 OF THE MAPUTO PROTOCOL

3.1 Introduction

This chapter shall discuss the interdependency of human rights, specifically that of articles 14 and 17 of the Maputo Protocol. Firstly, I shall discuss the principle of interdependency of human rights then proceed to analyse how article 14 and 17 are interdependent. Finally, this chapter shall propose a concept of constitutional culture as that which must guide the realization of sexual and reproductive rights.

3.2 The interdependence of articles 14 and 17 of the Maputo Protocol

3.21 Interdependence of human rights

Human rights are said to be universal, indivisible, interdependent and interrelated.[83] These are principles that guide human rights. Of all these principles, scholarly work has focused on the universality of human rights and not much on the other principles. However, all the principles are key in the interpretation and application of human rights. Interdependence is about how the realization of one right contributes to the realization of the other rights, despite such rights being different. As further elaborated, "to say that rights are interdependent despite their distinctiveness as particular rights means that the enjoyment of one right (or group of rights) requires enjoyment of others—which may or may not be part of the same "category"".[84] Some scholars have proposed that "interdependence may also be understood as having two senses; organic and related interdependence. In the organic sense, one right forms a part of another right and may therefore be incorporated into the later right".[85]

The interdependence of human rights ensures that even where rights are not explicitly recognized or guaranteed by a state, they can still be implied from the existing rights. The African Commission

[83] Vienna Declaration and Programme of Action, Article 5.
[84] D Whelan 'Untangling the Indivisibility, Interdependency and Interrelatedness of human rights' (2008) The Human Rights Institute Working Paper 7 University of Connecticut.
[85] C Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journals*.

used this principle in the *Ogoni*[86] case where it was argued that "the right to food is implicit in the African Charter in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22) such that by its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed". "From an organic perspective, interdependent rights are inseparable or indissoluble in the sense that one right (the core right) justifies the other (derivative right)"[87].

Related interdependence on the other hand means "that the rights in question are mutually reinforcing or mutually dependent, but distinct. With related interdependence, rights are treated as equally important and complementary, yet separate. To protect right x will indirectly protect right y".[88] This type of interdependence of human rights ensures that rights are enjoyed and realized together and not in isolation. The realization of one right already sets the bare minimum conditions for the other right to be realized. In other words, it boosts the prospects of achieving the other rights.

3.2.2 Interdependence of Articles 14 and 17 of the Maputo Protocol

Articles 14 and 17 of the Maputo Protocol are interdependent both in the organic and in the related sense. In the organic sense, reproductive rights are connected to the cultural context in which the recipient of those rights exist. That is to say, prevailing attitudes, traditions, policies, laws affect the realization of reproductive rights. For example, a state that has restrictive laws on abortion creates a context where women and girls cannot exercise their right to choose when to have children or the number and spacing of the children as well as the right to terminate pregnancies in some allowable instances such as rape and incest. Because of this, women and girls resort to unsafe methods of terminating pregnancies leading to high maternal deaths and or disability. To reproductive rights, this does not reflect a positive cultural context because the restrictive laws are in conflict with provisions under article 14 of the Maputo Protocol and other international human rights standards on reproductive rights. Further to this, the context created leads to further

[86] Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) / Nigeria.
[87] C Scott (n 85 above).
[88] C Scott (n 85 above) 780.

violations of other human rights such as the right to life and health in general because women resort to unsafe and life-threatening measures in order to assert their reproductive autonomy.

Similarly, the continued existence of cultural practices which have negative impact on the reproductive autonomy represent a negative cultural context that hinders the realization of reproductive rights for women in Africa. Practices such as child marriage exposes girls to early pregnancies leading to maternal complications such as death and fistula. It also means the girls do not exercise the choice of when to have children as procreation commences as soon as they are married. Polygamy may also impact on a woman's choice on the number and spacing of children to have as her choice must be made in consideration of the other wives, as well as the husbands' wishes and means. Further, it has been reported that in some instances, women compete to have male children or just generally more children with the intention of being the favourite wife, and/or be entitled to increased share of the matrimonial property.[89]

As already established, a negative cultural context is a great impediment to the realization of women's rights in Africa, especially reproductive rights. Where negative cultural policies thrive, sexual and reproductive rights of women suffer. It follows therefore that to protect women's sexual and reproductive rights, the right to a positive cultural context must also be protected and promoted as it indirectly contributes towards the realization of the latter right. A question then arises: what must states do? The realization of sexual and reproductive rights is mutually dependent on the removal of harmful practices, policies and laws and the involvement of women. To this end, state parties to the Maputo Protocol should take all appropriate measures, through policies, sensitization and civic education programs, to remove all obstacles to the enjoyment by women of their rights to sexual and reproductive health.[90] Furthermore, "states must direct specific efforts to address gender disparities, patriarchal attitudes, harmful traditional practices, prejudices of health care providers and discriminatory laws and policies, in accordance with articles 2 and 5 of the Protocol". Specific direct efforts include passing of legislation that criminalizes harmful practices and affirmative actions that aim at increasing representation of women at decision making tables so that women's issues are represented. In this regard, State parties should work in cooperation with health care providers, traditional and religious leaders, civil society organizations, non-

[89] P Rossi, 'Strategic choices in polygamous households: theory and evidence from Senegal' (2016)..
[90] General Comment No. 2 on article 14.1 (a) (b) (c) and (f) and article 14.2 (a) and (c) of the Maputo Protocol.

governmental organizations, including women's organizations, international organizations and technical and financial partners.[91]

State parties should provide a legal and social environment that is conducive to the exercise by women of their sexual and reproductive rights. This involves revisiting, if necessary, restrictive laws, policies and administrative procedures relating to family planning/ contraception and safe abortion in the cases provided for in the Protocol, as well as integrating the provisions of the said legal instrument into domestic law.[92]

3.3 Justiciability of Articles 14 and 17

Questions may then arise on the justiciability of articles 14 and 17 of the Maputo Protocol. As Whelan suggests, "the interdependence of human rights is, to my mind, relatively unproblematic, if we assume that a right to something or to be free from something is, as a right, justiciable. It becomes more problematic when one or more of the rights that are thought to be interdependent are not necessarily justiciable".[93] The justiciability of social, economic and cultural rights is still a contentious issue in most domestic courts, such rights being considered vague and hard to enforce. The term justiciability refers to "the ability of people who claim to be victims of rights violations to file a complaint before an independent or impartial judicial body, to request an adequate remedy if a violation is found and have the applicable remedies enforced".[94] As further explained, "a right is said to be justiciable to the extent to which its claim can be adjudicated and remedy provided through the legal system".[95] As Kelsen defines it, "the essential element of a right is the legal power bestowed upon the individual by the legal order to bring about, by a law suit, the execution of a sanction as a reaction against the nonfulfillment of the obligation".[96] While legal enforcement of rights is not the only way to ensure that the citizenry enjoy their human rights, it is important that a right is justiciable before local courts for the purpose of accessing effective remedies for victims of human rights violations.

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[91] African Commission 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 60

[92] African Commission General Comment No. 2, para 46.

[93] D Whelan, 'Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights' (2008) 2.

[94] H Kutigi, 'Towards Justiciability of Economic, social and cultural rights in Nigeria: A role for Canadian-Nigerian cooperation' (2017) *The Transnational Human Rights Review* 132.

[95] D Whelan (n 93 above) 2.

[96] H Kelsen, *Pure Theory of Law* (1967) 125-126.

All rights contained in the Maputo Protocol are justiciable. Article 25 of the Maputo Protocol clearly imposes an obligation on states parties "to undertake to provide for appropriate remedies to any woman whose rights or freedoms, therein recognized, have been violated and to ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law". Remedies at the judiciary level imply that states are able to adjudicate on cases that involve the interpretation and application of various provisions of the Maputo Protocol. A state ratifying the Maputo Protocol without reservation to this article therefore has an obligation to ensure that its domestic laws allow for courts to have such powers cannot therefore contend that the rights provided are not justiciable.

While there has been some successful litigation of reproductive health and rights issues in African courts, the same has not been devoid of problems. In some instances, courts failed to note the reproductive rights issues raised and determined the case as if it were a tort or personal injury matter. In the Ugandan case of *Centre for Health, Human Rights and Development and 4 others v Nakaseke District Local Administration*,[97] the court dwelled on the negligence of the health providers and found the local hospital to be vicariously liable for the death that occurred. The case presented the court an opportunity to address the reproductive rights violations arising from government's failure to provide trained health personnel who can address various maternal needs of women. Unfortunately, it was merely dealt with as a negligence matter.

In other instances, courts refuse to adjudicate due to fears of usurping the powers of the executive branch of government.[98] However, it is important that courts at all levels have a clear understanding of the obligations that a state has regarding reproductive rights so that when they are presented with such matters, they are able to recognise the human rights violations and impose remedies that not only benefit the victim, but all other women.

[97] Civil Suit No. 111 of 2012 (Uganda High Court 2015).

[98] In the case of Centre for Health, Human Rights and Development and 3 Others v. Attorney General [2012] UGCC 4, Constitutional Petition No. 16 of 2011 Uganda, the Constitutional Court of Uganda for example held that petition brought before it claiming that government's failure to provide basic maternal healthcare infringed on Constitutionally guaranteed rights raised acts and omissions that fell under the doctrine of a "political question," and the Court could not find any competent question requiring constitutional interpretation.

3.4 Realizing reproductive rights through the concept of a constitutional culture

All modern-day African states have adopted constitutions that guide and bind the states and the people in those states. The Supreme Court of India in the *Johar*[99] case extensively discussed important elements of a democratic constitution especially regarding the recognition of contentious rights. From the onset, "constitutions are scripts in which people inscribe the text of their professed collective destiny. They write down who they think they are, what they want to be, and the principles that will guide their interacting along that path in the future".[100] Therefore, regardless of the moral, religious or cultural differences that exist in any state, the constitution reflects their collective aspirations as people and it is the standard upon all which matters can be addressed. Constitutions "as foundational documents are organic and breathing documents with senses which are very much alive to its surroundings, because they are created in such a manner that they can adapt to the needs and developments taking place in the society".[101]

In these constitutions, African states have gone further to provide the right to health and some have gone further to provide for reproductive rights of women. For those not expressly provided, the right to health has been generally provided and therefore, sexual and reproductive rights can be implied from such provisions because it has been established that the right to health includes sexual and reproductive rights.[102]

A few countries have expressly provided for reproductive health rights in their constitutions including Ethiopia, South Africa, Zimbabwe and Kenya. In Ethiopia, women have the right to access to family planning education, information and capacity under Article 3 of the Ethiopian Constitution.[103] Articles 12(2)(a) and 27(1)(a) of the South African Constitution[104] provides for reproductive health services by stating that everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and that everyone has the right to have access to health care services, including reproductive health care respectively. In Malawi, the Constitution under section 13(c), as a principle of national policy, there is an

[99] *Navtej Singh Johar & ORS v Union of India, THR. Secretary and Ministry of Law and Justice*, Writ Petition (Criminal) No. 76 of 2016 Supreme Court of India.
[100] Uday S Mehta, 'Constitutionalism' In The Oxford Companion to Politics in India (Niraja Gopal Jayal and Pratap Bhanu Mehta eds.), Oxford University Press (2010), page 15 in the Johar case n 74 above.
[101] Johar case (n 99 above) Dipak para 82
[102] ESCR General Comment No. 2 on the Right to sexual and Reproductive Health.
[103] Constitution of the Republic of Ethiopia 1994.
[104] Constitution of the Republic of South Africa 1996.

obligation on the state to "provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care". It can be argued that from this, women are entitled to reproductive health services meeting their needs and of international standards.

The inclusion of reproductive health rights in these constitutions is not without some negative connotations. Some constitutions, for example the Constitution of Kenya, eSwatini (Swaziland), Somalia and Uganda, have expressly prohibited certain elements of reproductive health rights like abortion. Article 15(5) of the Constitution of eSwatini explicitly states that "abortion is unlawful except on medical or therapeutic grounds to preserve life, physical health or mental health, in the case of rape, in the case of incest, or in the case of foetal impairment". The provision in the Kenyan Constitution is much more centred on the woman and open to interpretation as it states under article 26(4) that "abortion is prohibited except when there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law". The Constitution of Somalia makes a blanket ban on abortion by stating under article 15(5) that "abortion is prohibited except in cases of necessity, especially to save the life of the mother".

Despite the explicit prohibition of some reproductive rights and some 'claw back clauses' in these constitutions, they remain important tools towards total recognition of all reproductive rights if constitutions are interpreted as living documents. In fact, subsequent interpretations of such provisions have been found to be with exceptions, thus allowing abortions in certain circumstances. This is further discussed in detail in the next chapter. Nevertheless, the constitutions of Kenya and Uganda for example still contain provisions guaranteeing and protecting other reproductive rights of women. Article 33(3) of the Uganda Constitution provides that the state shall protect women and their rights, taking into account their unique status and natural maternal functions in society. While this provision does not explicitly contain the words reproductive rights, it is highly likely that the unique and natural maternal functions referred to include the reproductive aspect that women possess and from this, reproductive rights of women can be said to have constitutional protection in Uganda. Save for abortion which is explicitly prohibited by article 22(2) of the Uganda Constitution and in addition to the reservation to article 14(2) (c) of the Maputo Protocol, the rest of reproductive rights are constitutionally protected.

Hence despite such explicit prohibitions of certain reproductive rights and implicit recognition of other reproductive rights in the constitutions, the liberal and purposive interpretations of such provisions, other human rights guaranteed and international human rights guarantees applicable to the particular state, it is much more likely that all reproductive rights would be recognized and protected. While it is commendable that states have implicitly recognized reproductive rights through other human rights such as the right to health, it is still required that reproductive rights, which comprises of various rights, be individually recognized.

The transformative role which our constitutions can play in the recognition of reproductive rights for women in Africa should therefore not be underestimated. The expression transformative constitutionalism as discussed in the *Johar* case, refers to the ability to change or to be altered in order to suit the current demands or environment.[105] This is what must be encouraged in the interpretation of our constitutions especially where contested and sensitive matters are in question. Constitutions must be looked at holistically and the morality which they hold must be reflected in the totality of their provisions. As stated in the *Johar* case, "constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. It assumes that citizens would respect the vision of the framers of the constitution and would conduct themselves in a way which furthers that vision. Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance".[106] Therefore, no matter the social resistance that some elements of reproductive rights face, the morality of our constitutions must remind us that all rights are worth protecting.

3.5 Conclusion

Human rights cannot be realized or achieved in isolation. While it is not necessary to achieve all human rights at once, it is important to recognize the connection which certain human rights have. This ensures that the realization of one right is not derailed due to the failure of other rights directly connected to it. For human rights such as reproductive rights, whose realization is affected by beliefs, traditions, and practices held by people, it is important to engage with rights that address such practices, traditions and laws. Fortunately, for the women in Africa, the Maputo Protocol

[105] Johar case (n 99 above) Dipak para 96
[106] Johar case (n 99 above) Dipak para 141

includes the right to live in a positive cultural context. As discussed above, the interdependence of article 14 and 17 of the Maputo Protocol cannot be underestimated and efforts must be directed to achieving article 14 and 17 simultaneously if we are to guarantee women their reproductive rights.

CHAPTER 4 – PROBLEM AREAS, RECOMMENDATIONS AND CONCLUSION

4.1 Introduction

In this final chapter, I discuss challenges or problems with the interdependence of articles 14 and 17 of the Maputo Protocol. In the discussion, I will analyse potential problems that can be encountered in the realization of reproductive rights of women in Africa through the right to live in a positive cultural context. Lastly, I will make recommendations on how the two rights can be advanced.

4.2 CHALLENGES

4.2.1 The ambiguity of the concept of positive African values

The concept 'African values' has been used in various documents and communications by the African Commission. However, what makes up positive African values is still ambiguous. The challenges in the interpretation and application of this phrase are two-fold. Firstly, this phrase becomes contentious when applied to culturally sensitive issues such as reproduction. As Ngwena states, "from time to time, African values are invoked by political and cultural authorities to continentalise sexuality and to prescribe a regimented and homogenized African sexuality that specifically excludes sexualities outside heterosexuality and, more specifically, delegitimizes non-heteronormative and same-sex sexualities".[107] While he was speaking from the context of sexualities, the same reasoning can be applicable to reproductive rights issues. Women are seen as tools for child bearing as such any deviation from the process of bearing of children is seen as not reflecting African values and met with hostility.

Secondly, the contention arises when one tries to conceive the idea of positive African values as uniform in all African states, and this is especially challenging with reproductive rights. African states are at very different political, economic and development stages. As such, the idea of positive African values will be understood differently from one state to another depending on its context. There are some African states such as South Africa which have legalized abortion, while some such as Uganda and Kenya have specifically prohibited it in their Constitutions. There are some states such as The Gambia, Nigeria and Egypt who have specifically banned harmful cultural

[107] C Ngwena, *What is Africanness: Contesting nativism in race, culture and sexualities* (2018) 15.

practices, while others like Mali, Chad and Liberia have no law against the practice. In short, there is not uniform way in which African countries have approached cultural issues.

At the bare minimum, however, the African Union through the African Commission, should have established what should be considered positive African values so that states build up from that. As discussed in chapter 2, positive African values are consistent with international human rights standards and the right to culture under the African charter only protects positive African values consistent with international human rights standards.

4.2.2 No unified women's voice

The right to live in a positive cultural context can be said to be both a collective right and an individual right. Women can exercise it as a group or individually. This is problematic when exercised collectively in the sense that it is almost impossible to have a unified women's voice on cultural, social or religious issues that affect reproductive rights. In this way, the practicability of the right is moot. Such divisions in women's voices though fuelled by patriarchy have been witnessed even on practices such as FGM and polygamy, with adult women insisting that they be allowed and be accepted to take part in such practices.[108] The contention such issues bring about is polarizing where "if a woman supports customary practice she is viewed as backwards or uneducated, but if she promotes statutory law she is dismissed as being a mouthpiece for a hegemonic western orthodoxy".[109]

While it is desirable that such rights that have the potential for changing women's narrative be exercised collectively to ensure that certain undesirable traits are completely and collectively eliminated, the downside is that it derails the realization of other rights at an individual level. As Davis argues:

> As such, allowing women to contribute as individuals rather than as token voices or a marginalized movement is not assisted by the implementation of affirmative action

[108] In July 2017, a woman in Kenya by the name of Dr Tatu Kamau filed a petition to overturn Kenya's Prohibition of Female Genital Mutilation Act of 2011 arguing that "all cultural beliefs are equally valid and that truth itself is relative, depending on the cultural environment" at https://brightthmag.com/legalize-female-genital-cuttng-fgm-kenya-health-f5335243b4e2 accessed on 10 August 2019.

[109] Davis (n 64 above) 984.

programs. A woman's voice as an individual, rather than as part of a class, group or status, is hampered by the representation provisions of the Protocol.[110]

4.3 RECOMMENDATIONS

4.3.1 Constitutional recognition of reproductive rights of women

The inclusion of specific human rights in constitutions by states is a deliberate and most clear expression of their intention to be held accountable for their failure to realize the concerned right. This is because "Domestic constitutions are the most vital expressions of government responsibility and individual entitlements, and therefore one of the channels best suited to endorsing states' commitments to human right".[111] Indeed most states do not easily depart from the clear provisions of their constitutions and usually establish other institutions such as Human Rights Commissions, Ombudsmen and Courts, to ensure that the constitutional provisions are upheld.

Legal recognition of rights in constitutions is vital to the protection of human rights for several reasons. Firstly, "legal recognition in constitutions can endure changes in government administrations and survive economic or social strife, therefore ensuring a certain degree of consistency over time".[112] Constitutions are not easily amended, with some states requiring referendums to amend certain segments of their constitutions. As such, this ensures consistency for a long period of time.

Constitutional recognition of rights is also important because in the interpretation of constitutional provisions, courts usually adopt a broad, liberal and purposive interpretation to give effect to its fundamental values and principles. "Constitutions are usually interpreted as living documents".[113] This ensures that the current circumstances in a state are taken into consideration, thereby creating a path of protecting new interests and concerns.

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[110] Davis (n 64 above) 984.

[111] L Pizzarossa and K Perehudoff, 'Global survey of National Constitutions: Mapping Constitutional commitments to sexual and reproductive health and rights' (2017) *Health and Human Rights Journal* 281.

[112] L Pizzarossa (n 111 above) 281.

[113] Johar case (n 99 above)

It is estimated that "20 nations replace or amend their constitutions annually and this presents the opportunity to strengthen state commitments to reproductive health and rights as during the process of constitutional change or amendments, constitutional framers often seek inspiration from other jurisdictions or from international law".[114] Recently Malawi amended its constitutional provision on marriage age,[115] making 18 the legal age for marriage and doing away with the previous provision that merely discouraged marriages under 18 years of age. This was influenced by Malawi's commitments under the Maputo Protocol and other international human rights frameworks.

It is important for constitutional law, as all domestic law, to conform to a human rights approach to protect and promote the right to sexual and reproductive health. "Specifically, committed governments should expressly respect, protect, and fulfil these rights for all individuals without discrimination".[116] It is also important that reproductive health rights are expressly recognized. The explicit recognition of reproductive rights in most African constitutions has been through the provision of certain reproductive health rights and restriction or prohibition of abortion. The restriction or prohibition of abortion in these constitutions is not absolute and leaves room for interpretation. So while on the face of it the service is prohibited, the essence of the provisions is just restricting the service to certain circumstances. The Constitution of Kenya for example explicitly states under article 26(4) that abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. While such a law exists in Kenya, a recent court decision[117] in Kenya has affirmed that while abortion is not permitted under the above provision, victims of sexual offences can have access to abortion where the assault results in pregnancy. The court stated that it was their view that "women and girls in Kenya who find themselves pregnant as a result of sexual violence have a right, under Kenyan law, to have an abortion performed by a trained health professional if that health professional forms the opinion that the life or health of the mother is in danger". Health, in the courts view, encompasses both physical and mental health. The court further stated that "while Kenya made a reservation to Article 14 (2) (c) of the Maputo

[114] Pizzarossa (n 111 above) 281.
[115] Malawi Constitutional amendment Act No. 36 of 2017
[116] Pizzarossa (n 111 above) 290.
[117] *Federation of Women Lawyers & others v The Attorney General & others*, High Court of Kenya at Nairobi Constitutional and Human Rights Division Petition No 266 of 2015, Delivered 12th June 2019.

Protocol, it is instructive that the words of the Article mirror in some respects the words used in the Constitution".[118] Of profound importance in this decision is the courts recognition of the effects of sexual violence on the health women. The court stated that "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".[119] And it is on this reasoning that the court found that women who are victims of sexual violence can have access to abortion.

It is therefore of paramount importance to lobby for the inclusion of reproductive rights in constitutions.

4.3.2 Strategic litigation as an advocacy tool in advancing reproductive health rights and elimination of harmful practices

Public interest litigation on human rights issues is gaining momentum in domestic courts in Africa. This can be attributed to the fact that most African states recognise various human rights through their constitutions and international treaties they signed or ratified. Even though this is the case, it has been noted that public interest litigation has been underutilized by women's rights groups throughout the world as a strategy at the national level for the promotion of social change.[120] However, commencing human rights cases in national courts is in itself a hurdle with several jurisdictions having stringent rules on standing, slow judicial processes which delay pronouncements on matters and politically influenced judiciaries. Despite such limitations, national courts still provide an excellent avenue for change in legal regimes and realities of women's lives.[121]

The need to address reproductive health rights issues is immediate and will require resorting to measures like public interest litigation in order to bring about the required change in laws and policies. One such way is through strategic litigation. Strategic litigation involves the identification of legal issues and pursuit of legal cases as part of a strategy to promote human rights.[122] "Strategic

[118] n 117 above, para 372.
[119] n 117 above, 144 par 374.
[120] L Cabal et al, 'What role can international litigation play in the promotion and advancement of reproductive rights in Latin America' (2003) *Health and Human Rights* 51-77.
[121] Cabal et al (n 120 above) 51.
[122] Trial International, 'Strategic Litigation' www.trialinternational.org/topics-post/strategic-litigation accessed on 1 July 2019.

litigation cases set important legal precedents by publicly exposing injustices, raising awareness and bringing changes in legislation, policy and practice".[123] Such cases can be pursued before national, regional or international courts. However, national courts decisions have much more impact. This is because "national courts have the privilege of dispensing decisions that are unquestionably authoritative in the eyes of national authorities, such courts can play an august role in contributing towards the fulfilment of human rights if they are able and willing to indigenize human rights".[124] Strategic litigation can be pursued especially where the legislature is unwilling to pass progressive laws.

Strategic litigation has paved way for the recognition of human rights and changes in legislation in Africa. Recently, the High Court of Botswana in the case of *Letsweletswe Motshidiemang and Attorney General*,[125] declared provisions of the criminal code criminalizing same sex relations as *ultra vires* the Constitution of Botswana, thereby recognizing and affirming the rights of sexual minorities.

Strategic litigation also fosters awareness of human rights violations and helps in the creation of a culture that encourages private and governmental actors to respect and safeguard human rights. This is especially important for certain human rights issues that have not gained momentum or not known at all as human rights issues. This has been the case for intersex persons for example. In the Kenyan case of *Baby "A" (suing through her mother, E.A.) and The Cradle the Children Foundation v. Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths*,[126] while the case was not held in favour of Baby A as an individual, the petition was successful in raising awareness about the rights of persons with intersex conditions generally. The case is attributed to have "broken fetters with cultural norms about sex and sexuality in relation to intersexuality" and that "it forged new ground toward ensuring recognition and respect of the rights of persons with intersex conditions".[127] The same applies to reproductive rights issues, as so much remains hidden due to the sensitive nature of reproduction. Strategic litigation helps to bring such

[123] Trial International (n 122 above) 1.
[124] Legal Grounds III: Reproductive and Sexual rights in Sub-Saharan African Courts (2017) 132.
[125] Botswana High Court Case No. MAHGB-000591 of 2016.
[126] Petition No. 266 of 2013, Kenya High Court.
[127] Legal Grounds III (n 124 above) 132.

things to public and triggers conversation, which then ensures that the various reproductive needs of women are recognised and provided for.

"Litigation can also complement efforts of broader social movements or institutions that seek to highlight human rights violations, reform the law, and effect change in cultural attitudes toward upholding human rights".[128] In the Kenyan case of *Federation of Women Lawyers and others v The Attorney General and others,*[129] even though the court found abortion to be prohibited in Kenya, the case shed light on the human rights violations against women resulting from unsafe abortions. Most importantly, the case clarified exceptions in which abortion is permissible. In this case, the petitioners sought a declaration that the right to the highest attainable standard of health, including reproductive health care services protected in article 43(1) (a) of the Constitution, entitles victims of sexual violence to abortion in situations where, in the opinion of a trained health professional, continuing with a pregnancy would endanger the life or health of the victim as envisaged in article 26(4) of the Constitution of Kenya.

"Strategic litigation also fosters awareness of human rights violations and helps in the creation of a culture that encourages private and governmental actors to respect and safeguard human rights".[130] "Litigation can also complement efforts of broader social movements or institutions that seek to highlight human rights violations, reform the law, and effect change in cultural attitudes toward upholding human rights".[131] Therefore, even if it takes many years before a final settlement or recommendation is adopted, or if the litigation itself is ultimately unsuccessful, litigation still provides an opportunity to bring attention to the issue and the process of change builds up from such initiatives.

Malawi is one country that has a window for strategic litigation to change its restrictive laws on abortion. Sections 149, 150 and 151 of the Penal Code prohibit abortions including aiding and trading in materials that could be used to procure an abortion. Women can only have access to surgical abortion to preserve the life of the woman.[132] There are no guidelines set nor further interpretation on what preservation of the life of the woman means. It is estimated that 51,693

[128] Cabal et al (n 120 above) 73.
[129] Petition No. 266 of 2015, Kenya High Court.
[130] Cabal et al (n 120 above) 57.
[131] Cabal et al (n 120 above) 73.
[132] Section 243 of the Penal Code, Malawi

abortions result in complications requiring post abortion care and that unsafe abortion is among the top five direct causes of maternal deaths, contributing to 18% maternal mortality.[133] The Gender Equality Act under section 19 provides for reproductive health rights. However, under section 19(2), the Act states that "subject to any other written law, every person has the right to choose whether or not to have a child". In as much as this is a later legislation, it is subject to section of the Penal Code which restricts abortion to preserve the life of the woman. In 2015, the government of Malawi through the Law Commission sought out to liberalize abortion laws and a Termination of Pregnancy Bill was drafted. However, the bill is yet to be presented in parliament and the only chance that exists to remove the restrictive laws would be through the constitutional court declaring sections of the penal code as unconstitutional.

Chances of succeeding are high for the following reasons. Firstly, section 13(c) of the Constitution of Malawi provides as a national policy for the state to "provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care". Secondly, section 16 provides for the right to life and that "no person shall be arbitrarily deprived of their life". Furthermore, section 24 generally protects and guarantees rights of women by stating that "women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status…..". Restriction of abortion leads to death of women due to unsafe abortions and it is a health restriction that applies to women only, although it is a health need for women. As such, the restriction is discriminatory against women. Thirdly, section 19 of the Gender Equality Act, read together with the Maputo Protocol which Malawi ratified in 2007, can be said to represent the position on abortion which Malawi aspires to be. Reading the above in totality, the restrictive laws on abortion can be declared unconstitutional for conflicting with sections 13, 16 and 24 of the Malawi Constitution. Strategic litigation would also be highly recommended as the court is obligated to deliver a judgment within 90 days from the last date the parties in a trial filed written submissions.[134]This ensures that petitioners are guaranteed a court judgment as early as possible, and compel the court to provide such judgment where there are delays. In comparison to waiting for parliament to sit and deliberate on a bill, the court in this case, offers a faster solution to the continued rights violations.

[133] J Daire et al, 'Political Priority for abortion law reform in Malawi: Transnational and national influences' 2018 Health and Human Rights Journal.
[134] Order 16 rule 9(1) of the Courts (High Court) Civil Procedure Rules 2017.

4.4 CONCLUSION

The Maputo Protocol contains a great framework for the realization of reproductive rights for women in Africa. Not only does it specifically provide for various reproductive rights in article 14, it also prohibits practices that are prejudicial to reproductive rights. By including the right for women to live in a positive cultural context, it was recognized that the existence of harmful practices hinders the realization of women's rights including reproductive rights. It is very important to recognize the interdependency of article 14 with other rights in the Maputo Protocol and especially article 17 of the Maputo Protocol. This is because without addressing the various cultural contexts in which African women exist across the continent, the realization of reproductive health rights under article 14 of the Maputo Protocol will remain an unachievable goal. This process of redefining our cultural context will require the mutual efforts of women, lawmakers, the judiciary, and civil society organizations working for change in laws, policies, attitudes and practices across the continent.

The process of redefining our culture and finding what works for the best interest of all women in Africa demands that we recognise that African culture is not static; that it changes due to other external factors. It has to also be accepted that as Africans we are constantly going through cultural shifts; and finally, a realization that culture is required to serve us. Strict and rigid interpretations of what constitutes positive African values and clinging to traditional practices which perpetuate harm and inequalities against women especially in exercise of their reproductive autonomy will not only derail the realization of not just reproductive rights, but all rights of women in Africa. African states now possess the chance to rectify a multitude of reproductive wrongs and injustices against all women in Africa through the repressive laws, practices and values that have been allowed to exist to date.

I conclude therefore by quoting this paragraph in Ngwena's *What is Africanness*:[135]

> African identities that were extant, or more accurately, thought to be extant when Africa and Africans were first named, can no longer operate within their originary paradigm for the simple historical reason that the old Africa is no longer. Literally, centuries have passed, complete with their historical ruptures, including the advent and sedimentation of European

[135] C Ngwena, '*What is Africanness? Contesting Nativism in race, culture and sexualities'* 2018 PULP

> colonialism, anti-colonial struggles, modernity, the hybridization of cultures, capitalism, Christianity, Islam, African independence, the post-independence eras and globalizing processes. Consequently, without equivocation, we ought to concede that framing Africanness in terms of an integral, originary and unified identity, which was never there in the first place, is even less convincing today. Rather, as Hall argues, we are better served by a historically conscious concept of Africanness that marks a transformative identification poise….[136]

The Maputo Protocol provides through article 17 a transformation provision and only through a transformative view of African values shall we the realize the potential of article 17 in realizing the rights of women, especially reproductive rights which are intrinsically tied to our diverse and rich African values.

[136]C Ngwena (n 136 above).

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