

**Mainstreaming 21<sup>st</sup> century African feminisms in interpreting gender-based violence in the African Union human rights system**



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**By**

**Melissa Kathleen Wanjiru Mungai**

**[Student No. 21814245]**

**Prepared under the supervision of**

**Dr Roopanand Mahadew**

**Department of Law, University of Mauritius**

**&**

**Dr Ashwanee Budoo-Scholtz**

**Faculty of Law, University of Pretoria**

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Date: 27 October 2021.

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## List of acronyms

AFF	African Feminist Forum
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
APDF	<i>Association pour le Progrès et la Défense des Droits des Femmes</i>
AU	African Union
Banjul Charter	African Charter on Human and Peoples' Rights
Charter of Feminist Principles	Charter of Feminist Principles for African Feminists
COVID-19	Coronavirus disease of 2019
GBV	Gender-based violence
HIV/AIDS	Human immunodeficiency virus/acquired immunodeficiency syndrome
IHRDA	Institute for Human Rights and Development in Africa
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
Ouagadougou Protocol	Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights
UN	United Nations

## Chapter 1: Introduction

### 1.1. Background

Since 2020, gender-based violence (GBV) has been typified as the shadow pandemic paralleling COVID-19.<sup>1</sup> By June 2020, the governors in all the 36 states of Nigeria unanimously declared a state of emergency as a counter-response to GBV.<sup>2</sup> Between 25 and 29 November 2020, South Africa's president mandated five days of mourning for the victims of COVID-19, GBV and femicide.<sup>3</sup> This was amid efforts such as the launch of the National Strategic Plan on Gender-based Violence and Femicide 2020-2030 orchestrated by the government and civil society.<sup>4</sup> In Tunisia, the Ministry of Women Affairs' helpline received 11,361 calls: 87% of the calls comprised reports of physical violence against women and girls.<sup>5</sup> Likewise, the respective ministries of gender from the East Africa Community Partner States, surmised that there was a 'sharp increase in GBV' amounting to a 48% rise in GBV cases reported through toll-free lines and police stations.<sup>6</sup> In all of the countries mentioned, GBV affected women more than men.

Prior to the pandemic, the radical advocacy against GBV has illuminated the gendered inequalities women grapple with, be it social or political inequalities. The nude protests by female students during #FeesMustFall in South Africa aimed at triggering a ceasefire (police brutality against male students especially) and underscoring the overlooked contribution of women in the protest.<sup>7</sup> In 2018, Ugandan activist Stella Nyanzi applied genital cursing and shaming through her infamous poem, which

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<sup>1</sup> P Mlambo-Ngcuka 'Gender-based violence: We must flatten the curve of this shadow pandemic' *Africa Renewal* (25 November 2020) available at <https://www.un.org/africarenewal/magazine/november-december-2020/gender-based-violence-we-must-flatten-curve-shadow-pandemic> (accessed 26 October 2021).

<sup>2</sup> A Okunola 'All Nigerian states declare state of emergency over rape and gender based violence' *Global Citizen* (16 June 2020) available at <https://www.globalcitizen.org/en/content/nigeria-state-of-emergency-gender-violence-rape/> (accessed 26 October 2021).

<sup>3</sup> S Fisher 'SA to hold 5 days of mourning for those lost to COVID, gender-based violence' *Eye Witness News* (19 November 2020) available at <https://ewn.co.za/2020/11/19/sa-to-hold-5-days-of-mourning-for-those-lost-to-covid-gender-based-violence> (accessed 26 October 2021).

<sup>4</sup> Interim Steering Committee on Gender Based Violence and Femicide, 'Emergency Response Action Plan on Gender Based Violence and Femicide' (2020).

<sup>5</sup> African Union Commission - Women, Gender and Development Directorate, United Nations Entity for Gender Equality and the Empowerment of Women, Office of the United Nations High Commissioner for Human Rights and United Nations Population Fund 'Gender based violence in Africa during the COVID-19 pandemic' (2020) 7.

<sup>6</sup> East African Community 'Gender-based violence and COVID-19 in the EAC' available at <https://www.eac.int/gender/gbv/gbv-and-covid-19> (accessed 26 October 2021).

<sup>7</sup> P Malebye 'Fallist feminist futures in South Africa' in A Okech (ed) *Gender, protests and political change in Africa* (2020) 72-74.



challenged President Museveni's oppressive regime.<sup>8</sup> In 2009, Lubna Ahmed al-Hussein confronted the vague Sudanese criminal law on indecency (accruing a punishment of 40 lashes on conviction) in the courtroom after being arrested for wearing trousers in public.<sup>9</sup> *Men Lebsa Neber* (meaning 'what she wore') in Ethiopia is a travelling exhibition that showcases clothing last worn by 16 female victims of sexual violence.<sup>10</sup> The exhibition seeks to re-educate on victim-blaming after a rape incident. Lastly, in the 1920s, when Muthoni Nyanjiru from Kenya led a 2000-women protest against the colonial regime, she used *guturamira ng'ania* (a Kikuyu insult) involving lifting her dress while asserting to the colonial police officers: 'You take my dress and give me your trousers. You men are cowards. Our leader is in there. Let's go get him.'<sup>11</sup>

In comparison to the continental statistics and activism on GBV, the legal approach does not tackle the gendered aspect of GBV head on. For example, the legal standpoint restrictively understands GBV as violence against women alone, without defining women nor how women experience violence using gendered lenses.<sup>12</sup> Consequently, there is a limitation of the concerns of cis-women, transwomen, feminine identifying gender queer and non-binary persons as well as lesbians (when sexual orientation is considered).<sup>13</sup> Moreover, Aili Tripp writes that owing to the post-conflict status of most African countries especially after 2000, GBV 'has become one of the most important areas of new legislative provision in Africa, representing a normative shift in thinking about women's rights.'<sup>14</sup>

Observing the normative shift 21 years later, this research delves into the legal approach to GBV through the interpretation of the pertinent provisions on GBV in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Notably, the Maputo Protocol's drafting process began in the 1990s following agitation for a legal instrument that

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<sup>8</sup> G Warner, E Peralta & T Antolini 'Radical rudeness' *National Public Radio* (28 October 2020) available at <https://www.npr.org/transcripts/928692038> (accessed 26 October 2021).

<sup>9</sup> J Copnall 'Lubna Hussein: 'I'm not afraid of being flogged. It doesn't hurt. But it is insulting'' *The Guardian* (2 August 2009) available at <https://www.theguardian.com/world/2009/aug/02/sudan-women-dress-code> (accessed 26 October 2021).

<sup>10</sup> S Samuel 'What she wore' *Africa is a Country* (29 July 2020) available at <https://africasacountry.com/2020/07/what-she-wore> (accessed 26 October 2021).

<sup>11</sup> N Ileri 'Muthoni Nyanjiru: First among men, woman who showed trouble the way' *Kenya.co.ke* (9 February 2020) available at <https://www.kenya.co.ke/news/49558-muthoni-nyanjirus-forgotten-bravery> (accessed 26 October 2021).

<sup>12</sup> See for instance Maputo Protocol, articles 1 & 4.

<sup>13</sup> C Paradis 'A note on inclusive language: intersectionality, feminism, womxn, cis, non-binary, etc.' *Feminist Oasis* (2 January 2018) available at <https://feministsoasis.com/inclusive-language-womxn-cis-nonbinary/> (accessed 26 October 2021).

<sup>14</sup> A Tripp 'Legislating gender-based violence in post-conflict Africa' (2012) 5(3) *Journal of peacebuilding and development*, 9.

recognised women's rights specifically.<sup>15</sup> However, to-date, some countries are adamant on their reservations to the Maputo Protocol, which reveal the patriarchal realities the legal instrument operates within.<sup>16</sup> Pointedly, most of the reservations are about women's bodily integrity, such as control of their reproductive health or status within a marriage.<sup>17</sup> In addition, litigation on the Maputo Protocol has been disappointing despite its massive ratification and the recurring violations experienced by women and girls in Africa.<sup>18</sup>

The lack of a robust legal standpoint on GBV in the continent waters down the gains accrued in the struggle for gender equality. While the struggle by women for equality and power against the repressive contexts in Africa dominates gender analyses, they are not covered in the restrictive GBV standpoint, specifically in the interpretation of binding legal instruments like the Maputo Protocol. The limited interpretation could result in increased backlash against women's liberation (be it through promotion of women's rights), such as the claim that there is a loud silence on the position of masculinities in such standpoints. Moreover, in the restrictive meaning of GBV, men and boys are the only perpetrators of violence against women. Instructively, there is an increase in anti-GBV campaigns and studies in Africa, which seek to include men in the discourse on GBV.<sup>19</sup>

## 1.2. Problem statement

The current legal frameworks in the African Union (AU) human rights system against GBV are ill-equipped to proffer the relationship between gender and GBV in the continent. Pointedly, this research approaches the issue from a conceptual perspective especially the concepts of gender and GBV as constructed in the AU human rights system. Therefore, this research analyses the jurisprudence on GBV in the AU Commission on Human and Peoples' Rights (African Commission) and the AU Court of Human and Peoples' Rights (African Court) using a gendered gaze. 21<sup>st</sup> century African feminisms forms the conceptual framework owing to its continuous engagement with

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<sup>15</sup> 16th annual activity report of the African Commission on Human and Peoples' Rights 2002-2003, 13-14.

<sup>16</sup> Equality Now 'The Maputo Protocol turns 18 today. But what does it mean for women and girls in Africa?' (11 July 2021) available at [https://www.equalitynow.org/maputo\\_protocol\\_turns\\_18](https://www.equalitynow.org/maputo_protocol_turns_18) (accessed 26 October 2021).

<sup>17</sup>As above.

<sup>18</sup> Final Communiqué of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights, para.10.

<sup>19</sup> J Bennet 'In conversation: Masculinities and gender-based violence' (2010) 14 *Feminist Africa*, 93-102.

constructions of gender and how such constructions influence violence (and vice versa) within the continent.<sup>20</sup>

### 1.3. Research question

The main question is: How can African feminisms in the 21<sup>st</sup> century improve the jurisprudence on GBV in the AU human rights system?

The following sub-questions correspond to the subsequent chapters in this research:

- a. What are 21<sup>st</sup> century African feminisms?
- b. What are the current discourses on GBV in the AU human rights system and their shortcomings?
- c. What are the challenges of mainstreaming 21<sup>st</sup> century African feminisms in the jurisprudence on GBV from the AU human rights system?
- d. How can the African Commission and the African Court mainstream 21<sup>st</sup> century African feminisms in their jurisprudence on GBV?

### 1.4. Definition of key terms

#### 1.4.1. 21<sup>st</sup> century African feminisms

There is no single meaning of African feminisms. Nonetheless, this research's working definition of 21<sup>st</sup> century African feminisms draws from the Charter of Feminist Principles for African Feminists that 'places patriarchal social relations, structures and systems which are embedded in other oppressive and exploitative structures at the centre of analysis.'<sup>21</sup>

#### 1.4.2. AU human rights system

This includes the legal and non-legal instruments drafted at the AU that provide for women's rights. This research will focus on the jurisprudence, that is, communications by the African Commission

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<sup>20</sup> N Igbelina-Igbokwe 'Contextualising gender based violence within patriarchy in Nigeria' *Pambazuka News* (30 May 2013) available at <https://www.pambazuka.org/gender-minorities/contextualizing-gender-based-violence-within-patriarchy-nigeria> (accessed 26 October 2021); S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 15.

<sup>21</sup> African Feminist Forum 'Charter of Feminist Principles for African Feminists' (2006) 4.

and judgements by the African Court that tackle GBV. To a large extent, the jurisprudence of these two AU organs articulate GBV in human rights terms.

### **1.4.3. Gender**

Gender is the key concept under review in this research. Despite the numerous meanings of gender, this research adopts a conceptualisation of gender steeped in African feminist thought and put forward by Sylvia Tamale. According to Tamale:<sup>22</sup>

The term refers to a feminist analytical tool, viewed through a politico-historical lens, that aids our understanding of how humans relate to each other as ‘men’ and ‘women.’ It goes beyond cultural-specific masculine/feminine identities and power relations and is complicated by racial markers. As a colonial/modern institution, gender functions to limit the range and scope of possibilities for what it means to be a ‘man’/ ‘woman’/ ‘human’ in this world.

### **1.4.4. Gender-based violence**

The meaning includes:<sup>23</sup>

physical, sexual, verbal, emotional, and psychological abuse or threats of such acts or abuse, coercion, and economic or educational deprivation, whether occurring in public or private life, in peacetime and during armed or other forms of conflict, and may cause physical, sexual, psychological, emotional or economic harm.

The manifestations of violence are open-ended and within this research, the various types of violence are incurred or threatened against a person owing to the socio-political power relations in societies in Africa that dictate the scope of possibilities on what it means to be a man/woman/human in this world.<sup>24</sup>

### **1.4.5. Mainstreaming**

This term is used in the ordinary sense of the word, that is, to have, to reflect or to be compatible with the prevailing attitudes and values of a society or group.<sup>25</sup> In this research, women in Africa constitute

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<sup>22</sup> S Tamale *Decolonisation and Afro-feminism* (2020) xiv.

<sup>23</sup> Republic of South Africa ‘National strategic plan on gender-based violence and femicide’ (2020) 10.

<sup>24</sup> Tamale (n 22) xiv.

<sup>25</sup> <https://www.merriam-webster.com/dictionary/mainstream> (accessed 26 October 2021).

the pertinent group under review including their prevailing attitudes and values, which will be fleshed out through the 21<sup>st</sup> century African feminisms gaze.

## **1.5. Methodology**

This research relies mainly on a desk study using 21<sup>st</sup> century African feminisms as the conceptual framework. The study includes an analysis of cases adjudicated at the African Commission and the African Court on GBV. In addition, seminal scholarly texts of renowned African feminists (for instance books, book chapters and journal articles) largely form the desk-based study.

## **1.6. Scope and limitations**

This research focuses on the interpretive mandates of the African Commission and the African Court expressed through communications and judgements respectively. In particular, the interpretation of GBV as articulated in the Maputo Protocol. For this reason, this research excludes the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child because their preoccupation is interpreting GBV as articulated in the African Charter on the Rights and Welfare of the Child.<sup>26</sup> Another reason for the exclusion is the Maputo Protocol and 21<sup>st</sup> century African feminisms are women-centred. Thus, the framework and scope of this research cannot accurately sustain a discussion on children's rights, even where the girl-child is concerned. For instance, unpacking the principle of 'best interest of the child' would not yield the same outcomes as interrogating women's right to bodily autonomy using 21<sup>st</sup> century African feminisms. Even so, where children are concerned the Maputo Protocol has catered for the intersectionality of 'age' among the different typologies of women that it protects.

The scope of this research yields one communication and one judgement, which are analysed in chapter 4. Although there are more cases that could be reviewed owing to the vastness of GBV, the two cases offer an in-depth take on gender and specific forms of GBV. For example, this research does not analyse the communication, *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia* (2015).<sup>27</sup> In this case, the African Commission interpreted GBV (with some

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<sup>26</sup> See for instance, articles 15 (child labour), 16 (child abuse and torture), 21 (harmful cultural practices), 22 (armed conflict) and 27 (sexual exploitation).

<sup>27</sup> Communication 341/2007.

references to the Maputo Protocol) in the form of abduction, rape and forced marriage of a 13-year old girl.<sup>28</sup> The case is excluded for two reasons. First, the African Commission relied extensively on *Egyptian Initiative for Personal Rights & Interights v Egypt*, which is reviewed in chapter 4.<sup>29</sup> Secondly, the African Commission relied on an erroneous finding on GBV in *Egyptian Initiative for Personal Rights & Interights v Egypt*, when assessed using 21<sup>st</sup> century African feminisms, that is, conflation of sex with gender.<sup>30</sup>

The dearth of landmark cases touching on GBV (in the Maputo Protocol) in the two AU organs as well as the under-explored nature of gendered lenses such as 21<sup>st</sup> century African feminisms comprise the two major limitations of this research.

## **1.7. Literature review**

This research makes two major claims. First, the legal and non-legal documentation on GBV at the AU level largely relate GBV with human rights, women's rights specifically. Within this claim, the legal documentation dictates the views on GBV owing to the binding nature of the conventions, which package GBV in human rights terms. Secondly, even where women's rights are the focus, a gendered approach to understanding how women are directly affected by GBV does not form the dominant view. Instead, the rights of women are interpreted in terms of legal violations of the women's rights guaranteed in the AU conventions or interpretations of these AU conventions by the African Commission through communications and African Court through its judgements that ultimately found legal violations related to GBV. This restrictive standpoint renders the wider concerns on women under-theorised or under-developed conceptually. I will exemplify these claims further through this literature review using the subsequent sub-headings.

### **1.7.1. GBV as a human rights concern within the AU human rights system**

The Maputo Protocol is the focal legal instrument that shows the explicit connection between GBV and women's rights. Other than article 4 of the Maputo Protocol as well as the various provisions that depict the multiple forms of violence that different categories of women face, the majority of scholars in Africa have analysed the impact of the Maputo Protocol on the continent generally while some

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<sup>28</sup> As above, para. 3-4 &144.

<sup>29</sup> Communication (n 27) para. 145-149.

<sup>30</sup> As above.

have addressed specific forms of violence against women in specific countries. Their contributions are exemplified below.

In Roselynn Musa, Faiza Mohammed and Firoze Manji's co-edited guideline on the provisions of the Maputo Protocol, the contribution sought to popularise, and promote the universal ratification and implementation of the Maputo Protocol in 2006, just after the law entered into force.<sup>31</sup> The authors of the guideline were drawn from a conference—Solidarity for African Women's Rights Conference on the Maputo Protocol—that was jointly convened by the African Commission and a consortium of women's rights organisations in the continent.<sup>32</sup> In this sense, they had an insider's view on the drafting process of the Maputo Protocol including the political efforts required for the speedy ratification.<sup>33</sup> For the authors, the Maputo Protocol was a much-needed legal step in addressing human rights violations affecting women.<sup>34</sup>

Regarding GBV, the guideline highlights the significance of the inclusion of violence against women, not only as a violation of women's rights to life, integrity and security of person as well as the right to protection from harmful practices but as a state and individual duty.<sup>35</sup> In addition, violence against women is not only a public concern but a private concern such that when it is manifested in intimate spaces, it should be investigated and remedied through legal means especially.<sup>36</sup> As Musa succinctly explained:<sup>37</sup>

Although governments across Africa are now more concerned with the issue than in the past, few have taken legal, constitutional steps to stop the practice. The Protocol enjoins state parties to 'enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.'

Scholarly works that offer a subject-specific take on the Maputo Protocol have analysed the impact on specific provisions of the convention within the continent. For instance, Charles Ngwenya and

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<sup>31</sup> R Musa, F Mohammed & F Manji (eds) *Breathing life into the African Union Protocol on women's rights in Africa* (2006) 2.

<sup>32</sup> As above.

<sup>33</sup> See F Mohammed 'African Union Protocol on the rights of women in Africa: The SOAWR campaign' in Musa, Mohammed & Manji (eds) *Breathing life into the African Union Protocol on women's rights in Africa* (2006) 14-18.

<sup>34</sup> Musa et al (n 31) 2.

<sup>35</sup> R Musa 'The provisions of the Protocol' in Musa, Mohammed & Manji (eds) *Breathing life into the African Union Protocol on women's rights in Africa* (2006) 20. See also S Ndashe 'Strategic litigation: A tool for domesticating the Protocol?' in Musa, Mohammed & Manji (eds) *Breathing life into the African Union Protocol on women's rights in Africa* (2006) 68.

<sup>36</sup> The guideline acknowledges that the Maputo Protocol also provides for non-legal measures of addressing women's rights violations such as budgeting. See M Rusimbi 'Financing the Protocol: Considerations for influencing budgets from experiences in Tanzania' in Musa, Mohammed & Manji (eds) *Breathing life into the African Union Protocol on women's rights in Africa* (2006) 38-46.

<sup>37</sup> Musa (n 35) 20.

Ebenezer Durojaye co-edited a volume on article 14 of the Maputo Protocol, where the contributors interrogated how the African human rights tools could promote women's sexual reproductive health in Africa.<sup>38</sup> Similarly, Karen Stefiszyn and Alex Pezanti's advocacy tool analyses the impact of the Maputo Protocol in addressing violence against women and its imprints on the spread of HIV/AIDS; in other words, how sexual violence against women is a root cause of HIV/AIDS among women in Southern Africa.<sup>39</sup> Both of these works take on a legal approach to studying GBV as a human rights concern. Thus, the attempts to offer a gendered perspective are peripheral. For example in Ngwena's and Durojaye's volume it is only Rebecca Omollo's chapter on using the feminist capabilities approach theory as proffered by Martha Nussbaum to interrogate how 'the gender differences between men and women are reflected in patterns of health and illnesses' such as the transmission of HIV/AIDS.<sup>40</sup>

Notably, Victor Ayeni justifies the reliance on legal frameworks (rather than gendered views) to understand the Maputo Protocol. Based on three international law theories, Ayeni explains that the domestic politics theory, the spiral model of human rights change and the transnational process legal theory depict the behaviour of African states' levels of implementation and compliance to the Maputo Protocol.<sup>41</sup> The domestic politics theory predicts successful impact of the Maputo Protocol owing to the typical state-level characteristics such as political stability, citizen participation in governance and the primacy of policy makers, legislators, judges and local civil society organisations in driving the agenda on implementation of the Maputo Protocol.<sup>42</sup> The spiral model of human rights change assesses how transnational strategies to challenge state norms that repress human rights have occasioned a useful effectiveness of the Maputo Protocol in Africa.<sup>43</sup> Lastly, the transnational process legal theory is most suitable to this research. The theory advances that social internalisation, that is public acceptance or legitimacy of the Maputo Protocol is preceded by legal internalisation which is preceded by political internalisation.<sup>44</sup> In my view, this explains why gendered views which are grounded on social phenomena (cultures, traditions, a person's upbringing) are not prioritised in interpreting sociological terms like gender in GBV discourses at the AU human rights system.

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<sup>38</sup> C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 2-5.

<sup>39</sup> K Stefiszyn & A Prezanti *The impact of the Protocol on the rights of women in Africa on violence against women in six selected Southern African countries: An advocacy tool* (2009) 9-12.

<sup>40</sup> R Omollo 'Advancing a feminist capabilities approach to HIV and AIDS in Sub-Saharan Africa' in Ngwena & Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 185.

<sup>41</sup> V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016)11.

<sup>42</sup> As above.

<sup>43</sup> As above.

<sup>44</sup> As above.



Consequently, most of the contributions in Ayeni's text insist on studying the impact of the Maputo Protocol through analysing the number of domestic laws that comply with the Maputo Protocol. None of the contributions attempt to test a gendered view on the research objective, despite the diversity of the 17 countries under review.<sup>45</sup>

Even so, it is clear that the Maputo Protocol, from its genesis, aimed at centring women's rights within the AU human rights system. According to Fareda Banda, before the Maputo Protocol was drafted there was 'little interest in women's rights within the African Commission,' thus, 'it was decided that an additional protocol [to the Banjul Charter] would be the best way forward.'<sup>46</sup> For Frans Viljoen, the Maputo Protocol could 'contribute to the gradual reversal' of the societal structures that limit women's rights such as cultures and the dearth of legal guarantees that affirm women's rights.<sup>47</sup>

### **1.7.2. Jurisprudence on GBV within the AU human rights system**

In keeping with the dominance of legal perspectives in understanding GBV, the communications at the African Commission and the judgements at the African Court have found violations of women's rights based on their respective mandates under the African Charter on Human and Peoples' Rights (Banjul Charter) and the Maputo Protocol. Article 45 of the Banjul Charter mandates the African Commission to protect and promote human and peoples' rights as well as to interpret the Banjul Charter. To complement the African Commission's obligations, the African Court was founded in 2004 through article 1 of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights (Ouagadougou Protocol). Further, the Ouagadougou Protocol confers the African Court jurisdiction over disputes on the interpretation and application of the Banjul Charter, the Ouagadougou Protocol and human rights instruments that the disputing states have ratified; in this case the Maputo Protocol.

Literature on the interpretive mandate of the African Commission and the African Court are preoccupied with the litigious hurdles faced by potential litigants or persons seeking justice for a specific contravention of the Banjul Charter or the Maputo Protocol. Even so, the preoccupation

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<sup>45</sup> The countries studied were Burkina Faso, Cameroon, Côte d'Ivoire, Ethiopia, Eswatini, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, South Africa, Tanzania, Uganda and Zimbabwe.

<sup>46</sup> F Banda *Women, law and human rights: An African Perspective* (2005) 67-69.

<sup>47</sup> F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16(1) *Washington and Lee Journal of Civil Rights and Social Justice* 46.

stems from several reasons. First, article 45(3) of the Banjul Charter permits the African Commission to trigger its interpretive mandate after receiving a request from a state party, an organ of the AU or individuals. Therefore, the African Commission's interpretive mandate is 'largely integrated into the [African] Commission's promotional and protective mandate.'<sup>48</sup> Secondly, there is a dearth of cases admitted to the African Commission and the African Court claiming violations of the Maputo Protocol. Some of the reasons for the dearth include: satisfaction of legal criteria for admissibility in the two AU organs such as ratification of the Maputo Protocol, exhaustion of domestic remedies as well as state depositing of declarations in the case of the African Court.<sup>49</sup>

Beyond the AU level, Kanyali Mwikya, Carole Osero-Ageng'o and Esther Waweru's compendium on litigating the Maputo Protocol highlights some of the difficulties in seeking remedies for violations under the convention at state-level and other regional human rights bodies.<sup>50</sup> For instance, Cameroon has stringent rules of standing in civil proceedings on sexual harassment.<sup>51</sup> Further, Osai Ojigho writes that at the Economic Community of West African States Court of Justice, there are only three cases that make direct pronouncements on GBV and in the other few cases on women's rights, the reasoning used was 'skewed towards a narrow interpretation of the state's obligation to protect human rights that only focuses on state agents when acting in official capacity.'<sup>52</sup>

The compendium is an outcome of lawyers' training workshops held between 2019 and 2020 to improve the application of the Maputo Protocol in legal proceedings and hence, expand the jurisprudence on the convention at domestic level.<sup>53</sup> A motivation for the training in the editors' view was that:<sup>54</sup>

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<sup>48</sup> Centre for Human Rights 'Guide to the African human rights system: Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981 - 2021' (2021)16.

<sup>49</sup> As above 73.

<sup>50</sup> K Mwikya, C Osero-Ageng'o & E Waweru (eds) *Litigating the Maputo Protocol: A compendium of strategies and approaches for defending the rights of women and girls in Africa* (2020).

<sup>51</sup> G Mbuya 'An appraisal of the legal framework on sexual harassment at the place of work and schools in Cameroon' in Mwikya, Osero-Ageng'o & Waweru (eds) *Litigating the Maputo Protocol: A compendium of strategies and approaches for defending the rights of women and girls in Africa* (2020) 181-183.

<sup>52</sup> O Ojigho 'Litigating gender-based violence and discrimination—The Dorothy Njemanze case' in Mwikya, Osero-Ageng'o & Waweru (eds) *Litigating the Maputo Protocol: A compendium of strategies and approaches for defending the rights of women and girls in Africa* (2020) 9 & 26.

<sup>53</sup> Mwikya et al (n 50) 1.

<sup>54</sup> As above.

...many women's and girls' rights litigators, civil society organisations and other actors were missing a crucial opportunity to reference provisions of the Maputo Protocol in cases designed for the treaty's intervention.

These referential gaps on the Maputo Protocol are observed in the jurisprudence on GBV at the African Commission and the African Court. The few cases that have touched on GBV as a violation of the Maputo Protocol both implicitly and explicitly will be extensively discussed in chapter 3 of this research. In *Egyptian Initiative for Personal Rights & Interights v Egypt* (2011), the African Commission referred to the provisions on discrimination and violence against women in the Maputo Protocol to find a violation of GBV.<sup>55</sup> The African Court, in *Association pour le Progrès et la Défense des Droits des Femmes (APDF) & Institute for Human Rights and Development in Africa (IHRDA) v Mali* (2018), found a violation of articles 6 and 21 of the Maputo Protocol on minimum age of marriage and inheritance rights respectively. While this latter case did not mention GBV explicitly, the contentious issues provide fodder for a discussion on GBV using gendered terms owing to the multiple forms of GBV as well as the social phenomena within the contentious issues of the case such as age, religion and marriage.

Worth mentioning in these cases on GBV is the use of a human rights analysis to determine whether violations occurred. The African Commission and the African Court applied the so-called three-pronged test that assesses whether a limitation of a specific human right in the Maputo Protocol was lawful, proportionate and reasonable/justifiable. Therefore, in the place of a gendered analysis to the issues within the cases, a limitation of human rights perspective pervaded the reasoning in the communications and judgements.

### **1.7.3. Using gendered perspectives to develop the jurisprudence on GBV within the AU human rights system**

Mariam Kamunyu's doctoral thesis is the most recent and closely-related study (to this research) that examines the significance of applying gendered perspectives in interpreting women's rights violations within the AU human rights system.<sup>56</sup> Kamunyu uses gender responsiveness as a conceptual framework to analyse the protective mandate of the African Commission, including its interpretive

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<sup>55</sup> (2011) AHRLR 90 (ACHPR 2011), para. 120-121 and 166.

<sup>56</sup> M Kamunyu 'The gender responsiveness of the African Commission on Human and Peoples' Rights' unpublished PhD thesis, University of Pretoria, 2018, 11.

mandate.<sup>57</sup> In her view, gender responsiveness is ‘the extent to which norms and procedures effectively address the main concerns faced by women in Africa.’<sup>58</sup> Further, she advances four parameters that guide the analysis of gender responsiveness in the African Commission’s protective mandate, namely: results in substantive equality; is inclusive; recognises the intersectional identity of women; and adopts a contextualised African response.<sup>59</sup> Consequently, her thesis concludes that devoid of a gender responsive framework, the African Commission has fallen short of guaranteeing substantive equality on women’s rights or women’s lived realities.<sup>60</sup>

This research departs from Kamunyu’s thesis in two ways, hence, creating the space for my contribution on the subject. First, in terms of scope; this research focuses on the interpretation of GBV at the African Commission as well as the African Court with regard to the women’s rights under the Maputo Protocol. Secondly, in terms of conceptual frameworks, this research applies 21<sup>st</sup> century African feminisms. Although certain aspects of gender responsiveness inform 21<sup>st</sup> century African feminisms especially Kamunyu’s parameters like contextualised African responses and intersectionality, gender responsiveness as framed in Kamunyu’s thesis is formulated from feminist perspectives from the Global North.<sup>61</sup> For instance, there is much-reliance on the writings of Hilary Charlesworth on gender mainstreaming as well as Barbara Bloom and Stephanie Covington on gender responsive treatment. Consequently, the ‘Africanness’ sought in the framework is not unpacked, hence, the sociological references to gender, women, violence against women neither reflect African realities nor African women’s realities.

Chapter 2 of this research delves deeper into the parameters of 21<sup>st</sup> century African feminisms in relation to the research question. Nonetheless, by way of summary, the working definition of African feminisms in the 21<sup>st</sup> century or 21<sup>st</sup> century African feminisms culminates from the ongoing ideological and political tasks proceeding the inaugural African Feminist Forum. Between 15 November 2006 and 19 November 2006, 120 participants from 16 African countries convened in Accra, Ghana for the inaugural African Feminists Forum.<sup>62</sup> The development of a feminist epistemology in Africa was among the objectives of the meeting, which also facilitated the adoption

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<sup>57</sup> As above 113-141.

<sup>58</sup> Kamunyu (n 56) 51.

<sup>59</sup> As above.

<sup>60</sup> Kamunyu (n 56) 10.

<sup>61</sup> Global North is used politically rather than geographically thus, Australia is included.

<sup>62</sup> African Feminist Forum ‘Reclaiming our spaces: Executive summary of the 1st African Feminist Forum’ (2006) 3.

of the Charter of Feminist Principles for African Feminists.<sup>63</sup> This research, therefore, largely draws from the development of the feminist epistemology by the women within the African Feminist Forum Working Group through their scholarly contributions in particular that are also pertinent to the research question.<sup>64</sup>

## **1.8. Structure (overview of chapters)**

Chapter 1 makes for the introductory part of the research detailing the background of GBV realities within the continent, the problem statement, research questions, definition of key terms, literature review, methodology, scope and limitations of the discussion.

Chapter 2 presents the conceptual framework, where the delineation of 21<sup>st</sup> century African feminisms will be outlined. This includes the evolution of 21<sup>st</sup> century African feminisms from its 20<sup>th</sup> century predecessors' concerns such as feminism as a Western concept, developmental issues such as women empowerment, gender mainstreaming and gender equality. Lastly, the chapter analyses the radical stance on GBV as proffered by 21<sup>st</sup> century African feminisms that interrogate gender and violence conceptually through research and discursively through women-led civil society organisations and movements.

Chapter 3 analyses the current discourses around GBV advocacy in the AU human rights system particularly the jurisprudence developed on GBV by the African Commission and the African Court. In addition, the chapter assesses the shortcomings of these discourses especially where they defy the demands of 21<sup>st</sup> century African feminisms' parameters regarding women's rights.

Chapter 4 outlines the potential challenges in applying African feminisms in the 21<sup>st</sup> century within the jurisprudence of the African Commission and the African Court. Further, the extent of difference between the standpoint in the AU human rights system's jurisprudence and that of 21<sup>st</sup> century African feminisms is highlighted in a bid to make the case for mainstreaming the gendered perspectives on GBV advanced in 21<sup>st</sup> century African feminisms.

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<sup>63</sup> As above.

<sup>64</sup> AFF (n 62) 10.

Lastly, Chapter 5 concludes the research by way of summary of the main claims analysed in the research as well as recommendations on the way forward.

## Chapter 2: 21<sup>st</sup> century African feminisms

### 2. Introduction

This chapter outlines the features of 21<sup>st</sup> century African feminisms. An evolution of African feminisms from the 20<sup>th</sup> century initiates the discussion. The aim of the evolution is to highlight the main concerns or contexts that shaped the issues which African feminisms in the 21<sup>st</sup> century grapple with. Moreover, the genesis of African feminisms does not have an accepted established time. Rather, studying the development of African feminisms from the 20<sup>th</sup> century is simply for temporal purposes; recognising, nonetheless, that the concepts exist in a continuum. The aim of this chapter is two-fold: First, to answer the research sub-question, what are 21<sup>st</sup> century African feminisms? Secondly, to set out the criteria that inform the gendered assessment of the jurisprudence on GBV from the African Commission and the African Court, explored in chapter 3.

#### 2.1. 20<sup>th</sup> century African feminisms

##### 2.1.1. Westernisation versus Africanness debate

The bane of scholarship on African feminisms in the 20<sup>th</sup> century was the assumption that feminism, as an ideology, is a Western concept and thus, irrelevant to Africa. For example, Oyèrónké Oyěwùmí asserted that:<sup>65</sup>

African women and feminism are at odds because despite the adjectives used to qualify feminism, it is Western feminism that inevitably dominates even when it is not explicitly the subject under consideration.

Western feminism in its construction refers to ‘a feminism that is entangled with the history and practice of European and North American imperialism and the worldwide European colonisation of Africa, Asia and the Americas.’<sup>66</sup> Accordingly, when Western feminism was applied in Africa to define African women and their realities, there was an incongruence due to the effects of perceiving Africa in Western terms.<sup>67</sup> In other words, Western feminism operated in a cultural vacuum.

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<sup>65</sup> O Oyěwùmí ‘Introduction: Feminism, sisterhood, and other foreign relations’ in O Oyěwùmí (eds) *African women and feminism: Reflecting on the politics of sisterhood* (2003) 1.

<sup>66</sup> As above 3.

<sup>67</sup> M Kolawole ‘Transcending incongruities: Rethinking feminisms and the dynamics of identity in Africa’ (2002) 54 *Agenda: Empowering Women for Gender Equity* 92-94.

Difference between African feminisms and Western feminism became one of the main features of 20<sup>th</sup> century African feminisms. Oyěwùmí particularly rejected the claim in Western feminism that women worldwide shared the same experiences because of their biology or bodies. In her seminal work of 1997, ‘The invention of women: Making an African sense of Western gender discourses,’ she writes that by placing biology as key in defining women, Western feminism enabled a feminist lens that was obsessed with the difference between men and women.<sup>68</sup>

This divisive way of perceiving women spread into the Western feminist approaches to gender especially when gender connoted a biological rather than a social construct. Thus, ‘two social categories that emanated from this construction were the ‘man of reason’ (the thinker) and the ‘woman of the body’ and they were oppositionally constructed.’<sup>69</sup> Yet, the continent is replete with examples of communities whose gender systems were flexible enough to define women beyond their biological sex. Ifi Amadiume’s scholarly writing on male daughters and female husbands in Nigeria exemplifies suitably such systems.<sup>70</sup>

Studies in 20<sup>th</sup> century African feminisms depicted a demand for contextual and accurate portrayals of women in Africa because of the uncritical and inaccurate ways in which Western feminism described African women and their cultures.<sup>71</sup> Further, white feminists especially undermined cultural practices such as child marriages, bride price and genital cutting by labelling them as barbaric and violent.<sup>72</sup> Consequently, African women were categorised as helpless and victimised, which was occasioned by the African males’ savagery and ‘primitive cultures symbolised by barbaric customs.’<sup>73</sup> These views tended to be rigid and applied to all women in Africa despite their diversities.

Scholarly works on Africanness—what it means to be African or what is Africa—from political and historical lenses, influenced and were complemented by the evolution of African feminisms in the 20<sup>th</sup> century. Some mentionable contributions in this regard included Cheikh anta Diop and Mahmood Mamdani.<sup>74</sup> Ali Mazrui applied his Triple Heritage theory (which advances that African identity is

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<sup>68</sup> O Oyěwùmí *The invention of women: Making an African sense of western gender discourses* (1997) 11.

<sup>69</sup> As above 6.

<sup>70</sup> I Amadiume *Male daughters, female husbands: Gender and sex in African society* (1987).

<sup>71</sup> Kolawole (n 67) 21.

<sup>72</sup> Oyěwùmí (n 65) 31-33.

<sup>73</sup> Oyěwùmí (n 65) 28.

<sup>74</sup> Oyěwùmí (n 68) 18. See also, M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) & C Diop *Pre-colonial black Africa* (1987).



simultaneously developed through indigenous civilisations, Islamic civilisations and Euro-Christian civilisations) in a bid to analyse black women and sexism from an African perspective. Like the 'barbaric' and 'savage' labels attached to African cultures, Mazrui's analysis interrogated the discriminatory global culture of sexism when applied to black women in Africa, using three nuanced labels. These are: benevolent (generous/protective towards the underprivileged gender), benign (harmless and recognises gender differences) and malignant (subjects women to economic manipulation, sexual exploitation and political marginalisation).<sup>75</sup> The categories were nuanced because they were not fixed, as African cultures are not static; therefore, where bride wealth or traditions of female warriors may be perceived as benevolent sexism in one community, it could be practised in a malignant way in another.<sup>76</sup>

Thus, there was a rich diversity in theorising feminism in the 20<sup>th</sup> century by scholars, especially African writers. For instance, Gwendolyn Mikell writing in 1997 advanced the view that African feminisms were not only 'shaped by African women's resistance to Western hegemony' but 'distinctly heterosexual, pro-natal, and concerned with many bread, butter, culture and power issues.'<sup>77</sup> Obioma Nnaemeka's nego-feminism connoted a proactive type of African feminism that 'knows when, where and how to negotiate with or negotiate around patriarchy in different contexts.'<sup>78</sup>

Other writers preferred to grapple with the subject by steering clear of using the term feminism for the sake of inclusivity all the while ensuring that their approaches were context-specific. With this, the content of their theories, which in my view are strains of African feminisms, sought to bring the adversaries of Western feminism on board such as sceptics; African (or black) men in particular and some black African scholars (male and female alike).<sup>79</sup> Examples of these strains included Molara Ogundipe-Leslie's *Stiwanism*, whose definition explained the choice not to use the term feminism. In her words: <sup>80</sup>

I have advocated the word 'Stiwanism' instead of feminism, to bypass the combative discourses that ensue whenever one raises the issue of feminism in Africa. The word 'feminism' itself seems to be a

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<sup>75</sup> A Mazrui 'The black woman and the problem of gender: An African perspective' (1993) 24(1) *Research in African Literatures*, 87-92.

<sup>76</sup> As above 88-89.

<sup>77</sup> G Mikell (ed) *African feminism: The politics of survival in sub-Saharan Africa* (1997) 3 & 4.

<sup>78</sup> O Nnaemeka 'Nego-feminism: Theorising, practicing and pruning Africa's way' (2003) 29(2) *Signs: Journal of women in culture and society* 377-378.

<sup>79</sup> Kolawole (n 67) 93.

<sup>80</sup> M Ogundipe-Leslie *Recreating ourselves: African women and critical transformation* (1994).

kind of red tag to the bull of African men. Some say the word by its very nature is hegemonic, or implicitly so. Others find the focus on women in themselves somehow threatening. Some who are genuinely concerned with ameliorating women's lives sometimes feel embarrassed to be described as 'feminist.' 'Stiwa' is my acronym for Social Transformation Including Women in Africa.

Collectively, the diverse theorising of African feminisms in the 20<sup>th</sup> century converged in transformative ways of resolving the problems affecting women in Africa.

### **2.1.2. Development, law and women's rights influences**

In the 20<sup>th</sup> century, several influences other than colonisation shaped African identity and in turn the discourses on African feminisms. One of the main influences were the four world conferences on women convened by the United Nations (UN), which took place in Mexico City (1975), Copenhagen (1980), Nairobi (1985) and Beijing (1995).<sup>81</sup> The Beijing Declaration and Platform for Action, the key outcome from the 1995 conference, set out 12 strategic objectives and the ways governments, non-governmental organisations, the private sector, academia, financial institutions (such as the World Bank and the International Monetary Fund) could ensure the achievement of the objectives.<sup>82</sup> Women empowerment and gender equality were the overarching goals of the objectives as surmised in the mission statement:<sup>83</sup>

The Platform for Action emphasises that women share common concerns that can be addressed only by working together in partnership with men towards the common goal of gender equality around the world. It respects and values the full diversity of women's situations and conditions and recognises that some women face particular barriers to their empowerment.

The 12 strategies showcased a bent for promoting global economic development especially for the so-called Third World or developing countries. For instance, the first strategy on women and poverty, details that: 'More than 1 billion people in the world today, the great majority of whom are women, live in unacceptable conditions of poverty, mostly in developing countries.'<sup>84</sup> The strategy states

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<sup>81</sup>UN Women 'World Conferences on women' available at <https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women> (accessed 29 October 2021).

<sup>82</sup> UN Women 'Beijing Declaration and Platform for Action/Beijing+5 political declaration and outcome' (2014) 30.

<sup>83</sup> As above 16.

<sup>84</sup> As above (n 82) 34.

further that: ‘In the past decade the number of women living in poverty has increased disproportionately to the number of men, particularly in the developing countries.’<sup>85</sup>

From a legal and women’s rights standpoint, conventions at the UN and the AU also influenced the discourse on 20<sup>th</sup> century African feminisms. At the UN, the main legal instruments were the Convention on the Elimination of All Forms of Discrimination against Women (enacted in 1981), which was preceded by the work of the UN Commission on the Status of Women (established in 1946) over the span of 30 years.<sup>86</sup> On the other hand, the Banjul Charter (1981) made for the legal influence on women’s rights at the AU, especially article 2 on non-discrimination and article 18(3) on the elimination of all forms of violence against women.

20<sup>th</sup> century African feminisms’ contributors were as critical of these three influences particularly on the absence of context-specific issues, which women in Africa faced at the time. The scholarly writings reiterated that the three influences emphasised the Westernised gaze, which asserts that aspects that affect women such as law, human rights and development are necessarily androcentric (privilege men and some elite white women).<sup>87</sup> Ambreena Manji, for instance, challenged a similar view point on how the law affects women in Africa, namely, the phallogocentric legal centralism that hinders feminist engagement with law and power.<sup>88</sup> She noted that, while the view gave a partial account of women’s experiences with law, it also restricted analyses on legal pluralism which feminisms in Africa should engage with because:<sup>89</sup>

...in reality, state law does not intervene in women’s lives to the extent claimed [by the phallogocentric legal centralism approach]. Women have experienced state law as coercive and have deliberately distanced themselves from its control, a fact that undercuts the claim of state law to intervene in every aspect of social life.

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<sup>85</sup> As above.

<sup>86</sup> <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> (accessed 2 September 2021).

<sup>87</sup> J Oloka-Onyango & S Tamale “‘The personal is political,’ or Why women’s rights are indeed human rights: An African perspective on International Feminism’ (1995) 17(4) *Human Rights Quarterly*, 718-719.

<sup>88</sup> A Manji ‘Imagining women’s ‘legal world’: Towards a feminist theory of legal pluralism in Africa’ (1999) 8(4) *Social and legal studies*, 435.

<sup>89</sup> As above 451.

### 2.1.3. 20<sup>th</sup> century African feminisms' insights on GBV

GBV, within the ambit of 20<sup>th</sup> century African feminisms, necessitated a critique beyond the micro-level or private sphere alone.<sup>90</sup> In the 20<sup>th</sup> century, African states were shaped by foreign pressures such as colonisation and subsequently the International Monetary Fund's structural adjustment programmes, which resulted in tyrannical governance in the budding states that were equally not indigenous to Africa.<sup>91</sup> In addition, the prevailing gender ideologies had much bearing on the types of violence manifested in a given context.<sup>92</sup> Further, a macro-level purview of GBV revealed how violence of the state reversed and restructured gender roles.<sup>93</sup> For instance, women in military action would be perceived as progressive or a strategy to shame men into volunteering to participate in the war.<sup>94</sup> Middle class women in Africa would be vilified for being too Westernised while the rural woman's illiteracy and poverty was romanticised.<sup>95</sup>

Because the violence at a macro-level endorsed the inferior status of women, chances for redress, intervention or accountability were elusive. To illustrate, Kenya's parliament failed to pass the Marriage Bill (in 1976 and 1979) that guaranteed equal status of the spouses in marriage and divorce.<sup>96</sup> In apartheid South Africa, Mathogonolo Maboe noted that the politicisation of instances of gendered violence such as rape hindered reporting.<sup>97</sup> Maboe describes how during the political struggle, you could not charge a comrade (one's political affiliate in the liberation struggle) with a violent crime, as the victim would be perceived as selling out the comrade perpetrator to the apartheid regime.<sup>98</sup>

When 20<sup>th</sup> century African feminisms contended with GBV at the micro-level, the discourse was highly-critical on traditions or cultures that disfavoured women within a given community. While African women took pride in their cultures, the substance of some of the cultures were 'directly

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<sup>90</sup> M Ongundipe-Leslie 'Invite tyrants to commit suicide: Gender violence, human rights and African women in contemporary African nation states' in Centre for Women's Global Leadership (ed) *Gender violence and women's human rights in Africa* (1994) 4.

<sup>91</sup> As above 2-4.

<sup>92</sup> A Mama 'Sheroes and villains: Conceptualising colonial and contemporary violence against women in Africa' in MJ Alexander & C Mohanty (eds) *Feminist genealogies, colonial legacies, democratic futures* (1997) 53.

<sup>93</sup> Ongundipe-Leslie (n 90) 8.

<sup>94</sup> Mama (n 92) 55.

<sup>95</sup> Ongundipe-Leslie (n 90) 7.

<sup>96</sup> K Muli "'Help me balance the load?': Gender discrimination in Kenya' in J Peters & A Wolper (eds) *Women's rights, human rights: International feminist perspectives* (1995) 78.

<sup>97</sup> M Maboe 'Strategies to tackle rape and violence against women in South Africa' in Centre for Women's Global Leadership (ed) *Gender violence and women's human rights in Africa* (1994) 31.

<sup>98</sup> As above.

affected by gender relations in African society' and by men's flexibility and readiness to change them with regard to women's lives.<sup>99</sup> Moreover, even at state-level, culture is an untouchable subject; a claim backed by reasons such as 'preservation of communal cohesion' or sacrosanctity in the case of religious practices.<sup>100</sup>

Instructively, GBV itself was defined as more than aggressive acts of physical brutality or explicit physical threat. Nadia Toubia, for instance, defined GBV as the type of violence located within 'a broad social and political context in which not only men but women—and society as a whole—act to perpetuate systems which result in various forms of abuse.'<sup>101</sup> Such systems were primarily dictated by customs or mores that were old, established and with clear hierarchies.<sup>102</sup> Thus, elderly women were more empowered than adolescent girls as they had reaped more benefits from the socio-political traditional order over their life-span.<sup>103</sup> Further, customs such as subordination (internalised oppression) enabled women to identify themselves with the male persons who held immediate power over them (like husbands, eldest sons or male spiritual leaders).<sup>104</sup> Furthermore, lack of bodily autonomy proliferated incidences of sexual violence.<sup>105</sup> In all, whether women voluntarily or involuntarily occasioned violence, traditions rather than women's agency rubberstamped such incidences of GBV. As Toubia asserts succinctly:<sup>106</sup>

...the African woman faces [GBV] in monolithic form since practices and values attributed to the power of tradition act as effective oppressors, silencers and—most tragically— eliminators of women's true voices and desires, not only in the public sphere but in their own hearts and minds.

In summary, 20<sup>th</sup> century African feminisms provided a number of foundational pathways for women to think about and act on in view of their empowerment and overall well-being. Such pathways were not only rooted in the cultures or realities of African women but also necessitated proactivity in order to challenge negative forces of tradition, state violence and Western hegemony. It is therefore,

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<sup>99</sup> A Halim 'Tools of suppression' in Centre for Women's Global Leadership (ed) *Gender violence and women's human rights in Africa* (1994) 21-22.

<sup>100</sup> S Dawit 'Culture as a human rights concern: Highlights for action with the African Charter on Human and Peoples' Rights' in Centre for Women's Global Leadership (ed) *Gender violence and women's human rights in Africa* (1994)39; Halim (n 95) 23.

<sup>101</sup> N Toubia 'Women's reproductive and sexual rights' in Centre for Women's Global Leadership (ed) *Gender violence and women's human rights in Africa* (1994)16-17.

<sup>102</sup> As above 17.

<sup>103</sup> As above.

<sup>104</sup> As above.

<sup>105</sup> Toubia (n 101) 19.

<sup>106</sup> Toubia (n 101) 20.

uncommon to notice the terms ‘liberation’ or ‘struggle’ in 20<sup>th</sup> century African feminisms. Mĩcere Mũgo’s liberated zones is a notable example, and it refers to reclaimed spaces (from oppressive or exploitative systems) where the oppressed redefine themselves in their own terms physically, intellectually and conscientiously.<sup>107</sup>

## 2.2. Parameters of 21<sup>st</sup> century African feminisms

21<sup>st</sup> century African feminisms deal with the discursive contentions that 20<sup>th</sup> century African feminisms revealed, opposed and attempted to remedy with regard to the record on women’s concerns in Africa. For instance, Fatimah Kelleher took issue with the increasing instrumentalism in the women’s rights agenda especially when ‘driven primarily by economic indicators.’<sup>108</sup> Everjoice Win typifies this further in her brief on the silencing of middle class women in the narratives of the development agenda (be it UN or international non-governmental organisations), where the preferred image of African women is often poor, powerless, invariably pregnant, bare-footed and laden with children or goods fastened on her back or head.<sup>109</sup>

The imprints of colonisation and neo-colonisation on women’s lives also impact the methodologies used to craft 21<sup>st</sup> century African feminisms. Neo-colonialism, for instance, traces how after formal declarations of independence, African middle classes used colonial dominative and exploitative tools (like laws and public policies) to ‘facilitate accumulation for predominantly black men.’<sup>110</sup> Similarly, Fadekemi Abiru writes critically about the hangovers of ‘Africa’s lost decade’: the period between the 1980s and the 1990s where the International Monetary Fund and World Bank’s structural adjustment programmes rendered Africa perennially poor.<sup>111</sup> According to Abiru, women were especially affected during this decade because they became ‘shock absorbers of these adjustment efforts at an immense cost to their well-being.’<sup>112</sup>

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<sup>107</sup> W Soyinka, S Amin, BH Selassie, M Mũgo, T Mkandawire *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere lecture series 2009-2013* (2015) 183-184.

<sup>108</sup> F Kelleher ‘To chew on bay leaves: On the problematic trajectory of instrumentalist justifications for women’s rights’ in Busby M (eds) *New daughters of Africa* (2019) 537.

<sup>109</sup> E Win ‘Not very poor, powerless or pregnant: The African woman forgotten by development’ (2004) 35(4) *IDS Bulletin* 61.

<sup>110</sup> See, P McFadden ‘African feminist perspectives of post-coloniality’ (2007) 37 *The Black Scholar* 37.

<sup>111</sup> F Abiru ‘Africa’s lost decade: Women and the structural adjustment programme’ *The Republic* (25 September 2018) available at <https://republic.com.ng/augustseptember-2018/africas-lost-decade/> (accessed 26 October 2021).

<sup>112</sup> As above.

Digitisation has also created new liberated zones for 21<sup>st</sup> century African feminisms. For example, social media advocacy in Kenya has illuminated various feminist concerns through visibility, shaming and compelling state accountability for GBV especially.<sup>113</sup> For young Kenyan feminists, the online space offers solidarity unlike the isolation experienced offline.<sup>114</sup> However, they still have to put up with the society's mis-education on womanhood, which implicates both men and women.<sup>115</sup> For instance, Kenyan feminists have been labelled 'angry Twitter feminists' or 'mad women of the village' for advancing their causes vocally, brashly or with confrontational undertones.<sup>116</sup> Sometimes, they have received death threats.<sup>117</sup>

As mentioned in chapter 1, this research situates its analysis within African feminisms as advanced by the work of the African Feminist Forum (AFF). This is because several scholars working on African feminisms have been convened through the forum, especially their commitment to the Charter of Feminist Principles for African Feminists. Unlike any other organisation working on African feminisms in the continent, the scholarly contributions within this forum (the working group and its allies) are traceable through the reports and conference papers from the biennial regional conferences (2006, 2008 and 2010), the annual journal (*Feminist Africa*, from 2007 to 2017), the national feminist forums and the individual contributions of its affiliates through activism and scholarship.<sup>118</sup>

## **2.3. AFF and its contribution to 21<sup>st</sup> century African feminisms**

### **2.3.1. Charter of Feminist Principles for African Feminists**

The Charter of Feminist Principles for African Feminists (Charter of Feminist Principles) is the starting point in understanding AFF's contribution to African feminisms. The Charter of Feminist Principles clarifies the politics behind the choice to name the concept African Feminism then sets out the contents or substance of the concept. The Charter of Feminist Principles is an 'accountability mechanism for feminist organising in the continent' as well as 'a tool for peer-review amongst African feminist organisations.'<sup>119</sup>

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<sup>113</sup> N Nyabola 'Kenyan feminisms in the digital age' (2018) 46 *Women's Studies Quarterly* 264-265.

<sup>114</sup> As above 265.

<sup>115</sup> Nyabola (n 113) 267-268.

<sup>116</sup> Nyabola (n 113) 268.

<sup>117</sup> Nyabola (n 113) 267.

<sup>118</sup> Archives of the journal from 2007 to 2017 can be found here <http://www.agi.ac.za/agi/feminist-africa/archive> (accessed 2 September 2021).

<sup>119</sup> AFF (n 62) 10.

With regards to identity, the provision in the preamble titled ‘Naming ourselves as feminists’ reads:<sup>120</sup>

By naming ourselves as Feminists we politicise the struggle for women’s rights, we question the legitimacy of the structures that keep women subjugated, and we develop tools for transformatory analysis and action. We have multiple and varied identities as African Feminists. We are African women—we live here in Africa and even when we live elsewhere, our focus is on the lives of African women on the continent. Our feminist identity is not qualified with ‘Ifs,’ ‘Buts,’ or ‘Howevers.’ We are Feminists. Full stop.

The Charter of Feminist Principles signals patriarchy, a system of male dominance, as the key structure that legitimises women’s subjugation through political, social, cultural and religious institutions.<sup>121</sup> Therefore, as an intellectual construction or theoretical framework, patriarchy is not only centred in analyses using African feminism but defines African feminists’ ideological tasks to understand the system and political mandate to end it.<sup>122</sup>

The identity ‘African Feminists,’ according to the Charter of Feminist Principles, is a right or entitlement to be African and feminist.<sup>123</sup> This is unpacked under the following concerns: the recognition that feminist is not a homogenous term; the acknowledgement and celebration of diversity among feminists; the acknowledgment of a shared commitment to a transformative agenda for African societies and African women in particular; and the recognition of the current and past struggles by African women movements to acknowledge women’s personhood.<sup>124</sup>

### **2.3.2. Decentralised activism on African feminisms through national feminist forums**

To strengthen the activism on various national issues that African feminists face, the AFF has devolved into national feminist forums. In 2012, the Central African Youth Feminist Forum convened a conference in Congo Brazzaville where feminist issues peculiar to Central Africa were discussed such as human security, violence against women and girls, sexual and reproductive rights of (young) women living with HIV/AIDS, and homophobic laws in Cameroon and Democratic Republic of Congo especially.<sup>125</sup> Inaugurated in 2008, the Uganda Feminist Forum’s eighth convening in August 2019 was ‘Silencing our fears and fearing our silence’ in a bid to highlight self-censorship by feminists

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<sup>120</sup> AFF (n 21) 3.

<sup>121</sup> AFF (n 21) 4.

<sup>122</sup> As above.

<sup>123</sup> AFF (n 21) 5.

<sup>124</sup> As above.

<sup>125</sup> African Feminist Forum ‘Central African Youth Feminist Forum’ (2012) 1.



who are too afraid to organise owing to ‘social stigma, labelling and rejection in the exercise of agency around the contested issues [like rights for gender non-conforming women] that matter for women’s liberation.’<sup>126</sup>

These national feminist forums have amassed several successes and setbacks since their inception. Created in 2008, the Nigerian Feminist Forum was focal in the activism against the Indecent Dressing Bill (2008), and after their contribution the bill was not enacted.<sup>127</sup> The law intended to police women’s dressing in a way that violated women’s bodily integrity and was insensitive to cultural norms on dressing.<sup>128</sup> Although the Liberia Feminist Forum was formed in 2014, the women’s movement in Liberia had opposed its formation.<sup>129</sup> One of the reasons was that the term feminist is derogatory, ‘linked to lesbianism’ and disrespects the ‘socio-cultural configuration of Liberian society.’<sup>130</sup>

Collectively, the national feminist forums have enabled an inclusive space for knowledge-sharing and mentorship. For instance, the Francophone Feminist Forum (Benin, Burkina Faso, Côte d’Ivoire and Togo) caters to the feminist concerns in a part of francophone Africa.<sup>131</sup> Further, intergenerational dialogue as well as multi-disciplinarity is key within these national forums.<sup>132</sup> Therefore, the participation of young women and creatives (music, art, film) is essential in feminist mobilising.<sup>133</sup> The knowledge amassed from the activism is complemented by the academic thinking on African feminisms, thus, the AFF is keen on aligning their praxis and theory.<sup>134</sup>

### 2.3.3. Development of a feminist epistemology through scholarship

The development of a feminist epistemology in Africa was among the objectives of the inaugural AFF meeting.<sup>135</sup> Through the epistemological framework, the participants addressed feminist organising

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<sup>126</sup> Uganda Feminist Forum ‘A report of the 8th convening of the Uganda Feminist Forum’ (2019) 5.

<sup>127</sup> I Obibi & B Oparaocha ‘Two inches below the neck’ *Open Democracy* (19 November 2010) available at <https://www.opendemocracy.net/en/5050/two-inches-below-neck/> (accessed 26 October 2021). See also, B Bakare-Yusuf ‘Of mini-skirts and morals: Social control in Nigeria’ *Open Democracy* (22 February 2012) available at <https://www.opendemocracy.net/en/5050/of-mini-skirts-and-morals-social-control-in-nigeria/> (accessed 26 October 2021).

<sup>128</sup> As above.

<sup>129</sup> K Williams ‘Navigating checkpoints: The journey of the Liberia Feminist Forum’ (2017) 22 *Feminist Africa* 124.

<sup>130</sup> As above 123.

<sup>131</sup> African Feminist Forum ‘Report of the Francophone Feminist Forum’ (2017) 2.

<sup>132</sup> African Feminist Forum ‘3rd African Feminist Forum conference report. Feminist connections: Reconnecting with ourselves and our communities’ (2010) 10-11.

<sup>133</sup> As above 15, 46-47 & 60.

<sup>134</sup> AFF (n 62) 3.

<sup>135</sup> As above.

including ‘identifying the specificities of African feminist thought (sources, tensions, strengths)’ and ‘setting out the epistemic features of African feminist identity and intellectual construction.’<sup>136</sup> This section focuses on the scholarly contributions by the AFF members.

A common preoccupation within the contributions is the need for radical feminist activism through reclamation and re-energising of African feminisms’ narratives owing to a consistent and recurring backlash against the successes of African feminisms over the years, women’s rights especially. The backlash is articulated in various ways. According to Tamale, although the backlash against women’s issues is global, in Africa ‘political monopoly, economic deprivation, poverty, violence, displacement, adjusting economies and globalisation’ multiply the crisis of backlash tenfold.<sup>137</sup> Consequently, there is need for recourse to a ‘feminism with a capital F’; a feminism that defeats and resists the backlash.<sup>138</sup>

Josephine Ahikire articulates the backlash through a critical analysis of how gender has been understood over the years. First, gender is no longer applied politically and its theories are devoid of feminist perspectives.<sup>139</sup> Second, due to male backlash and ‘re-legitimation of crude anti-feminist conservatism’ terms like gender mainstreaming, engendering, gender sensitive and women empowerment used to suit the development agenda have been subsumed as cross-cutting issues ridding African feminism from its political impetus; it is more a play of rhetoric or buzzwords.<sup>140</sup> Alongside the development agenda, religious fundamentalisms also occasion anti-feminist conservatism. Writing from a Senegalese perspective, Fatou Sow describes how Muslim fundamentalists are opposed to symbols of women’s modernisation such as access to education (intellectual freedom) because it degrades female purity; a concept which is important in Islam.<sup>141</sup> Relatedly, many African states have over-prioritised formal equality to the detriment of substantive equality through laws that seek to redress women’s exclusion and, as the next section shows, women’s experiences with gendered violence.<sup>142</sup>

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<sup>136</sup> AFF (n 62) 4.

<sup>137</sup> S Tamale ‘African feminism: How should *we* change?’ (2006) 49 *Development* 39.

<sup>138</sup> As above.

<sup>139</sup> J Ahikire ‘African feminism in context: Reflections on the legitimisation battles, victories and reversals’ (2014) 19 *Feminist Africa* 16.

<sup>140</sup> As above 16-17 and 21.

<sup>141</sup> F Sow ‘Fundamentalisms, globalisation and women’s human rights in Senegal’ (2003) 11(1) *Gender and Development* 72-73.

<sup>142</sup> Tamale (n 22) 215-234.

## 2.4. 21<sup>st</sup> century African feminisms' conceptualisations of GBV

Like 20<sup>th</sup> century African feminisms, GBV in 21<sup>st</sup> century African feminisms acknowledges that violence against women, for instance, is a prominent expression of patterns of domination.<sup>143</sup> Generally, there is cultural acceptance (normalising) and desensitisation to all forms of violence against women, with the exception of extreme manifestations of violence.<sup>144</sup> Public discourse around sexual violence is censored and tolerated as an expression of masculinity and domination of femininity.<sup>145</sup>

Women in Africa have taken advantage of the post-conflict status to emphasise the enactment of anti-GBV legislation. In the 21<sup>st</sup> century, most African states have attempted to pass laws successfully or otherwise on domestic violence, sexual harassment and trafficking.<sup>146</sup> Despite the presence of these laws, 21<sup>st</sup> century African feminists have decried the hollow implementation of their provisions because the laws operate within a patriarchal environment.<sup>147</sup> In essence, the legislations are not accountable to women's experiences with GBV.

21<sup>st</sup> century African feminisms insist on applying a gendered gaze to understand GBV. According to Jane Bennet, discourses on gender and violence within the contexts of HIV/AIDS, militarism, masculinities research and heteronormative violence largely ignore the contributions of African feminisms.<sup>148</sup> As I have argued so far, African feminisms defy false dichotomies on gender that are often proffered by the West such as the private versus the public sphere and that biological sex alone defines gender. It is within heteronormative violence especially where Bennet surmises that African feminisms can offer transformative thinking.<sup>149</sup> For instance, the discourses on transphobia necessitate rethinking masculinities and femininities, in other words, challenge gender dynamics and the types of violence imagined or predicted in GBV.<sup>150</sup> To elaborate on how African feminisms confront GBV, Bennet problematises as follows:<sup>151</sup>

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<sup>143</sup> E Ayiera 'Sexual violence in conflict: A problematic intellectual discourse' (2010) 14 *Feminist Africa* 13.

<sup>144</sup> As above.

<sup>145</sup> As above.

<sup>146</sup> Tripp (n 14) 10-11.

<sup>147</sup> Tripp (n 14) 15-18.

<sup>148</sup> J Bennet "'Circles and circles': Notes on African Feminist debates around gender and violence in the c21' (2010) 14 *Feminist Africa* 28-32.

<sup>149</sup> As above.

<sup>150</sup> Bennet (n 148) 34-35.

<sup>151</sup> Bennet (n 148) 35.

...If ideas about patriarchy and colonialism predict that masculinisation encourages violence, the link between gender and violence is causal and catalytic—gendering dichotomises the organisation of social violence, just as it dichotomises the organisation of labour, authority, or ownership of land. If ideas about contemporary conventions about being gendered as ‘men’ or ‘women’ (which include predictions about heteronormativity) predict violence, the shape of the link changes. It becomes one of ontology. Gendering is no longer implicated in shaping the terms of violence: gender, as practiced conventionally despite diversity of contexts, is violence.

Two notable studies exemplify Bennet’s problematising. The first is Adelaine Africa’s research on black South African women in detention serving sentences for crimes like armed robbery and murder. As a feminist psychologist, Africa engaged with the link between violence and femininity, which is often discarded because women who resort to violence are ‘pathological (mad), victimised (sad) or deviant (bad).’<sup>152</sup> Pumla Gqola’s piece on the ‘cult of femininity’ scrutinises the acceptance of anti-GBV interventions in South Africa that are not transformative, instead, they leave intact the patriarchal structures that feminisms seek to dismantle.<sup>153</sup> Examples of interventions marred by the ‘cult of femininity’ include placing the burden on women to stay vigilant as a safeguard against rape culture and the assumption that empowerment is only for women in public or privileged spaces.<sup>154</sup> These enable violent masculinities to flourish amid a context of misogyny and increasing homophobia.<sup>155</sup>

## 2.5. Conclusion

This chapter has discussed the key features that informed 20<sup>th</sup> century African feminisms and how these features have been taken up affirmatively and expanded in 21<sup>st</sup> century African feminisms. Some of the features included Westernisation of feminism as an ideology and the influence of law and development on women’s lives. Throughout the evolution of African feminisms, GBV has been articulated through activism and scholarly works as a socio-political question that should be understood in gendered terms. With this, the contributions from the AFF-leaning African feminists provide clues on potential criteria for assessing jurisprudence on GBV at the African Commission and the African Court in the next chapter. These criteria are also based on the common threads in the various strains of African feminisms since the 20<sup>th</sup> century and they include: context-specificity, socio-cultural diversity of gender, legal pluralism and a contention with the influences of patriarchy,

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<sup>152</sup> A Africa “‘Murderous women?’: Rethinking gender and theories of violence’ (2010) 14 *Feminist Africa* 80-84.

<sup>153</sup> PD Gqola ‘How the ‘cult of femininity’ and violent masculinities support endemic gender based violence in South Africa’ (2007) 5(1) *African identities* 115-119.

<sup>154</sup> As above.

<sup>155</sup> As above.

colonisation and neo-colonisation because these impact on how Africa is understood socio-politically, how the identity of women in Africa is constructed and how women in Africa experience violence.

## Chapter 3: Jurisprudence on GBV in the AU human rights system

### 3. Introduction

Equipped with gendered criteria from chapter 2, the aim of this chapter is to assess how the AU human rights system interprets GBV. Focusing on the jurisprudence of two landmark cases from the African Commission and the African Court, this chapter seeks to reveal whether and how GBV as articulated in the Maputo Protocol has adopted a gendered interpretation. The chapter also responds to the second research sub-question: What are the current discourses on GBV in the AU human rights system and their shortcomings?

First, a brief outline on the GBV discourses at the AU level justifies this research's scope on the AU human rights system. Secondly, the findings pertinent to GBV within the two landmark cases is analysed. Owing to the broadness of GBV, several cases would apply for interrogation in this chapter. Thus, the chapter only focuses on GBV as proscribed in the Maputo Protocol. This filters out two cases, one from the African Commission and the other from the African Court. Lastly, the chapter assesses the findings against 21<sup>st</sup> century African feminisms in a bid to flesh out any shortcomings to interpreting GBV in the AU human rights system. With this, a case can be made for mainstreaming African feminisms in the 21<sup>st</sup> century in understanding GBV at the AU human rights system, which will be the bane of chapters 4 and 5.

#### 3.1. Discourses on GBV at the AU human rights system in the 21<sup>st</sup> century

The AU has furnished its input on GBV as a shadow pandemic demonstrated by an insistence on using gendered approaches in tackling COVID-19. Some of the reasons for such an insistence include the principles of gender equality and women empowerment as enshrined in the various AU foundational laws such as the Banjul Charter and the Constitutive Act.<sup>156</sup> Since the pandemic has heightened the rate of GBV in the continent, the Special Rapporteur on the Rights of Women in Africa advised that COVID-19 presents an opportunity for African states to 'strive to write a positive narrative' when the pandemic rolls over.<sup>157</sup> To achieve this, she implored African leaders to commit

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<sup>156</sup> African Union, 'Framework document on the impact of COVID-19 on gender equality and women's empowerment: Africa Union guidelines on gender-responsive responses to COVID-19' (2020) 3.

<sup>157</sup> Special Rapporteur on the Rights of Women in Africa 'Press release of the Special Rapporteur on the Rights of Women in Africa on violation of women's rights during the COVID-19 pandemic' (6 May 2020) available at <https://www.achpr.org/pressrelease/detailPid=495> (accessed 26 October 2021).

to their women's rights obligations by taking 'concrete steps towards developing gender-responsive approaches to the pandemic.'<sup>158</sup>

According to the 2020 AU guidelines on gender-responsive responses to COVID-19:<sup>159</sup>

Applying a gendered lens implies, among others, questioning how socially-constructed roles and identities may affect vulnerability to and experiences of COVID-19. A gendered lens to COVID-19 responses will improve outcomes for not only women, but all people affected by the virus and contribute to saving lives in Africa.

The guidelines situate GBV within the ambit of women's physical and psychological integrity.<sup>160</sup> Here, there is much emphasis on domestic violence against women and girls.<sup>161</sup> The guidelines suggest both preventive and survivor-centred advocacy tools against GBV. Examples of preventive tools include mobilising resources nationally and continentally for national rapid responses and sensitising critical state actors such as police, judiciary and prosecutors on violence against women.<sup>162</sup> Survivor-centred tools include establishing emergency shelters, free helplines and providing psychosocial support through online counselling services.<sup>163</sup>

Before the pandemic, the AU advocated against GBV through long-term strategies with the common goal of attaining gender equality. The Nairobi Declaration on Africa Women's Decade (2010-2020) is a noteworthy illustration. GBV was located among the 10 thematic special focus areas; peace and security and violence against women especially.<sup>164</sup> AU's Peace and Security Council was charged with overseeing the focus area, an excellent focal point considering the peace support operations in the continent, for example in Western Sahara, Liberia, Central African Republic and Somalia.<sup>165</sup> In addition, the decade witnessed a rise in violent extremism such as Al Shabaab in East Africa and Boko Haram in Northern Nigeria. Gender lenses 'heighten awareness of the particular (and changed)

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<sup>158</sup> As above.

<sup>159</sup> African Union (n 156).

<sup>160</sup> African Union (n 156) 14-15.

<sup>161</sup> As above.

<sup>162</sup> As above.

<sup>163</sup> As above.

<sup>164</sup> African Union 'Africa Women's Decade: Grassroots approach to gender equality and women empowerment' (2010) available at [https://www.chr.up.ac.za/images/researchunits/wru/documents/the\\_african\\_womens\\_decade.pdf](https://www.chr.up.ac.za/images/researchunits/wru/documents/the_african_womens_decade.pdf) (accessed 29 October 2021).

<sup>165</sup> C Hendricks 'Progress and challenges in implementing the Women, Peace and Security Agenda in the African Union's Peace and Security Architecture' (2017) 42(3) *Africa Development* 77.

circumstances which war creates for the construction and reconstruction of gendered roles in society.<sup>166</sup>

The AU discourse on GBV also advances intergenerational solutions. The AU Office of the Youth Envoy has been particularly vocal. In July 2020, they launched the ‘Youth Silencing the Guns Campaign,’ which was preceded by six virtual regional intergenerational dialogues that culminated in an overall reach of 48 million youths.<sup>167</sup> Indeed, the campaign stems from the recognition of how youth experience GBV in the continent such as child soldiers recruitment, urban violence and police brutality.<sup>168</sup>

Similarly, the Africa Young Women B+25 Manifesto published in November 2020 shows the link between GBV and young women. ‘Criminalise Gender-based Violence’ and ‘End Gender Discrimination’ make for two of the ten demands within the feminist political document pioneered by the AU Youth Envoy. Part of the GBV criminalisation demand involves proscribing early and forced marriages while some of the types of young women mentioned in the anti-gender discrimination demand include: young women seeking asylum, rural young women, young women migrants and young women of low socio-economic status.<sup>169</sup>

The discourses are mainly aspirational, guiding the actions of states and non-state actors in their agitation for gender equality. When it comes to GBV within the AU human rights discourse, there is more interpretation of the aspirations to secure the charge of a violation and its attendant sanctions. Through these findings on violations, the decision-makers must take on an intellectual exercise using the laws, the contexts informing the violations and the aspirational strategies or policies as their sites of knowledge. Therefore, the next sections highlight the discourse on GBV in the AU human rights system with particular focus on the provisions of the Maputo Protocol and the jurisprudence on GBV from the two landmark cases.

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<sup>166</sup> L. Vincent ‘Engendering peace in Africa: A critical inquiry into some current thinking on the role of African women in peace-building’ *African Centre for the Constructive Resolution of Disputes* (30 May 2016) available at <https://www.accord.org.za/ajcr-issues/engendering-peace-in-africa/> (accessed 26 October 2021).

<sup>167</sup> African Union Youth Envoy ‘Youth silencing the guns: Intergenerational Dialogues’ (2020) 1-3.

<sup>168</sup> As above 14.

<sup>169</sup> AU Young Envoy ‘Africa Young Women B+25 Manifesto’ (2020) 5-6.



## 3.2. Jurisprudence on GBV at the African Court and African Commission

### 3.2.1. GBV as a human rights concern: Unearthing GBV in the Maputo Protocol

Pointedly, the Maputo Protocol packages the AU discourses on GBV in human rights terms. Article 4 of the Maputo Protocol explicitly and elaborately guarantees women's rights to life, integrity and security of person, which proscribes all forms of violence against women in the same breath. Therefore, states are furnished with diverse duties in order to eliminate, prevent and protect women from violence in its totality. Examples of these duties include: legislative and economic measures, punishing perpetrators while rehabilitating victims and promoting peace education to eradicate cultural stereotypes that enable violence against women.<sup>170</sup>

The Maputo Protocol provides an extensive meaning of violence against women as well as a broad meaning of women. On the former, article 1 defines violence against women as:

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

This shows the diversity of instances of violence that women living in Africa occasionally face while at the same time gives clues on the situations that enable violence against women. Relatedly, the Maputo Protocol offers a broad idea of 'women in Africa.' For example, article 1 defines women as persons of the female gender including girls, which I will problematise later in this chapter; article 4 mentions expectant or nursing women facing death penalties as well as women refugees; article 6 guarantees rights to married women; article 11 is about women in armed conflict; article 20 details on protection of widows' rights; article 22 covers special protections for elderly women; article 23 is about women with disabilities; and article 24 is about women in detention including expectant or nursing women in detention.

In line with the 21<sup>st</sup> century AU discourse on gender equality and women empowerment, the Maputo Protocol realises this goal through its political agenda and legal provisions. The preamble states that

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<sup>170</sup> Maputo Protocol, article 4 (2).

the Maputo Protocol ‘reaffirms the principle of promoting gender equality’ as stipulated in the AU foundational framework, which underline women as equal partners in African development and women’s equality with men. Article 8 is also explicit in the standpoint that women and men are equal before the law. Chapter 2 revealed that negative forces of tradition or culture hinder women’s well-being, hence, article 17 provides for the ‘right to live in a positive cultural context.’

Article 27 tasks the African Court to interpret the provisions of the Maputo Protocol, which raises doubt on the role of the African Commission in this regard especially for this research. I side with the scholarly opinions which aver that a textual interpretation of legal instruments should not result in absurdities and in this case, a purposive interpretation should enable the greatest protection of women’s rights.<sup>171</sup> Viljoen suggests that the exclusion of the interpretive mandate of the African Commission in the Maputo Protocol does not preclude the complementarity between the African Court and the African Commission to improve the situation of women.<sup>172</sup> Therefore, individuals in states parties of the Maputo Protocol are entitled to submit communications to the African Commission for examination of the alleged violations.<sup>173</sup> Having clarified this, the subsequent sections analyse the interpretation of GBV in both the African Commission and African Court.

### **3.2.2. The African Commission’s interpretation of GBV: Egyptian Initiative for Personal Rights and Interights v Egypt (2011)**

The alleged GBV violations within this communication occurred during the violent police dispersal of a protest in Egypt on 25 May 2005.<sup>174</sup> During the protest, young supporters of the National Democratic Party (NDP) attacked the supporters of the Egyptian Movement for Change (Kefaya), who had organised the demonstration against the NDP regime.<sup>175</sup> The four complainants in this communication were all female journalists, three were participating in the protest while one was merely a passer-by.<sup>176</sup> The nature of the GBV the four experienced was similar owing to the police inaction that enabled the perpetration of violence against them by the riot police and unidentified men and women. The complainants called to question the accountability of the Egyptian criminal justice system

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<sup>171</sup> Kamunyu (n 56) 110-112.

<sup>172</sup> Viljoen (n 47) 39-40.

<sup>173</sup> As above.

<sup>174</sup> (2011) AHRLR 90 (ACHPR 2011), para. 3.

<sup>175</sup> As above.

<sup>176</sup> AHRLR (n 174) para. 5-22.

in sanctioning the police and redressing the sexual violence meted out to them. For example, the four victims could only secure charges on misdemeanour crimes against their perpetrators as per Article 242 of the Egyptian Penal Code (on unarmed beating or wounding of a person that is neither premeditated nor occasions sickness, disability or grave physical injuries).<sup>177</sup>

Instructively, the complainants did not allege any violations under the Maputo Protocol. However, the African Commission imbibed the definition of violence against women in examining the alleged sexual violence.<sup>178</sup> The complainants too also relied on article 1 of the Maputo Protocol because it proscribes physical, psychological or sexual violence.<sup>179</sup> Besides, as part of its findings, the African Commission recommended Egypt to ratify the Maputo Protocol.<sup>180</sup> Therefore, the main aim of referring to this communication is to show how the gendered discourse informed the African Commission's affirmative finding on sexual violence.

The nature of the GBV the four victims experienced revealed physical violations to their bodily autonomy. Below are excerpts of the victims' harrowing encounter with GBV in their submissions to the African Commission.

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<sup>177</sup> AHRLR (n 174) para. 21.

<sup>178</sup> AHRLR (n 174) para. 121.

<sup>179</sup> AHRLR (n 174) para. 87.

<sup>180</sup> AHRLR (n 174) para. 275.

1 <sup>st</sup> victim (by-stander)	2 <sup>nd</sup> victim (provided media coverage of the protest)	3 <sup>rd</sup> victim (exercising right to protest)	4 <sup>th</sup> victim (participating as member of Kefaya)
<p><i>Their hands were fondling my breasts and molesting all the sensitive areas in my body. They assaulted me with their hands and tore off my clothes and jewellery...I ended up almost naked as a result...</i><sup>181</sup></p>	<p><i>The State Security Intelligence Officer ordered a group of female supporters of the NDP to tear off her clothes and hit her. She...was later dragged to the main street...where security and police officers continued to hit, sexually assault, insult, and slap her face...[she] was also allegedly called abusive names such as 'whore' and 'slut'...</i><sup>182</sup></p>	<p><i>One of the women pulled my hair and brought me to the ground. The next thing I knew I was being beaten...All the clothes on the upper half of my body were torn off and I ended up with only a bra...</i><sup>183</sup></p>	<p><i>...She was attacked by a group of unidentified men who pushed her against the wall and hit her in her lower abdomen several times until she collapsed on the ground...she was kicked on her pubic area by one of the men, while the others continued to beat, and tried to tear off her clothes...</i><sup>184</sup></p>

In addition, the four victims alleged that as a result of the physical assaults on their bodies, they suffered psychological violence. Notably, the four sought redress from the police by filing complaints but in turn the police and unidentified persons threatened them for refusing to withdraw their charges. The same refusal resulted in the first victim losing her job and her husband divorced her.<sup>185</sup> The third and fourth victim stated that they were emotionally traumatised and incurred mental health conditions following the physical assault during the protest.<sup>186</sup> The second victim narrated, 'My feelings of personal security have deteriorated...I change my clothes in the dark...scared to see myself naked. I felt like their fingerprints were marked on my body.'<sup>187</sup>

The reasoning of the African Commission in determining whether the four were victims of GBV adopted a gendered gaze akin to the 21<sup>st</sup> century African feminisms criteria. First, the African Commission affirmed that state violence is a key enabler of GBV. The excerpts above reveal that the police were not only implicated as perpetrators of sexual violence during the protest but also issuing threats after the four victims refused to withdraw their complaints. For the African Commission, Egypt's explanations for failure to investigate the allegations of violence and sanction the police and

<sup>181</sup> AHRLR (n 174) para. 131.

<sup>182</sup> AHRLR (n 174) para. 11.

<sup>183</sup> AHRLR (n 174) para. 134.

<sup>184</sup> AHRLR (n 174) para. 17.

<sup>185</sup> AHRLR (n 174) para. 9.

<sup>186</sup> AHRLR (n 174) para. 15 & 135.

<sup>187</sup> AHRLR (n 174) para. 133.

unidentified culprits was further proof of perpetrating GBV.<sup>188</sup> Egypt had submitted that their investigations were inconclusive because they could not identify the culprits with precision.<sup>189</sup> This was further complicated by the large crowds during the protest and the four victims' recollections of events, which in Egypt's opinion were tainted by their psychological and physical conditions.<sup>190</sup>

Secondly, the African Commission acknowledged that beyond the state actors, GBV operates in a context of systematic (sexual) violence informed by established societal traditions. The old or established nature of the traditions therefore meant that the perpetrators of the sexual violence knew about the consequences of their actions for themselves and their families.<sup>191</sup> The African Commission explicitly recognised that the Egyptian society is founded on Arab Muslim mores, 'where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband.'<sup>192</sup>

Even so, the African Commission also negated the public-private dichotomy on GBV when experienced by women, which is similar to the stance in 21<sup>st</sup> century African feminisms. According to the African Commission, the incidents of sexual violence depicted an affront to women's participation in the public sphere. Therefore, the perpetrators knowingly sexually violated the four victims 'as a means of punishing and silencing them from expressing their political opinions.'<sup>193</sup> Moreover, there were instances where the female protestors were cautioned by the police or unidentified culprits to disengage from the political space. For example, while her bodily integrity was being violated, the second victim narrated, 'An identified police officer at the scene told me, 'I'll show you not to go down to the streets again'...He also told me 'we'll take your picture and distribute it.'<sup>194</sup>

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<sup>188</sup> AHRLR (n 174) para. 166.

<sup>189</sup> AHRLR (n 174) para. 112.

<sup>190</sup> As above.

<sup>191</sup> AHRLR (n 174) para. 152.

<sup>192</sup> As above.

<sup>193</sup> As above.

<sup>194</sup> AHRLR (n 174) para. 132.

### 3.2.3. African Court's jurisprudence on GBV: APDF & IHRDA v Republic of Mali (2018)

This judgement directly construed GBV as articulated in the Maputo Protocol namely, article 2(2) on harmful traditional practices, article 6 (a) on the right to consent to marriage, article 6 (b) on the minimum age of marriage for girls and article 22 on the right to inheritance.<sup>195</sup> Since 1998, Mali began reforming its laws to suit international human rights law standards.<sup>196</sup> In 2011, the Persons and Family Code (Family Code) was among the promulgated laws, whose enactment was shrouded by widespread protests organised by Islamic organisations.<sup>197</sup> Instructively, Mali unlike Egypt has ratified the Maputo Protocol.

The applicants alleged that the Family Code permitted 16-year old girls to contract a marriage while the Maputo Protocol sets the minimum age at 18 years.<sup>198</sup> Further, in special circumstances 15-year old boys would be permitted to contract marriages with the consent of their father and mother; for 15-year old girls, only the father's consent was required.<sup>199</sup> The Family Code did not have an explicit sanction for religious ministers who officiated religious marriages without verifying the consent of the parties.<sup>200</sup> According to the applicants, the lack of sanctions contravened article 6 (a) of the Maputo Protocol, which stipulates that marriages should take place with the free and full consent of the parties. In the absence of a will, the Family Code promoted the application of religious and customary law in matters inheritance.<sup>201</sup> This violated article 21 of the Maputo Protocol that guarantees equitable share of inheritance because the customary laws did not secure the same.<sup>202</sup> In all, the applicants alleged that Mali did not proscribe harmful practices such as early marriages that impede the protection of women's rights. This contravened article 2(2) of the Maputo Protocol, which obligates states to eliminate harmful traditional and any other practices 'based on the idea of inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.'

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<sup>195</sup> *APDF & IHRDA v Republic of Mali* (judgement) (2018) para. 8.

<sup>196</sup> APDF (n 195) para. 7.

<sup>197</sup> APDF (n 195) para. 6.

<sup>198</sup> APDF (n 195) para. 59.

<sup>199</sup> APDF (n 195) para. 60.

<sup>200</sup> APDF (n 195) para. 78-81.

<sup>201</sup> APDF (n 195) para. 96.

<sup>202</sup> APDF (n 195) para. 102.

In my opinion, although the African Court found a violation of all the mentioned provisions of the Maputo Protocol, the judges' reasoning was bereft of a gendered discourse. Rather, a legal analysis determined whether the Family Code negated women's rights. For the judges, the Family Code did not guarantee women's rights because it did not comply with international human rights law standards, especially the Maputo Protocol. There was neither a link between the violated provisions of the Maputo Protocol and GBV or gender equality even where the submissions revealed some of the gender dynamics that enabled practices such as inequitable inheritance. With this, the next section highlights some incongruences in the interpretations of GBV by the African Court and the African Commission. As this African Court judgement shows, incongruences could include missed opportunities to undertake a gendered analysis alongside the legal analysis.

### **3.3. Shortcomings of the AU human rights system's jurisprudence on GBV through the lenses of 21<sup>st</sup> century African feminisms**

#### **3.3.1. Conflation of sex with gender**

In construing whether there was a violation of GBV, the African Commission asserted that the incidences of sexual violence were gender-specific. The commissioners' reasoning, however, interpreted gender as sex. The following finding is worthy of consideration:<sup>203</sup>

The African Commission concurs with the complainants that the type of violence used during the demonstrations was perpetrated based solely on the sex of the persons present in the scene of the demonstration. In other words, the violence was gender-specific and discriminatory by extension.

Another instance of this conflation was the African Commission's interpretation of GBV, which relied on the criterion of similar treatment between the male and female protestors.<sup>204</sup> Through this, the African Commission portended the rigid false dichotomy in GBV, which suggests that GBV is solely a women's issue or even where it touches on women's concerns, that GBV is connoted in relation to men's concerns. Instructively, the African Commission explained that reference to the false dichotomy was significant because 'the characteristics of violence commonly committed against women and men differ.'<sup>205</sup> While this is true, the interpretation proceeded to generalise women's experience with

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<sup>203</sup> AHRLR (n 174) para. 153.

<sup>204</sup> AHRLR (n 174) para. 129.

<sup>205</sup> AHRLR (n 174) para. 142.

violence; an experience pitted against men's experience with violence. First, the African Commission opined that 'slut' and 'whore' are not usually used against persons of the male gender. Instead, the insults degrade women 'who refuse to abide by traditional religious and even social norms.'<sup>206</sup> Secondly, the African Commission concluded that the sexual violence was gender-specific because there was no evidence to prove that 'male protesters in the scene were also stripped naked and sexually harassed as the women were.'<sup>207</sup> Lastly, the African Commission classified the four victims' experience with GBV as gender-specific because such GBV could only be directed at women, for example: breast fondling, touching 'private and sensitive parts' and the accusations of prostitution.<sup>208</sup> In the African Commission's view, 'There is no doubt that the victims were targeted in this manner due to their gender.'<sup>209</sup>

21<sup>st</sup> century African feminisms suggest that interpretations of GBV should confront the gender dynamics in a given society directly. Therefore, womanhood or femininity is broader than the physical or biological autonomy of the woman. The conflation of sex with gender ignores the gender reality of violent masculinities (or the 'cult of femininity'), which is perpetrated by both men and women as the communication proved. Besides, the Maputo Protocol does not aid much in this regard because the definition of woman is a person of the female gender; a blatant confusion of sex and gender. This definition shuts out the diverse realities of femininity defined beyond the heteronormative space or heteronormative violence, for instance, transphobia.

### **3.3.2. Disregard for legal pluralism**

The African Court relied on a legal interpretation of GBV more than a gendered analysis. Although improving the situation of women or gender equality is the aim of both GBV constructions, the African Court missed the opportunity to consider a gendered discourse even within their legality bias. Through the legal interpretation, women's concerns were invisibilised in the discussion, instead the demands of international human rights standards were prioritised. Consequently, the African Court held that the application of Islamic law and customary practices on inheritance in Mali 'are not in conformity with the instruments ratified by [Mali].'<sup>210</sup> Secondly, Mali 'violated its international

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<sup>206</sup> AHRLR (n 174) para. 143.

<sup>207</sup> AHRLR (n 174) para. 138.

<sup>208</sup> AHRLR (n 174) para. 144 & 145.

<sup>209</sup> AHRLR (n 174) para. 144.

<sup>210</sup> APDF (n 195) para. 114.



commitments’ by enacting the Family Code which sustains discriminations against women.<sup>211</sup> Relatedly, the African Court ordered Mali to amend the Family Code and ‘harmonise its laws with international instruments.’<sup>212</sup> Lastly, the African Court noted that the way a valid religious marriage is contracted in Mali ‘may lead to forced marriage and perpetuate traditional practices that violate international standards.’<sup>213</sup>

With this, the African Court ignored the relationship between law and women in Mali. The submissions provided snippets on this relationship, suggesting that both formal law and customary law influence women’s experiences. Therefore, by castigating Islamic practices as a contravention to international law is a partial account of Malian women’s encounters with the law. In other words, Islamic customs are the living law for a majority of women even though there are instances of negative forces that subjugate their integrity. The African Court ought to have elaborated on how both the customary laws and formal laws could be used to affirm women’s rights and sanction violations. Moreover, Mali had submitted that the Family Code was in harmony with socio-cultural realities in Malian society, otherwise, ‘it would serve no purpose to enact a legislation which would never be implemented.’<sup>214</sup>

In my view, there were two blatant opportunities for the African Court to ingrain a gendered analysis in their legal interpretation on GBV. On forced marriages, the applicants submitted that generally religious marriages take place without the presence of parties and the presence of women is not required.<sup>215</sup> The African Court only focused on the consent requirement of the parties to the marriage by stressing on the minimum age criterion. Even so, the African Court disregarded Mali’s submissions on minimum age that offered a gendered gaze. According to Mali, despite the Islamic stance, ‘at the age of 15, [girls’] biological and psychological conditions of marriage are in place.’<sup>216</sup> The second chance was on inequitable inheritance where the applicants submitted that ‘under Islamic law, granting equal inheritance shares to men and women is a favour and not a right.’<sup>217</sup> A gendered analysis would interrogate these gender dynamics in Malian society that inform women’s positionality in matters

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<sup>211</sup> APDF (n 195) para. 124.

<sup>212</sup> APDF (n 195) para. 135.

<sup>213</sup> APDF (n 195) para. 94.

<sup>214</sup> APDF (n 195) para. 66.

<sup>215</sup> APDF (n 195) para. 82.

<sup>216</sup> APDF (n 195) para. 66.

<sup>217</sup> APDF (n 195) para. 106.

marriage or inheritance, hence, pin-pointing to Mali where the shortcomings of Islamic cultures lay not only with regard to women but their encounter with the law.

If 21<sup>st</sup> century African feminisms were applied in the African Court's judgement, the link between law and GBV would be clarified. First, GBV must be understood according to the contexts where it occurs. This was the argument of Mali in stating that the Family Code conforms with Malian social realities in as much as the state was reforming its laws to adhere to international standards. Secondly, 21<sup>st</sup> century African feminisms demand that laws should be accountable to women's experiences with GBV. Therefore, it is insufficient to reform laws to secure formal equality when the reality is dictated by violent masculinities and patriarchal systems, which are in turn permeated through the established customary laws and formal laws. Besides, according to Manji, women's encounter with formal laws is marginal as the African Court case affirmed.<sup>218</sup> For instance, the applicants submitted that 'the majority of the population lacks the capacity to use the services of a notary to authenticate a will.'<sup>219</sup> Consequently, this complicates how Malian law can guarantee a woman's right to equitable inheritance shares.

### **3.4. Conclusion**

There is a consistent narrative at the AU that combatting GBV results in gender equality, hence, necessitating centring gender in the discourse. This chapter has demonstrated that the jurisprudence on GBV in the AU human rights system has had to contend with gender dynamics that inform GBV. The two landmark cases located the gender dynamics in Egypt and Mali that resulted in various instances of GBV and how the African Commission and African Court constructed their jurisprudence of GBV in light of such dynamics. When assessed against the criteria provided by 21<sup>st</sup> century African feminisms, two main shortcomings in the jurisprudence were revealed, namely the conflation of the definition of sex and gender as well as the disregard for legal pluralisms. These shortcomings, in my view, deserve more elaboration because they also explain why it is difficult to apply 21<sup>st</sup> century African feminisms in the interpretation of GBV in the AU human rights system. Chapter 4 elucidates these difficulties further.

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<sup>218</sup> Manji (n 88) 451.

<sup>219</sup> APDF (n 195) para. 97.

## **Chapter 4: Challenges to mainstreaming 21<sup>st</sup> century African feminisms in the jurisprudence on GBV in the AU human rights system**

### **4. Introduction**

This chapter outlines two potential challenges in applying African feminisms in the 21<sup>st</sup> century to the jurisprudence of the African Commission and the African Court. These are the ideological biases in the international human rights discourse and secondly, the political internalisation of the Maputo Protocol. Further, the extent of difference between the standpoint in the AU human rights system's jurisprudence and the concepts from 21<sup>st</sup> century African feminisms will be highlighted in a bid to make the case for mainstreaming the gendered perspectives on GBV advanced in 21<sup>st</sup> century African feminisms.

#### **4.1. Ideological biases in the international human rights discourse**

Over the years, African scholars have criticised the AU human rights system for maintaining ideological biases that are an affront to the way of life in Africa. The common claim weaving the biases together is that the dominant conceptualisations on human rights as applied in Africa are steeped in Western thought. Otherwise, the AU human rights system is playing catch-up with the European human rights system or the UN's philosophies on human rights. For instance, there is a tendency to compare the effectiveness of the Maputo Protocol with the UN's Convention on the Elimination of All Forms of Discrimination Against Women.<sup>220</sup>

##### **4.1.1. Human rights as legal rights**

Writing in 1989, Issa Shivji asserted that Africa needs to re-conceptualise its application of human rights, where human rights are not theorised as legal rights but a means of struggle.<sup>221</sup> This was against the backdrop of the widespread agitations for democracy between the 80s and 90s throughout Africa. Thus, Shivji explained further that the struggle perspective exposes and resists human rights violations 'with a view ultimately to overcome the situation which generates human rights violations.'<sup>222</sup>

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<sup>220</sup> For instance, Banda (n 46) 69-79.

<sup>221</sup> I Shivji *The concept of human rights in Africa* (1989) 71.

<sup>222</sup> As above.

Shivji's wisdom has a bearing on the jurisprudence on GBV at the AU human rights level. GBV understood as a violation of international human rights standards can be located as strictly theorising GBV within the legal framework. Legal rights are static leaving no room for incorporating other aspects that affect the discourse on GBV such as history, gender and politics. Tamale opines that the legal treaties on international human rights place human rights into different silos [for example, women's rights, disability rights, sexual minority rights), which in turn ignores the intersecting horizontal oppressions that people are subjected to on a daily basis.<sup>223</sup>

#### 4.1.2. Culture versus human rights

Culture has also been pitted against human rights in the dominant ideologies on human rights. Pertinently, within the ambit of women's rights violations such as GBV, the effect of cultures and rights on GBV are discussed separately. In some instances, the contribution of cultures is disregarded. Dawit labels this as a tacit refusal to recognise culture as a human right.<sup>224</sup> In addition, she elaborates on the dangers of not considering culture as part and parcel of the interpretation of GBV within the international human rights regime. First, it enables the continuous mythicising of cultures as solely social rather than endorsing their political impressions.<sup>225</sup> Secondly, culture intersects directly with women's rights thus, by neglecting culture, women's rights are articulated unclearly.<sup>226</sup>

There is a historical bearing on the law-leaning understanding of human rights and its contempt for culture. For example, chapter 2 demonstrated how African cultures were classified using un-nuanced terms like barbaric or savage. Moreover, the static or determinist nature of law cannot fathom the fluidity of cultures. Such fluidity includes the recognition that some cultural traditions may accept or totally reject the dominant views on human rights.<sup>227</sup> Therefore, it is no surprise that practices such as early marriage were rendered violations of international human rights standards without a deserving explanation on the reasoning behind such a conclusion.

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<sup>223</sup> Tamale (n 22) 203.

<sup>224</sup> Dawit (n 100) 39.

<sup>225</sup> Dawit (n 100) 41.

<sup>226</sup> Dawit (n 100) 42.

<sup>227</sup> A Ahmed An-Na'im 'Introduction' in A Ahmed An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1992) 3-4.

### 4.1.3. Essentialising or instrumentalising gender equality

The AU human rights system presents gender equality as a principle or African value, while the AU generally has heralded gender equality as an outcome of eradicating GBV. However, so long as gender equality is interpreted within the dominant international human rights view, that is, legal-centric, then the term slips into the abstract. Further, gender equality hails largely from Eurocentric thinking that views equality as subjective, entailing normative judgements and mono-cultural.<sup>228</sup>

The colonial regimes and post-colonial regimes in Africa have applied this mono-cultural lens in the recognition of the diverse gender representations in the continent. Within this context, the gender dynamics in the continent are replete with stereotypes and rigidity.<sup>229</sup> While the colonial regimes used the distorted gender gaze to subjugate the indigenous Africans, the post-colonial regimes have crafted the distortions in the name of nation-building and institutionalising authoritarian cultures.<sup>230</sup>

The interpretation of GBV at the AU human rights level makes for a notable illustration on how gender equality is essentialised. First, gender equality only focuses on the sex identity (male versus female) and ignores the other aspects of identity pertinent to gender such as economic autonomy and religion.<sup>231</sup> Secondly, stressing on sex alone shifts the focus of gender equality to women's rights, which is often instrumentalised or quantified. Although there is value in promoting women's rights, the point here is that the systems that hinder gender equality are under-explored such as violent masculinities where both men and women collude in its perpetuation.<sup>232</sup>

Strict legal interpretations especially fracture the AU human rights system's jurisprudence on GBV. This would not be the case had there been recourse to locating laws in the gender dynamics of a given community (depending on the case). Here the cultural diversity in Africa offers many examples on how African laws and women specifically responded to GBV through principles of respect and accountability in the main, and protest or sanction in the extreme.<sup>233</sup>

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<sup>228</sup> Tamale (n 22) 210.

<sup>229</sup> Oyèwùmí (n 65) 28; Win (n 109) 61.

<sup>230</sup> D Lewis 'Representing African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 210.

<sup>231</sup> Tamale (n 22) 210.

<sup>232</sup> As above; Lewis (n 230) 213.

<sup>233</sup> I Amadiume *Re-inventing Africa: Matriarchy, religion and culture* (1997) 163-166.

## 4.2. Political internalisation of the Maputo Protocol

Applying the transnational process legal theory to the desired impact of the Maputo Protocol in Africa, Ayeni explained that the norms in the Maputo Protocol ‘cascade much more easily into the domestic system if political internalisation is followed by legal internalisation and then social internalisation.’<sup>234</sup> The reverse sequence is also possible albeit difficult.<sup>235</sup> Political internalisation refers to the political elites’ acceptance of the Maputo Protocol, legislative or judicial domestication of the Maputo Protocol is an example of legal internalisation, and social internalisation occurs when the Maputo Protocol obtains ‘public legitimacy, support and widespread adherence.’<sup>236</sup>

At the AU human rights level, there has been little jurisprudence on the Maputo Protocol generally and its articulation of GBV specifically. Political internalisation suggests that the ratification process is fairly new leaving sites for interpretation like the African Commission and African Court under-utilised. However, where the AU human rights system’s interpretive mandate has been triggered, it has chosen to remain mum on political questions in the state party. In a commentary on *APDH & IHRDA v Mali*, Brenda Kombo identifies the African Court’s *silence* on Mali’s argument that the Family Code adhered to Malian societal realities.<sup>237</sup> In her view, the silence was appropriate because the African Court manoeuvred around the endless debate on culture and rights in international human rights discourse.<sup>238</sup> At the same time, the silence is an invitation for further research by scholars and activists on how tensions in implementing the Maputo Protocol can be navigated using a context-specific purview.<sup>239</sup>

I disagree with Kombo’s delegation of the African Court’s interpretive mandate of the Maputo Protocol to scholars and activists. The African Court operates within the AU gender equality discourse and there is no limitation to referring to the long-term policies to guide the political internalisation of the Maputo Protocol. Similarly, there is no restriction on neither the African Court nor the African Commission from referring to the scholarship by African feminists, for example, to enrich their jurisprudence. Pointedly, the jurisprudence on GBV at this budding stage of the Maputo Protocol

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<sup>234</sup> Ayeni (n 41) 12.

<sup>235</sup> As above.

<sup>236</sup> Ayeni (n 41) 11.

<sup>237</sup> B Kombo ‘Silences that speak volumes: The significance of the African Court decision in APDF and IHRDA vs Mali for women’s rights in Africa’ (2019) 3 *African Human Rights Yearbook* 405-413.

<sup>238</sup> As above 413.

<sup>239</sup> Kombo (n 237) 413.

both at the AU human rights level and the states parties means that the jurisprudence serves as landmark decisions, whose impact can mark the parameters for understanding GBV in Africa's future.

This is exemplified further by recognising that GBV is widespread and increasingly adopting an 'endemic' character. Thus, despite the African Commission's decision on the infamous Black Wednesday protest in Egypt, there have been subsequent protests with alarming incidences of sexual violence such as the 25 January Revolution.<sup>240</sup>

These affirm the need for the AU human rights system to continuously engage with the political internalisation of the Maputo Protocol. Egypt's ratification of the Maputo Protocol will still have to contend with the silences of the state as the primary response to the sexual violation of females in public and private spheres in as far as the silences portend barriers to gender equality. Hind Zaki and Dalia Alhamid explain that state responses burden the ultimate long-standing demarcation between male and female roles in Egypt.<sup>241</sup> For men, they are burdened with the role of protector of women from other men while women are burdened with the task of accepting responsibility for the sexual violence meted out to them in public.<sup>242</sup> In my view, if the AU human rights system fails to address the political internalisation of GBV as articulated in the Maputo Protocol or AU long-term strategies, then they will be cementing these distorted gender roles that Egypt, and many other African states hold on to. Zaki and Alhamid express with precision, the effect of ignoring the distortions when responding to GBV in Egypt:<sup>243</sup>

[The responses] cemented the binary of the 'protective' man and the 'weak' woman who, despite her weakness (or maybe because of it), would be held responsible for assaults against her body. The assumption by the state of the traditional male role—the protector who does not protect but actually takes part in the abuse—turns the classical understanding of the public sphere as a place for all citizens, male and female, on its head, creating a purely masculine public space where women have no place regardless of the rights provided by the constitution or the law.

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<sup>240</sup> HA Zaki and DA Alhamid 'Women as fair game in the public sphere: A critical introduction for understanding sexual violence and methods of resistance' *Jadaliyya* (9 July 2014) available at <https://www.jadaliyya.com/Details/30930/Women-As-Fair-Game-in-the-Public-Sphere-A-Critical-Introduction-for-Understanding-Sexual-Violence-and-Methods-of-Resistance> (accessed 26 October 2021).

<sup>241</sup> As above.

<sup>242</sup> As above.

<sup>243</sup> As above.

### 4.3. Conclusion

The two challenges outlined above trace the contours of difference in interpreting GBV in the AU human rights system versus 21<sup>st</sup> century African feminisms. Notably, the challenges do not seek to place blame on the current interpretation of GBV, rather, this chapter sought to identify the areas where 21<sup>st</sup> century African feminisms can enrich the jurisprudence. The first area highlighted the effect of too much reliance on legal perspectives to understand GBV or gender equality. Besides, the AU human rights system cannot be faulted for adopting the legal-centric standpoint because this view outdates aspects of the AU human rights system such as the enactment of the Maputo Protocol. The legal-centric standpoint is deeply-rooted in the colonisation of Africa where the way of life of the indigenous Africans were destroyed. Yet still, the post-colonial regimes maintain the destruction of Africanness through, for instance, ignoring the cultural significance in creating gender identities in Africa. The second challenge proved that the AU human rights system's jurisprudence on GBV is not applied in a vacuum; it must contend with the political realities of African states whether or not they have ratified the relevant treaties. The next chapter will elaborate on how 21<sup>st</sup> century African feminisms can improve these setbacks.



## Chapter 5: Recommendations

### 5. Introduction

This chapter concludes the research by providing highlights of the findings in the previous chapters as well as proffering suggestions on mainstreaming 21<sup>st</sup> century feminisms in the jurisprudence on GBV in the AU human rights system. Ultimately, the chapter responds to the fourth research sub-question: How can the African Commission and the African Court mainstream 21st century African feminisms in their jurisprudence on GBV?

#### 5.1. Summary of findings

Chapter 1 set the groundwork for this research by outlining a situational and literal overview of GBV in Africa. GBV is a current concern owing to its heightened rate during the COVID-19 pandemic such that GBV is likened to a shadow pandemic. Before the pandemic, radical activism on GBV confronted the gendered aspects of GBV head on unlike the legal discourses on GBV, for instance at the AU human rights level. This claim was supported by the literature review, which demonstrated how GBV is articulated as a human rights concern in the Maputo Protocol, giving rise to a restricted understanding on GBV in Africa. With this, the main finding in chapter 1 asserted that the AU human rights system is ill-equipped to offer a gendered assessment of GBV.

Chapter 2 delved into a broad analysis on 21<sup>st</sup> century African feminisms, which this research has signalled as a conceptual pathway for interpreting GBV in the AU human rights system. Through the evolution of 21<sup>st</sup> century African feminisms from its 20<sup>th</sup> century African feminisms predecessors, chapter 2 demonstrated how 21<sup>st</sup> African feminisms construe the focal concepts in this research namely, gender and GBV. The main finding of chapter 2 was a gendered assessment or criteria for analysing the GBV jurisprudence in the AU human rights system. The criteria included: context-specificity, legal pluralism and a contention with patriarchy, colonialism and culture.

Chapter 3 first situated the AU human rights system's jurisprudence on GBV within the larger AU discourse on GBV. Both discourses culminated in characterising gender equality as the antithesis of GBV or gender equality as an outcome of eradicating GBV on the continent. Gender equality, therefore, necessitated a gendered interpretation of GBV. Consequently, the constructions of GBV in the African Commission and African Court were interrogated against the 21<sup>st</sup> century African

feminisms gendered criteria to illumine the compliance and shortcomings of such constructions. The main finding of chapter 3 was that the AU human rights system has grappled with gender dynamics in its jurisprudence on GBV although there is a conflation of sex with gender and a disregard for legal pluralism.

Chapter 4 identified two barriers that prevent the AU human rights system from applying the gendered criteria offered by 21<sup>st</sup> century African feminisms. These barriers were the ideological biases within the international human rights framework that view human rights as strictly legal phenomena, pit culture against human rights and essentialise gender equality. The second barrier was the level of political internalisation of the Maputo Protocol in the continent. This explains why the AU human rights system manoeuvres around the political controversies embedded in the Maputo Protocol such as minimum age of marriage or ratification of the Maputo Protocol. The barriers were not discussed to incriminate the AU human rights system rather, to shed light on the areas where 21<sup>st</sup> century African feminisms can improve the jurisprudence on GBV.

## **5.2. Mainstreaming 21<sup>st</sup> century African feminisms in the jurisprudence on GBV in the AU human rights system**

As chapter four showcases, there are prevailing ideologies that curtail the contributions of 21<sup>st</sup> century African feminisms within quasi-judicial bodies like the African Commission and the African Court. This section, which also serves as the recommendations of the research, points to situations when the African Commission or the African Court have triggered their interpretive mandates on a matter concerning GBV. There is also an assumption that the contentious issue on GBV has been found admissible by the African Commission or the African Court. Thus, there is an anticipation of a final communication or judgement.

### **5.2.1. Seizing crucial opportunities to refer to the Maputo Protocol**

There is a dearth of instances in the African Court or the African Commission where GBV as articulated in the Maputo Protocol has been interpreted robustly. Often the Banjul Charter, the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on the Rights and Welfare of the Child are the main laws informing the interpretation of a violation on GBV. Yet, the Maputo Protocol can be applied in various contexts owing to the diversity

of women in Africa that it protects such as women in armed conflict, girls and elderly women. Further, the Maputo Protocol has a broad definition of violence against women such that it can be invoked in several cases touching on landlessness, employment and secession. Thus, the first crucial opportunity the African Court and African Commission could seize is infusing the provisions of the Maputo Protocol in most of its cases because GBV is not limited to physical (threats of) violence.

The second crucial opportunity involves taking the time to elaborate on the provisions of the Maputo Protocol. Basic definitions such as ‘woman’ need to be clarified as the current meaning conflates sex with gender. Relatedly, the African Court and African Commission could appraise the Maputo Protocol briefly especially when a state has not ratified the Maputo Protocol and there is a finding that urges the state to ratify the Maputo Protocol. The appraisal serves as a show of the African Court or the African Commission’s stance in the political and rights objectives that the Maputo Protocol seeks to achieve. As stated before, the Maputo Protocol is still at a budding stage at the AU human rights level and therefore, there is an impetus to popularise it.

### **5.2.2. Applying the parameters of 21<sup>st</sup> century African feminisms**

Once the Maputo Protocol is under the microscope, then the concerns of 21<sup>st</sup> century African feminisms can be seamlessly roped into the jurisprudence. This is because there are traceable strains of 21<sup>st</sup> century African feminisms within the Maputo Protocol especially within the context of gendered violence. The African Commission and the African Court are not restricted from referring to the scholarly works by African feminists in this regard, however, as a foreseeable manner of mainstreaming, the parameters are a surer way. The parameters are not mutually exclusive, and it would be aspirational if each are taken into account in one communication or judgement.

#### ***Context-specificity***

This criterion demands that the geographical and political backgrounds where the incident of GBV occurred should inform the interpretation of GBV by the African Court and the African Commission. It is unclear why this is ignored considering that each communication or each judgement begins with an introduction of the disputing parties and how the dispute arose within a given geo-political climate. This criterion rings true even when the Maputo Protocol is advanced, therefore triggering a human

rights perspective on GBV. As Shivji argued, it is the situations that enable the violation of human rights to be perpetuated that should be interrogated.<sup>244</sup>

### ***Socio-cultural diversity***

This research has shown that negative forces of culture and GBV are directly interlinked. At the same time, the African Commission and the African Court should not adopt brash labelling of cultures as negative or against the international human rights standards guaranteed in the Maputo Protocol. Instead, the interpretation could expand the meaning of the right to live in a positive culture in the Maputo Protocol or the interpretation could elaborate on the contents of the specific culture that render it averse to women's rights, for instance.

### ***Legal pluralism***

GBV has not only been proscribed by the Maputo Protocol but other written and unwritten laws within the member states of the AU. It is within the ambit of living laws like traditions and religion where the African Commission and African Court have missed the opportunity to interrogate how these impact GBV. In addition, there should be an acknowledgement that the formal laws such as treaties and domestic legislations affect people differently; some are marginalised from the law's reach. Legal pluralism enables the African Court and the African Commission to expand the legal-centric lenses in order to interpret the gendered aspects of GBV.

### ***Patriarchy and coloniality***

This criterion brings to the fore the focal concept of gender. By contending with patriarchy and colonisation as well as neo-colonisation, the African Court and the African Commission will be unearthing how gender dynamics work in the given context. There were traces of these in the two landmark cases where the disputing parties submitted illustrations on patriarchal systems and the hangovers of colonial laws in need of reform. Patriarchy and coloniality insist on a historical understanding of the given context. This differs with the first criterion on context-specificity, which is more immediate.

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<sup>244</sup> Shivji (n 221) 71.

In all, the criteria should culminate in a nuanced interpretation of GBV. Secondly, the interpretation will be accountable to the specific concerns of the aggrieved person, particularly the person's experience with GBV. Thirdly, the interpretations will result in diverse and deep jurisprudence on GBV. Through the gendered assessment, the judges or commissioners will have different takes on GBV as the strictly legal approach has been extended. The difference could lead to unanimity or dissonance in the ultimate finding of a violation on GBV; but this is the stuff that makes for robust jurisprudence.

### 5.3. Conclusion

21<sup>st</sup> century African feminisms lay bare the co-occurrence of the realities of violence in society and gender. Although there is a bent for women's well-being in this regard, it is not lost on 21<sup>st</sup> century African feminisms that femininity and masculinity operate in a spectrum. As the research has shown, violent masculinities and the cult of femininity shape how GBV is perpetuated in the society. Notably, this research has elaborated on the various ways 21<sup>st</sup> century African feminisms can be applied to interpret GBV in a manner that incorporates the vastness of violence and the broad spectrum of gender. 21<sup>st</sup> century African feminisms celebrate difference within the gender dynamics. This is not yet the dominant standpoint in society with GBV as a clear illustration. Therefore, 21<sup>st</sup> century African feminisms implore transformative re-thinking and re-constructing of the gender dynamics in society.

This research leaned towards a more theoretical than practical method of decrying GBV. There was some appreciation of the anti-GBV activism on the continent through entities like the AFF, AU Youth Envoy and personalities like Muthoni Nyanjiru. However, the larger reality of combatting GBV is neither spoken about nor written about. Amina Mama typifies this reality as a hidden struggle, and this research draws to a close by saluting this silent resistance. In Mama's words:<sup>245</sup>

...It must be said that for every abused woman who makes the headlines by being killed or maimed, or for each of those who suffer in clubbed-down silence, there must be many thousands who receive local support and who engage in a hidden struggle for their survival and dignity—a continuous struggle that neither receives nor demands acknowledgement.

**Word count: 19,488 words**

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<sup>245</sup> Mama (n 92) 61.

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