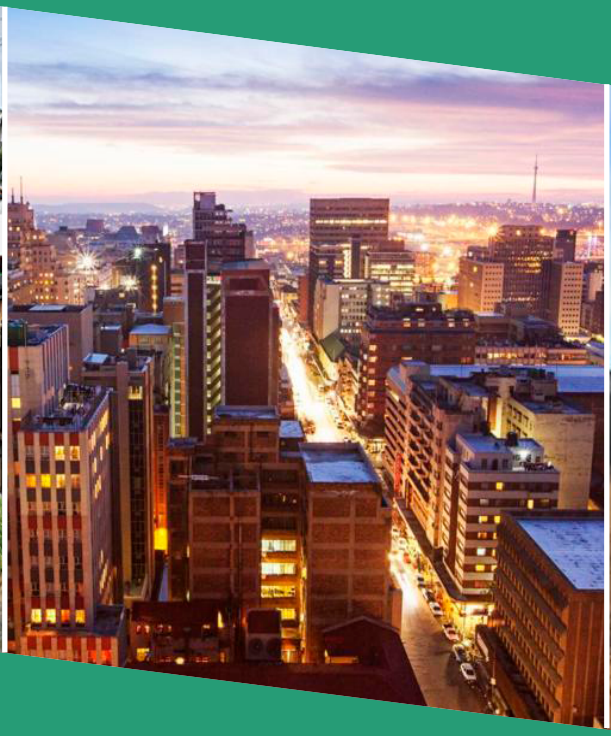

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ESR REVIEW

Economic & Social Rights Review in Africa

ENSURING **RIGHTS** MAKE REAL **CHANGE**

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Editorial

This is the third issue of ESR Review in 2019. It includes two feature articles and a case review that discuss various areas of economic and social cultural rights.

In the first feature, Agaba Daphine Kabagambe examines the Life Esidimeni debacle with a human rights lens. This comes at a time when we witness an ongoing struggle for the rights of people with psychosocial disabilities – it has to be kept in mind that the tragedy occurred despite the protective policy and legislative framework in place in South Africa.

In the second feature, Robert Doya Nanima explores the implications of the Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage (2017). The Joint General Comment describes legislative, institutional and other measures that should be taken by African countries to give effect to the prohibition of child marriage and to protect the rights of those at risk of or affected by child marriage.

Since time immemorial, women have been side-lined in issues to do with the right to matrimonial property upon dissolution of marriage. In a case review, Bright Sefah and Patrick O'phade Phiri dissect a recent decision by the Constitutional and Human Rights Division of the High Court of Kenya in the matter of Federation of Women Lawyers Kenya (FIDA) v Attorney-General (2018). The case was a missed opportunity to correct historical wrongs in the realisation of this right.

In the events section, Michelle du Toit discusses a strategic consultation on forced sterilisation in Africa that the Initiative for Strategic Litigation in Africa (ISLA) convened in August 2018. The objective of the consultation was to facilitate a conversation about empowering social movements with litigation strategies appropriate for the varying and complex contexts where rights violations occur.

We acknowledge and thank all the contributors to this issue. We trust that the readers will find it stimulating and useful in the advancement of socio-economic rights.

Gladys Mirugi-Mukundi
Co-Editor

FEATURE

Life Esidimeni: Applying a Human Rights Lens

Agaba Daphine Kabagambe

The Life Esidimeni incident has been the subject of a great deal of discussion in the media and elsewhere – and rightly so. Tragedies such as these need to get as much attention as possible to prevent us from becoming indifferent to the suffering of the poor and keep us focused in our different fields on seeking ways to alleviate preventable suffering in the health system.

Applying a human rights lens requires investigating deeply-held assumptions about why certain people end up suffering certain afflictions beyond the presenting issues (Yamin 2015). This calls for an understanding of the role that poverty, gender inequality, social and systemic exclusion, and political failure play in perpetuating human rights violations.

Seen in this regard, the Life Esidimeni case presents a series of human rights violations at the heart of which were vulnerable and poorly resourced mental health-care users. The article describes each of the main rights that were violated; due to the interrelated nature of rights, infringing on these rights also violated other underlying rights, such as the right to food and water.

The commentary in this article reflects on the arbitration hearings led by Justice Dikgang Moseneke and the judgment he delivered on 19 March 2018. It also draws on information from human rights organisations, such as Section 27, that have been advocating for the rights of mental health-care users.

Background to the Life Esidimeni tragedy

In October 2015, the MEC for Health in Gauteng announced the termination of the contract between the Department of Health and Life Esidimeni (Makgoba 2017). Around 2,000 people who were receiving specialised psychiatric treatment were to be moved out of Life Esidimeni to families, NGOs and psychiatric hospitals providing acute care as part of the Gauteng Health Marathon Project.

The MEC said the reasons for the closure of the facility were, among other things, to save money and implement a de-institutionalisation policy. Whilst this policy was commendable, it required careful implementation and time in which to develop and capacitate community care. Prior to the closure, civil society groups had made several efforts to prevent the Gauteng government from moving patients out of Life Esidimeni, but these were unsuccessful (Section 27 Fact Sheet 2017).

From March to June 2016, mental health-care users were discharged from life Esidimeni in large numbers, in the course of which they were subjected to untenable conditions in ill-equipped

and ill-prepared facilities, leading to the death of 144 patients and to thousands more being exposed to trauma and morbidity. By 2018, the whereabouts of about 44 of them was still unknown (Moseneke 2018).

Subsequently, the Minister of Health requested that the Health Ombud investigate the circumstances surrounding the death of the mentally ill patients. The Ombud wrote a detailed report uncovering a multitude of violations and recommending compensation for families that had lost loved ones and measures to ensure that the surviving patients did not suffer further trauma (Makgoba 2017). One of the recommendations was to establish an alternative dispute-resolution process to determine redress mechanisms and compensation.

This led to arbitration proceedings that included affected families and patients. The proceedings were concluded in February 2018 with a judgment from retired Justice Moseneke. In the judgment, the government was ordered to pay a substantial sum to claimants for the shock and psychological harm the patients experienced, for funeral expenses and for constitutional damages, with the payments to be made not later than three months after the publication of the award.

Applying a rights lens

The corpus of human rights is made up of binding international texts to which South Africa has assented, among them the International Covenant of Economic Social and Cultural Rights (ICESCR) and International Covenant on People with Disabilities (ICPD). It also consists in non-binding interpretive documents such as general comments, technical guidance and treaty-body recommendations, including, for example, the 1991 United Nations Principles for the Protection of Persons with Mental Illness. To domesticate international law, national legislation, such as the Constitution, has been adopted with provisions similar to those in the international documents.

Against this backdrop, a number of rights were violated in the Marathon Health Project, including the right to life, right to the highest attainable standard of mental and physical health, right to food and water, and the freedom from torture and cruel, inhuman and degrading treatment.

> **The lack of accountability and transparency was a significant factor in the Marathon Health Project**

All these rights are catered for in South Africa's Constitution and, more specifically, its bill of rights. The advancement of human rights and freedoms is one of the tenets of the Constitution. The Constitution is the supreme law and any law inconsistent with it is invalid. It binds all state organs and every official entrusted with public power. South Africa has also enacted laws and policies to cater for persons living with mental health conditions. These include the National Health Act, Mental Health Care Act, and National Mental Health Policy Framework and Strategic Plan.

Accountability is a key human rights principle. The lack of accountability and transparency was a significant factor in the Marathon Health Project. In playing their accountability role, states should respect people's rights by refraining from denying or limiting access to health care. By prematurely terminating the Life Esidimeni contract without providing a reasonable alternative, the state limited mental health-care users' rights. States are also required to protect people's rights by adopting legislation to ensure equal access to health care and prevent third parties from infringing on the rights to health and health care (Durojaye E and Agaba DK 2018).

All public officials who made decisions on the Marathon Health Project were bound to adhere to the Constitution as well as the laws and policies relevant to mental health-care users. By delegating power to NGOs, state organs empowered them with

> **Mental health-care users were treated as beneficiaries rather than active participants in decisions affecting their lives**

public power, which entailed that the NGOs were required to exercise their mandate lawfully and in a reasonable manner. Ultimately, the exposure of mental health-care users to under-resourced NGOS amounted to a failure by the state to play a preventative role – instead, the state facilitated the abuse of users' rights by third parties contracted by itself.

Duty-bearers should also be answerable to citizens by providing them with timely, accessible and accurate information and encouraging public participation in policy decisions. The Marathon Health Project treated mental health-care users and their families as beneficiaries rather than as active participants in decisions that affected their lives. They were not privy to information about when and where they would be moved; instead, families had to conduct lengthy searches for their loved ones, sometimes finding they had died. Moreover, patients and families were not involved in the decision in the first place to move them from Life Esidimeni, and attempts to contest the move were ignored or met with disdain.

Accountability also entails the efficient, economical, equitable and effective use of resources. The evidence revealed that care at some of the hospitals to which the users were moved cost three times as much as that at Life Esidimeni. While the NGOs, on the other hand, cost less, most of them lacked essential requirements for mental health-care users; at times, funds to the NGOs were paid late, or paid to ones that had closed down. This demonstrated the government's lack of adequate planning for the move.

Rights that were violated

1. The right to life

The right to life is at the basis of all human rights. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) declares every human being's inherent right to life and provides that no one shall be arbitrarily deprived of his or her life, as does article 11 of South Africa's Constitution.
In this regard, it has been highlighted already that 144 mental health-care users lost their lives. Both the Ombud's report and the arbitration hearings revealed that the deaths were not natural but were caused negligently and unlawfully. The government's defence – that it could not have foreseen that the move would lead to death and suffering – was refuted by reference to the fact that it had been cautioned repeatedly by NGOs and the families of patients that the project had the potential to cause harm and lead to loss of life, warnings the government did not heed.

Furthermore, the NGOs to which patients were moved were not equipped to provide for them. The NGOs were selected on mysterious grounds and all 27 of them operated without valid licences. Conditions at their premises were so bad that they were called 'death traps'. Patients were transferred, whether in departmental vehicles or vehicles owned by NGOs, without a written plan for the transportation. While in transit, some had their hands or feet, or both, tied up. Others suffered the trauma of being moved from place to place, which forced families in turn to go from place to place looking for them. Patients were often moved without their clinical records or personal belongings.

Mental health-care users also faced a series of challenges after they were moved to the NGOs. These included lack of appropriate caregivers to identify or provide appropriate medicine for them; food of poor quality and insufficient quantity; understaffing or inappropriate staffing; insufficient security; and inadequate blankets and clothes for the cold period. Some NGOS were overcrowded, with unhygienic and ill-unmaintained facilities (one had a leaking roof

and a door about to fall off its hinges). Some patients reported abuse and mistreatment. Multiple deaths – more than 95 per cent – ensued at these ill-equipped and ill-prepared NGOs.

2. The right to dignity

The preamble of the Universal Declaration of Human Rights recognises 'the inherent dignity and the equal and inalienable rights of all members of the human family', and declares that 'contempt and disregard for human rights have resulted in barbarous acts that have outraged the conscience of mankind'.

Similarly, the South African Constitution enshrines human dignity and the achievement of equality among its fundamental values. Article 10 of the Constitution declares that everyone has inherent dignity and the right to have his or her dignity respected and protected. The right to dignity is especially important in South Africa, as it is vital for a meaningful departure from the oppression of colonialism and apartheid.

However, the Marathon Health Project trampled on the mental health-care users' dignity by failing to include them and their families in decision-making pertaining to their movement to the NGOs or private hospitals; by transporting them in inhuman conditions; and by exposing them to ill-functioning facilities, leading to the undignified death of some and the untold suffering of others.

The evidence showed that those who searched for their loved ones were confronted with emaciated, dehydrated and ailing patients in dingy, unkempt NGOs – a clear demonstration of undignified treatment. Other families reported that they conducted long searches only to find that loved ones had died. One claimant said the body of a loved one was found decomposing in a hospital mortuary.

3. Freedom from cruel, inhuman and degrading treatment

Freedom from cruel, inhuman and degrading treatment is closely related to the right to dignity.

The evidence showed that those who searched for their loved ones were confronted with emaciated, dehydrated and ailing patients in dingy, unkempt NGOs

Such treatment consists of systematic acts that are not only unkind but hateful and directed at causing bodily and psychological hurt and harassment. Evidence by various expert witnesses during the arbitration proceedings demonstrated that the treatment of the mental health-care users amounted to torture.

One witness said that the way the users were treated was reminiscent of the apartheid regime:

> The entire project is a sad reminder of Steve Biko … who died in detention. On the night before he died he was placed on cell mats on the floor of the Land Rover, semi-comatose, naked and handcuffed, and driven to Pretoria Central Prison. No medical records were sent with him. Neither was he accompanied by any medical personnel during the medical journey (Moseneke 2018).

Another expert observed that

> [i]f you take a group that did not know the move was coming, weren't prepared for it and are moved on the back of trucks, tied with sheets without identity documents, without wheelchairs, that amounts to torture. And then they are moved into filthy dangerous environments as if they are not human and you deny them basic food and water you overcrowd them … All those are features of actively torturing people.

> **The right to health and health care is also related to other rights violated in this case, such as the rights to food, life, non-discrimination and human dignity**

4. The right to health

Ultimately, all the actions above violated the right to health of the mental health-care users. The realisation of the right to health and health care is also closely related to that of the other rights violated in this case, such as the rights to food, life, non-discrimination and human dignity. Article 12 of the ICESCR recognises everyone's right to the highest attainable standard of mental and physical health. Article 16 of the African Charter has the same provision, emphasising moreover that state parties must take the necessary measures to protect the health of their people and ensure they receive medical attention when they are sick.

Section 27 of the South African Constitution recognises everyone's right to health-care services. The state must take reasonable, legislative and other measures within its available resources to progressively realise this right. By failing to take rational and reasonable steps to protect the right to health and health care of the mental health-care users, the state violated the right to health. Furthermore, by transferring them to NGOs that were not in position to ensure adequate food and water, the state violated a series of determinants vital for the realisation of the right to health and health care.

Conclusion

The catastrophe that was Life Esidimeni is a reminder that even though it functions under an elaborate and aspirational constitution, the South African health system still faces a range of challenges that are capable of leading to violations of human rights. The blatant disregard that public health officials showed for mental health-care users despite attempts by various parties to warn them of the irrationality of their actions is symptomatic of the situation on ground, especially where it concerns users who are poor and vulnerable.

A responsive public health system should be able to foresee and prevent the tragedy that happened in the Marathon Health Project. It is hoped that lessons have been learnt and will be put to use in continuous improvement of the health system and in protection of the rights of vulnerable people in their attempts to access health-care services.

Dr Agaba Daphine Kabagambe is a Post-Doctoral Researcher at Thabo Mbeki African Leadership Institute (TMALI)

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FEATURE

The ACHPR and ACERWC on Ending Child Marriage: Revisiting the Prohibition as a Legislative Measure

Robert Doya Nanima

The Joint General Comment of the African Commission on Human and People's Rights (ACHPR) and African Committee on the Rights and Welfare of Children (ACERWC) on Ending Child Marriages (hereafter Joint General Comment) (ACERWC 2017) raises both a topical matter – ending child marriages in Africa – as well as a technical legal issue. As has been widely observed, at the core of every General Comment is the question of whether it is an authoritative interpretation of treaty norms, or merely an unsystematic statement without legal weight (Mechlem 2009; Keller and Ulfstein 2012).

Answering the question in full is a daunting task and beyond the scope of this article: further insights in this regard can be gleaned from scholarly work on the International Covenant of Civil and Political Rights (Harland 2000; Blake 2008). That being noted, it is prudent to deal with each General Comment in the light of the perspectives of the drafters and the goodwill of the state parties bound by its guidance.

As such, the more workable question is whether the Joint General Comment offers an authoritative interpretation of the relevant treaty provisions that helps in developing jurisprudence towards the desired prohibition of child marriages in Africa. This article examines the context surrounding the prohibition on child marriage since its adoption in 2017, in addition to which it considers the prohibition's future prospects as a legislative measure.

The article begins with an explanation of what General Comments are, after which it evaluates the Joint General Comment and the obligations it creates and goes on to propose ways in which it could be made more effective.

What are General Comments?

General Comments are texts or materials prepared by international treaty bodies to address pertinent issues and guide state parties on how to meet their obligations under the treaties more effectively than they have been (UNHCHR 2005). Alston (2001: 775) describes a General Comment as

> a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the "jurisprudence" emerging from its work.

Over time, this practice has also been adopted by non-UN human rights bodies. For instance, the ACPHR (African Commission) spearheaded the adoption of General Comment 3 of 2014 on the right to life as recognised in article 4 of the African Charter of Human and Peoples' Rights (African Commission 2014).

As noted, every General Comment raises the basic question: Is it an authoritative interpretation of treaty norms, or an unsystematic statement that lacks adequate grounding with no attachment of legal weight (Alston 2001; Keller and Ulfstein 2012). While various answers have been given, dealing with the question here would be an insurmountable task. For the purposes of this article, the question is if the Joint General comment provides an authoritative interpretation that is instructive in directing the development of jurisprudence towards the desired prohibition of child marriages in Africa.

Background to the Joint General Comment

Prior to the adoption in May 2014 of the Joint General Comment, the African Union (AU) launched a campaign to end child marriage by raising awareness of its harmful impact. In the same year, a Goodwill Ambassador for Ending Child Marriage was appointed, with the African Committee appointing an AU Special Rapporteur on Child Marriage. A subsequent meeting of AU heads of state and government formally adopted the position on the AU campaign to end child marriage (ACERWC 2017).

Members of the African Commission and ACERWC, in consultation with experts, academics, states and organisations working to end child marriage in Africa, reviewed the drafts of the General Comment at meetings held in Ethiopia in April 2015 and in Kenya in October 2015 (ACERWC 2017). Following the presentation of the first drafts at the 59th Ordinary Session of the ACEWRC and the 27th Ordinary Session of the African Commission, the comments were consolidated and presented as a revised draft of the General Comment at a joint session of the African Committee and African Commission in November 2016 (ACERWC, 2017). The final draft was then adopted as Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Right and Welfare of the Child on Ending Child Marriage (2017).

It is worth noting that a recent decision by the African Court on Human and People's Rights (African Court) deals with some of the contextual problems that the General Comment addresses. In ***Association Pour le Progrès et la Defense Des Droits Des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali*** (2016) (the APDF case), the African Court evaluates the human rights implications of various sections of Mali's Family Code Law.

These sections hinge on the Family Code's minimum age of marriage, right to consent to marriage, right to inheritance and the state's obligation to eliminate traditional practices (para 6). The findings of this case are instrumental in the growing jurisprudence of the African human rights system, and, as such, will be brought to bear in the evaluation of the General Comment.

Contextualising the prohibition on child marriage

The Joint General Comment is divided into five thematic areas: its objective and scope; its underlying principles of interpretation; the normative framework; state obligations; and dissemination and monitoring. This section of the article evaluates its normative content and the nature of its obligations in the context of the prohibition as a legislative measure

Normative content of the Joint General Comment

Unlike other General Comments, which are based on a single article in a treaty, this one draws on provisions from various treaties. To this end, the first batch of articles to be evaluated are from the ACRWC. The Joint General Comment is informed by article 21(1) of the ACRWC, which requires state parties to take all appropriate measures to eliminate harmful social and

cultural practices affecting the welfare, dignity and normal growth of children.

Furthermore, article 21(2) prohibits the betrothal and of girls and boys, and requires that effective action be taken to ensure the effectiveness of the prohibition. First, it requires that the minimum age of marriage be 18 years and that it be compulsory for all marriages to be registered. Another normative provision that reiterates the need for the prohibition is found in article 1(3) of the ACRWC, which requires state parties to discourage any custom, cultural or religious practice that is inconsistent with the rights, duties and obligations in the Charter to the extent of the inconsistency.

One may argue that the prohibition in article 21(2) that precludes all exceptions to the age of 18 years as the minimum age of betrothal and marriage, fails to protect a child whose age is not ascertained in that it does not stipulate the bureaucratic procedures that state parties should follow to prove that an affected person is below 18 years. There is no normative provision in the Joint General Comment that protects an individual (who is about to be a victim of a child marriage) where his or her age has not been ascertained. This potentially dangerous predicament is resolved in paragraph 26, where there is an obligation on state parties to presume that the person is under the age of 18 (ACERWC 2017).

The position is reiterated by the African Court in the APDF case where it requires that states should not condone any discrimination against the girl child through the use of an age that is lower than 18 for marriage (APDF, paras 75-78).

The second batch of normative provisions are from the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter the Maputo Protocol). The major provisions include articles 6, 6(a) and (b), and 1(b). On the basis of article 6(a) and (b), the Joint General Comment reiterates the requirement that state parties have to ensure that legislative measures are in place to guarantee that no marriage takes place without the free and full consent of both parties, with the age of marriage for women having to be 18 years. Article 6 of the Maputo Protocol requires that state parties ensure that men and women enjoy equal rights and are regarded as equal partners in marriage, while article 1(b) enjoins state parties to combat all forms discrimination against women.

These provisions are instrumental in ensuring that the rights of girls are protected from the practice of child marriage. However, they portray the girl child as the main victim of child marriage, a position exacerbated by some of the definitions. For instance, the Joint General Comment adopts the definition of harmful practices from the Maputo Protocol as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity' (article 1(e)).

The jurisprudence of the African Court indicates that where a state maintains legislation that does not protect children from harmful practices, it maintains discriminatory practices which undermine the rights of women and children and that are tantamount to a violation of its international commitments (APDF, para 124).

This provision does not envision any harmful practices to the boy child in the context of child marriages, yet a study by UNICEF (2019) finds that Africa has the highest number of child grooms in the world. According to this study of 82 countries, the Central African Republic had the highest rate globally, at 22 per cent, followed by Nicaragua at 19 per cent; it also found that some 115 million boys and men around the world were married as children, with about 20 per cent of them married before age 15 (UNICEF 2019). Such studies clearly indicate that boys are as much affected by child marriage as girls.

Another notable feature of the Joint General Comment is its lack of reference to any provision of the ACHPR in either its principles of interpretation or its normative provisions (ACERWC 2017). This is not a limitation on the ACPHR's relevance, however.

First, a reading of the Joint General Comment indicates that the mandates of the African Commission and ACERWC informed its adoption. Secondly, although the mandates of these two organs are to protect and promote rights, the African Commission's generalised approach complements the child-focused one of the ACRWC. Thirdly, the African Commission engages its article 17(2) to provide for the retention of the girl child in school to prevent child marriage and mitigate its effects.

Fourth, both the African Commission and the ACERWC

are mandated to use instructive jurisprudence that develops their mandate. The APDF case is instructive in this regard as it lays down the normative provisions from the ACHPR, the ACRWC, the Maputo Protocol and the CEDAW Committee with regard to the minimum age of marriage, the right to consent to marriage, and the state's obligation to eliminate harmful traditional practices (APDF, 2016, paras 59-131).

Fifth, with regard to dissemination, monitoring and reporting on compliance with recommendations in the Joint General Comment, the African Commission, along with the Maputo Protocol and the ACRWC, requires states parties to submit periodic reports on the implementation of the obligations to end child marriages.

It should also be recalled that while the ACRWC provides for frameworks for the promotion and protection of the rights of a child (such as the best interests principle), it does not provide an extensive list of rights of the child. The ACHPR, on the other hand, provides for the rights of a person (such as the rights to dignity, health, education and life).

Finally, from an interpretative perspective, the two bodies have recourse to draw inspiration from international law on human and peoples' rights with regard to the provisions of various African and international instruments on human rights. This provides for the organic interpretation of the General Comment in the context of various developments stemming from organs such as the African Court. This is provided for in article 60 of the ACHPR and article 46 of the ACRWC. As such, the lack of direct reference to the African Charter with regard to underlying principles is not a limitation to its relevance under the Joint General Comment.l.

An issue of equityNature of the obligations

The Joint General Comment classifies obligations as legislative, institutional and other measures. As for the legislative measures, they deal with three main issues: the prohibition on child marriages, the question of consent, and the need for constitutional reforms (ACERWC 2017). With regard to the prohibition, the Joint General Comment reiterates the prohibition, urging state parties to adopt legislative measures that take precedence over all customary, religious, traditional and subnational laws. Furthermore, it requires that the dissemination of these laws involve various stakeholders, such as teachers, health workers, immigration officers, civil society and the general public.

While the obligation to prohibit child marriages is an important step forward, the scope of the prohibition is such that it gives limited attention to the boy child while tending to portray the girl child as the only child burdened with harmful practices. In addition, the General Comment falls short of offering extensive guidance on the roles of national human rights institutions (NHRIs), regional economic communities (RECs), the media, and the private sector. These stakeholders play a key role in the effectiveness of a General Comment. For instance, NHRIs have a role in ensuring accountability by state parties, while the media have to ensure that the child's development is not impaired by their reporting.

How can the General Comment be used effectively?

The Joint General Comment would be more effective if it contained stronger recognition of the different stakeholders and the role they play. Stakeholders such as NHRIs, RECs, the media and the private sector need to be heavily engaged. NHRIs should have the mandate to attend sessions and give shadow reports as a means of ensuring accountability. The media have to be encouraged to embrace professional and ethical standards to ensure the all-inclusive welfare of children affected by child marriage.

The African Commission and ACERWC need to strengthen the Joint General Comment's ability to embrace the emerging challenges of child grooms. This calls for revisiting some of the phrasing and definitions that characterise the prohibition as a preserve of the girl child so as to take account of

the fact that child marriage is a problem that effects boys as well as girls. State parties' stakeholders in the justice and law and order sectors should work together to promote accountability and engage in constructive dialogue to bring child marriage to an end.

Conclusion

This article set out to establish whether the prohibition and legislative measures in the Joint General Comment offer an authoritative interpretation of the relevant treaty provisions on child marriages. It was established that the Joint General Comment does not offer detailed guidance to key stakeholders about their role in dealing with the prohibition. Secondly, the prohibition focuses on the girl child to the exclusion of the boy child. In the light of emerging research on child grooms, there is a need to develop jurisprudence that deals equally with girls and boys. The African Committee has made it its practice to conduct country studies – it is proposed that similar studies be commissioned on the prohibition of child marriages and the situation among state parties. Decisions by other African Union organs such as the African Court highlight issues that the Joint General Comment should engage with to ensure non-discrimination against children in respect of their protection against child marriage.

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Universal Declaration of Human Rights

CASE REVIEW

Women's Right to Matrimonial Property Is Still in Murky Waters: A Review of Federation of Women Lawyers v the Attorney-General

Patrick O'phade Phiri & Bright Sefah

Since time immemorial, women have been marginalised in issues of the right to matrimonial property upon dissolution of marriage. The recent decision by the Constitutional and Human Rights Division of the High Court of Kenya in the matter of Federation of Women Lawyers Kenya (FIDA) v the Hon. Attorney-General was a missed opportunity to correct historical wrongs in the realisation of women's right to property.

In its decision, the Court held that section 7 of the Matrimonial Property Act (MPA) of 2013 – which bases the criteria for distributing matrimonial property upon dissolution of marriage on contributions by the parties in the acquisition of the property – is constitutional and does not impinge on women's right to equality and right to property. In a nutshell, the Court is of the view that the Act secures women's right to property and equality by including both monetary and non-monetary contributions in the equation for ascertaining the distribution of property.

This article contends, however, that the Court's decision failed to protect women's right to matrimonial property by overlooking the unequal power relations between men and women in general and in marriage in particular. The woman's financial contribution to the property acquired during the marriage is, indeed, restricted by cultural factors and the hierarchical relationship between men and women, while her non-financial contribution is undervalued by the same system.

Overview of the case

The MPA of 2013 became law in Kenya on 16 January 2014, repealing the Married Women's Property Act of 1882. The law was enacted to establish a new regime regulating matrimonial property and codifying the principles governing the distribution of matrimonial property. The law gave effect to the principle of equality before, during and after the subsistence of marriage, as enshrined under article 45(3) of the Kenyan Constitution of 2010.

However, within two years of its application, a petition was brought before the Constitutional Division of the High Court of Kenya challenging the Act's constitutionality and its adherence to international human rights. The Court, upon hearing the case, delivered its decision on 14 May 2018 in favour of the defendant, holding that section 7 of the Act does not

violate rights of women to property and equality, as had been argued by the petitioner

The Court summarised the issues before it into one question: Is section 7 of the Act unconstitutional? Within this question is the issue of whether the section infringes women's right to property and equality by requiring proof of contribution upon distribution of matrimonial property.

Background to the case

The petitioners, the Federation of Women Lawyers (FIDA-K), a nongovernmental, non-profit and non-partisan organisation, brought a petition against the Attorney-General in its own interest and on behalf of the women of Kenya. The petitioners alleged that section 7 of the MPA violates or threatens the fundamental rights and freedoms of women, including their rights to property, equality and non-discrimination, and is thus unconstitutional. The Initiative for Strategic Litigation in Africa (ISLA), a pan-African and feminist-led initiative, joined FIDA-K as an ***amicus curiae***.

Prior to the passing of the MPA, the distribution of matrimonial property in Kenya was regulated by principles enunciated under the common law as a result of the Married Women's Property Act of 1882, a statute of general application in England that was applicable in Kenya pursuant to section 3 of the Judicature Act (cap 8 of Laws of Kenya).

In brief, section 17 of the Married Women's Property Act gave wide discretion to the judge when faced with the distribution of matrimonial property. Subsequent changes to the Act, made by virtue of amendment under section 37 of the Matrimonial Property and Proceedings Act of 1970, resulted in the recognition by the courts of substantial monetary or non-monetary contributions made by either spouse.

Developments under the common law led to the courts applying section 17 of the Married Women's Property Act in a such a way that the non-financial contribution by women, including domestic work, constituted a contribution warranting a share in the matrimonial property (Oyuga and Ikinu 2017). The position was precarious, though, as there was no uniformity in the proportion of value attached to such contribution (Owino 2017).

> **The Court of Appeal … rejected the existence of a general principle of sharing property in equal shares upon dissolution of marriage**

The adoption of the 2010 Constitution brought about further developments in the jurisprudence on the distribution of matrimonial property. The Constitution enshrined the right to property (section 46) as well as guaranteeing women equal rights during and at the dissolution of the marriage (section 45(3)). Buoyed by the new constitutional framework, the courts progressively enforced distribution of matrimonial property on a 50-50 basis, and there was a presumption that the domestic duties of a wife amounted to a substantial contribution to the acquisition of property (Oyuga and Ikinu 2017).

The Court of Appeal in effect halted this progress in ***Agnes Nanjala William v Jacob Petrus Nicolas Vander*** (Civil Appeal No. 127 of 2011) when it rejected the existence of a general principle of sharing property in equal shares upon dissolution of marriage; it held, furthermore, that the courts can only consider non-financial contribution to acquisition of property upon the legislature passing a law to that effect. It was to this end that the MPA was adopted.

Section 7 of the MPA provides that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and is divided between the spouses if they divorce or their marriage is otherwise dissolved. Section 2 of the MPA, however, defines contribution towards acquisition of property as both monetary and non-monetary in nature. After the law was put to use, and upon receiving complaints from women

that they were being disadvantaged in the distribution of matrimonial property under the new regime, the FIDA-K brought the present application.

Arguments by the parties

The petitioner argued that the effect of section 7 of the MPA is to deprive women of enjoyment of property rights. It was the petitioner's view that basing the distribution of matrimonial property on contributions disadvantages women because their indirect contributions are undervalued. In support of the petitioner's arguments, the ***amicus curiae*** submitted that despite the provision's appearance of neutrality, its application adversely affects women's right to matrimonial property.

The respondent's main counterargument was that there is a general presumption of the constitutional validity of legislation and that the onus is on the person challenging legislation to rebut the presumption. The respondent argued that the petitioner failed to do so, among other things by failing to demonstrate how the provision in the MPA contravenes the right to equality.

The Court's key findings

In dismissing the petitioner's action, the Court held that section 7 of the MPA does not infringe on the right of women to hold property. It opined that the constitutional and legislative framework guarantees men and women equal opportunities in general and, in particular, equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

The Court regarded marriage as a partnership of equals, with both parties bearing equal responsibility to acquire property and develop the family. Thus, the Court believed it only fair that, at the dissolution of the marriage, each party should receive property in proportion to its contribution to the acquisition of it. The Court was of the view that holding that equality demands a 50-50 share of matrimonial property at divorce would be tantamount to creating a safe haven for spouses who do not pull their weight during the marriage, or to providing an avenue for those seeking easy riches through marriage.

Lastly, the Court held that the section does not discriminate against women because it does not make a distinction between men and women: since the provision is gender-neutral, there is no distinction to give rise to discrimination.

Was women's right to property protected?

The petition presented the Court with an opportunity to entrench the principles of gender equality and non-discrimination insofar as the distribution of matrimonial of matrimonial property is concerned. Arguably, however, it would seem that the Court missed the opportunity to do so and, in the end, entrenched the infringement of women's right to matrimonial property.

First, the decision fails to conceptualise the principle of equality and non-discrimination properly. One is led to the conclusion that the Court considered only formal equality and direct discrimination, rather than substantive equality, transformative equality and indirect discrimination.

For instance, it found that section 7 of the MPA promotes the constitutional principle of equality in that it treats men and women as equal partners during the subsistence of marriage as well as at divorce by allowing them to contribute to the acquisition and ownership of property. The Court erred by not considering that indirect discrimination may arise in the application of an otherwise seemingly neutral provision or practice.

Furthermore, substantive and transformative equality calls for measures beyond the legal provision of equality, including the removal of social constraints and barriers to enjoyment of rights. To this end, the Court failed to consider gendered structures and systematic stereotypes that may affect the actual contribution women can make to the acquisition of matrimonial property.

Research shows that there are disparities in Kenya

between men and women's access to economic wherewithal such as employment and credit (Nature Conservancy Central Science 2013). There is also a gender imbalance in decision-making within the family and in society at large. Women are constrained, too, by the competing demands of the household and the labour market, since they are responsible for most of the household work. These and other factors disadvantage them in the contribution they make to the acquisition of property.

The recognition of non-monetary contribution, though a step in the right direction, cannot on its own alleviate all these social constraints. As the petitioner argued, because the non-monetary contribution is undervalued, what typically happens is that the person who made the monetary contributions gets the major percentage of the property. Unfortunately, in the light of gender inequality in Kenya, in most instances the person making the non-monetary contribution will be a woman.

Secondly, and relatedly, the Court failed to properly elucidate the position and application of the right to equality and non-discrimination as provided for under international human rights law. Among other international instruments, the petitioner relied on the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Kenya ratified in October 2010 and March 1984, respectively. The two instruments call for the elimination of all forms of discrimination against women and for laws and legal constructs to be subjected to an in-depth gender analysis.

At their core, these instruments entail the removal of gendered structures and systemic stereotypes that impinge on women's enjoyment of their rights.

Article 16 of CEDAW calls on state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, to ensure that women enjoy on a basis of equality with men the same rights and responsibilities during marriage and at its dissolution. Furthermore, states are called upon to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

The Committee on CEDAW (the Committee) in its

These instruments entail the removal of gendered structures and stereotypes that impinge on women's rights

General Recommendation on article 16 (hereafter General Recommendation) recognises that property distribution and post-distribution often favour men regardless of whether the laws appear neutral. It identifies gendered family roles and insufficient recognition of non-financial contribution as among the cause of this unfair state of affairs (para 43).

In its interpretation of the obligations imposed by article 16, the Committee adopts an expansive approach to the distribution of matrimonial property to ensure substantive equality. For instance, it says that other factors that should be considered in the distribution of matrimonial property, including the 'recognition of use rights in property related to livelihood or compensation to provide for replacement of property-related livelihood; and adequate housing to replace the use of the family home' (para 47 CEDAW General Recommendation on article 16). When measured against this standard, the Kenyan provision is found wanting for restricting the distribution of matrimonial property to contribution only.

Furthermore, the CEDAW Committee's definition of non-financial contribution is widened to include household and family care, lost economic opportunity, and tangible or intangible contribution to a spouse's career development, economic activity and human capital (para 47). By contrast, the definition under section 2 of the MPA includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work.

The MPA's allowance of non-financial contribution is not enough to offer real protection. Although it takes into account the work performed by a spouse, it does

not recognise the intangible influence one spouse can have on the professional or economic development of the other. It also fails to make provision for sacrifices that either of the parties make for the betterment of the marriage. For instance, a woman who is well educated might agree to be a housewife in order to take care of the children and thereby allow the husband to work or conduct business. Taking care of children is indeed recognised as a contribution warranting a share of the property, but the economic loss the woman suffers as a result of sacrificing her own professional career may not suffice as a contribution under the MPA.

The Maputo Protocol, on the other hand, specifically obliges states to ensure that men and women have an equitable share of the joint property deriving from the marriage – its article 7 places an obligation on states to enact appropriate legislation to ensure that women enjoy the same rights as men during separation, divorce and annulment. Equity is concerned with fairness. Distribution of property based on contribution may in some cases not be equitable because of the disadvantaged position of women.

It has to be mentioned that the Court did remark that the essence of the section 7 of the MPA is that the Courts are to evaluate the interests of the parties and the property to reach a just and equitable distribution of the property (para 62). The problem, however, is that this evaluation will be constrained by the ambit of the section – by its narrow provision of factors to be considered when distributing property, and by its narrow definition of non-financial contribution.

For substantive equality to be achieved and guarantee the enjoyment of the right to matrimonial property for women, the Court needs to consider all the pertinent factors, including those identified by the CEDAW Committee, to ensure fairness. The MPA is therefore in conflict with the Maputo Protocol in that it recognises contribution as the only factor in the distribution of matrimonial property.

Conclusion

Both CEDAW and the Maputo Protocol recognise the gender disparities between men and women in the enjoyment of the right to property. This is evident from the emphasis their provisions on the distribution of matrimonial property place on substantive equality and equity. Taking contribution as the sole factor in the distribution of matrimonial property can have the unfair result of disadvantaging women; by contrast, considerations such as health, housing needs and the anticipated post-dissolution income of the spouses may demand a different share than the computed share contributions to acquisition of property.

The MPA therefore fails to adequately protect women's right to property on an equal basis with men – and the Court failed to remedy this.

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EVENT

ISLA's Strategy Consultation on Forced Sterilisation in Africa

Michelle du Toit

In August 2018, the Initiative for Strategic Litigation in Africa (ISLA) hosted a consultative strategy meeting on forced sterilisation in Africa. The meeting focused on cases concerning forced sterilisation and litigation strategies pertaining to them.

Forced sterilisation is an intrusion upon a woman's bodily autonomy, as it deprives her of many rights including the right to make decisions regarding medical intervention. It is a violation of human rights and medical ethics, and is considered an act of torture and a form of cruel, inhuman and degrading treatment. Forcibly ending a woman's reproductive capacity has far-reaching consequences physically, emotionally, socially and culturally.

The forced or coerced sterilisation of women is a global phenomenon, particularly for already marginalised groups of women such as women living with HIV, indigenous women, gender-non-conforming women, and women living with disabilities. Against this backdrop, the meeting considered practical, substantive and procedural issues relating to litigation on forced sterilisation.

The Kenyan cases

The Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), together with the African Gender and Media Initiative Trust (GEM), currently has two petitions before the Constitutional and Human Rights Division of the High Court of Kenya – Petition 605 and 606 of 2014. The petitions bring forth cases of five women who were forcibly sterilised by tubal ligation. The sterilisations occurred under the following circumstances:

- threatening to withhold food portions and baby formula milk from the women;
- inducement through promising to cover the medical expenses;
- through the lack of provision of the necessary information for the women to be able to make informed decisions; and
- through the lack of providing choices on family planning methods.

In Petition 606, the petitioner is an HIV-positive woman who was forcibly sterilised. She was not informed of the procedure but for receiving two vouchers labelled 'CS' and 'TL' prior to giving birth via caesarean section. It was only years later, when trying to conceive with her new husband, that she was informed she had had tubal ligation surgery. Petition 606 captures the nature of forced sterilisation:

> Coerced sterilization occurs when financial or other incentives, misinformation or intimidation tactics are used to compel an individual to undergo the procedure while forced sterilization occurs when a person is sterilised without her knowledge or is not given an opportunity to provide informed consent (para 22).

The first respondent in Petition 606, Marura Maternity and Nursing home, aver in their responding affidavit

The first petitioner ... was informed that if she did not undergo tubal ligation, she would not qualify for food portions and formula. Upon seeking formula after giving birth, she had to provide proof that she had undergone tubal ligation

that they are being wrongly sued.

Petition 605 concerns the forced sterilisation of four women, all HIV-positive. The first petitioner, SWK, was given a consent form to sign before going into theatre for a caesarean and was informed that if she did not undergo tubal ligation, she would not qualify for food portions and formula. Upon seeking formula after giving birth, she had to provide proof that she had undergone tubal ligation before she could receive formula.

Similarly, the second petitioner, PAK, was told she would not get further provision of formula for her twin boys if she did not provide evidence that she had undergone tubal ligation. In undergoing this procedure to ensure access for formula for her sons, she was given a consent form to sign. She cannot read and the contents were never explained to her.

The third petitioner, GWK, was given a form to sign before going into theatre after 48 hours of labour. Only afterwards was it explained to her that they had performed tubal ligation, and she too had to provide proof of this to receive food and formula assistance.

The fourth petitioner, AMM, was denied formula unless she could provide proof of tubal ligation. She underwent this procedure, without its being explained to her, to obtain access to formula. She too was given a form to sign, the contents of which were never explained to her even though she cannot read.

Petition 605 summarises the crux of the case:

> The unlawful and involuntary sterilization of the 1st – 4th petitioners was unreasonable, unjustifiable and unconstitutional because it was not done in accordance with the law and ethics, was not necessary in the circumstances, was not legitimate and necessary and was not the reasonably available alternative of family planning (para 42).

An affidavit in support of the first respondent in Petition 605 is by a woman who willingly underwent tubal ligation and speaks to the counselling received and procedures followed by the first respondent. Another supporting affidavit, by a nutrition assistant, holds that in providing food assistance it did not matter whether women had documentation proving tubal ligation. She alleges that food support could not be withdrawn, regardless of a woman's lack of family planning practices.

The petitioner's cases argue that the forced sterilisation violated the following rights of the victims:

- the right to life (article 26(1) of the Kenyan Constitution);
- the right to equality and freedom from non-discrimination (article 27(1)-(8) of the Constitution);
- the right to human dignity (article 28 of the Constitution);
- freedom and security of the person (article 29(d) and (f) of the Constitution);
- freedom of expression and freedom to seek and receive information and ideas (article 33(1) of the Constitution);
- the right to privacy (article 31 of the Constitution);
- the right of access to information (article 35(1)(b) of the Constitution);
- the right to health (article 43(1)(a) of the Constitution); and
- the rights of consumers to be given services of reasonable quality and the information necessary for them to gain full benefit of the services and

protection of their health (article 46(1)(a)-(c) of the Constitution).

The petitioner's cases allege that the violations of these rights are not justifiable under article 25 of the Constitution and therefore unlawful.

Petition 605 observes as follows:

> It is apparent from the guidelines mentioned as read together with the provisions of the Constitution, International Conventions and instrument that there is a need for policy and law-makers to come up with a law on involuntary/forced/coerced sterilization. Such policy must be compliant with the Constitution and should incorporate principles from international guidelines and best practices in other jurisdictions (para 60).

In the light of this, the petitioners' cases seek the following:

- a declaration of the violation of rights;
- a declaration that threats such as these experienced amount to a rights violation;
- a declaration that women living with HIV have equal reproductive health rights;
- an order directing respondents to put in place guidelines, measures and training for health-care providers and social workers regarding informed consent;
- an order directing the introduction of a seven-day waiting period between the obtaining of consent and the commencement of the procedure; and
- an order for the issuance of a circular by the Ministry of Health that this practice of forced sterilisation is ***not*** government policy.

These petitions continued to be heard before the High Court in Nairobi 2018 and 2019. As at January 2020, the High Court in Nairobi had given directions that the two (Petition 605 and 606 of 2014) continue for hearing in May 2020.

The Ugandan case

The Ugandan case also concerns the forced sterilisation of four HIV-positive women. The Uganda Network on Law, Ethics and HIV/AIDS (UGANET) are in the initial stages of development of their case.

The third petitioner in the Ugandan case underwent a caesarean that resulted in a still birth. The caesarean was consented to by a relative of the petitioner – a paternal aunt – without any discussion with the petitioner on the matter. Only years later, when trying to conceive again and failing to do so, did the petitioner go for a medical examination and find that tubal ligation surgery had been performed on her when the still birth occurred.

The doctor who performed the caesarean allegedly deemed her unfit to have children because of her HIV-positive status. The petitioner remarks:

> My life has since been overburdened with stress and self-pity – I feel less of a woman since I cannot bear any child anymore and since my husband and I cannot enjoy any conjugal rights following this history of painful events (para 7).

Another petitioner in the Ugandan case also had to undergo a caesarean in giving birth, at the age of 26. She is HIV-positive. Before going into the surgery, but already in labour, she was asked by the doctor to say how many children she had. She answered that she had none. The doctor then said (translated from the Luganda language), 'We are going to stop you.'

The next day, when another doctor was making ward rounds, she overheard him ask who performed the caesarean and why tubal ligation was performed on a 26-year-old. She did not understand what this meant.

Only years later, after her son passed away (the third child she had lost) and when unable to conceive again, was she informed by a doctor that she had undergone tubal ligation in her last caesarean. She says, '[The] doctor deemed me "unworthy" and therefore denied me the ability to procreate, thereby violating my right under articles 21 and 31 of the Constitution.'

Her discharge form from the caesarean and tubal ligation surgery has been lost.

The Ugandan case is still in the preparation stages due to the challenges faced.

- Practical issues identified in the Ugandan cases include dealing with the litigant's high

expectations and confronting the gaps in psychosocial support.

- Substantive issues include a lacuna in the domestic law, which does not include sexual and reproductive health rights. The Ugandan Constitution has no specific article dealing with sexual and reproductive health rights and therefore they need to rely on international and regional instruments as well as qualify these rights through interpretation of other rights. The case shall rely on the right to protection from inhumane and degrading treating under article 24 of the Ugandan Constitution and the right to privacy under article 27. The right to privacy has been interpreted to include the right to bodily autonomy and the right to be free from physical intrusion in the body.
- Procedural barriers include the lack law on the issues and having to choose between, on the one hand, an approach which is acceptable but fetches lesser tangible remedies to the clients and more remedies in terms of orders to change policies and laws, and, on the other, approaches that may result in more client-centred remedies but less structural and policy changes.
- The next steps in the case include identifying a medical expert to re-examine the survivors; taking survivors through these medical examinations; managing survivors' psychosocial needs; redrafting of pleadings; and holding a litigation surgery to prepare for court.

This case also raises a somewhat unique issue concerning the Elimination of Mother-to-Child-Transmission (EMTCT) of HIV Validation Programme of the World Health Organisation. Countries doing EMTCT undergo assessment of their programme in order to achieve a recognised status globally depending on performance. Uganda has been doing EMTCT and is now going through the validation exercise.

ISLA got to know of this through its partner, the International Community of Women Living with HIV Eastern Africa (ICWEA), which did the research and brought this case to it. A staff member of ICWEA sits on the National Validation Committee and raised the concern that, for countries where sterilisation is taking place, the validation exercise cannot go through positively. The filling of this case means that ISLA is bringing the matter into the limelight, which will frustrate the validation.

The further focus of the meeting

In addition to considering the cases, the meeting engaged with article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter Maputo Protocol). The purpose of this was to aid ISLA's development of a litigation manual on article 14, which concerns health and reproductive rights.

The Maputo Protocol states that 'any practice that hinders or endangers the normal growth and affects the physical development of women and girls should be condemned and eliminated'. The Protocol contains progressive provisions, such as protecting women's rights in the context of HIV (the first human rights instrument to do so); affirming women's autonomy regarding their reproductive capacities; and allowing for abortion on certain grounds. State obligations under article 14 are further clarified in General Comments 1 and 2 of the African Commission.

The adoption of the Maputo Protocol provides African states with the opportunity to rely on a human rights instrument that explicitly recognises SRHRs. This litigation manual will be published by ISLA.

Michelle du Toit is an independent legal researcher who worked as a consultant for ISLA for the purposes of this meeting. For more information

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