EVENING OUT THE DIVIDE BETWEEN RIGHTS AND CULTURE: A CASE FOR MOBILISING POSITIVE CULTURE IN STATE RESPONSES TO GENDER-BASED VIOLENCE IN KENYA

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Abstract

The main focus of the article is on the inadequacy of state responses in eliminating gender-based violence in its structural and direct expressions. The article departs from the premise that gender, sexuality, and identity are cultural constructs and argues that culture and social constructs are dynamic and changing, hence state responses to eliminate gender-based violence must engage the positive and egalitarian aspects of African culture for social legitimacy. While acknowledging that constitutional and legal frameworks lay a normative foundational basis for protection against gender-based violence, the effectiveness of these frameworks must be measured through implementation. It is in the implementation of the constitutional and legal norms that cultural contestations emerge, for instance, in the context of structural forms of gender-based violence such as female genital mutilation and marital rape. The main question that the article seeks to answer is how states can bridge the gap between norms and implementation which arises out of cultural contestations. Focusing on Kenya as a case study, the article examines state responses to structural forms of gender-based violence, specifically, female genital mutilation and marital rape. The Kenyan constitutional framework recognises culture as the foundation of the nation and the right to culture in the Bill of Rights, and on equal footing embraces egalitarian principles which place dignity, freedom, and equality at the core of societal relations. Applying doctrinal research methodology, we analyse case law on female genital mutilation and legislative initiatives in the prohibition of marital rape to identify and distil the judicial and legislative approaches on the interplay between the prohibition of gender-based violence norms and culture. Based on this, the article suggests proposals on how the progressive aspects of African culture that resonate with the egalitarian constitutional structure can be engaged in state responses to gender-based violence.

Keywords: *gender-based violence, culture female genital mutilation human rights marital rape*

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1 Introduction

The human rights discourse has long understood culture as nested within its jural foundations. Illustratively, the foundational human rights instruments that is, the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") support rights that expressly refer to culture.[1] At the African regional level, the African Charter on Human and Peoples' Rights ("African Charter") guarantees the peoples' right to cultural development[2] and also extensively addresses African culture. It foregrounds the family unit as the embodiment of the exercise and expression of social and cultural values and imposes a duty on individuals to preserve positive African values in relations within the family and society.[3] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol") confronts culture in relation to discrimination and gender-based violence and enshrines the right of women to positive cultural context.[4]

Even then, these phrases hardly settle the divide between culture and human rights. The relationship between culture and human rights remains tense and largely negative. Culture has often been viewed as regressive, stuck in time and incompatible with the protection of human rights. It is often seen as the placeholder for harmful practices, intolerance, and an obstacle to gender equality, posing the question of whether one would have to discard their culture in place of human rights.[5]

Leaving aside the polarised debate on universalism and cultural relativism, cultural contestations arise in the actual implementation of human rights norms, particularly in the context of gender and sexuality rights which are deeply rooted in local cultures. This turns to the question of how states can bridge the gap between norms and implementation which arises from cultural contestations. Broadly, there is scholarly consensus on the instrumentality of domestic social institutions in the implementation of international human rights standards.[6] A number of studies have also pointed out that cultural contestations cannot be resolved merely by legislation or executive fiat, but rather by cultural transformation to align culture with universal human rights standards. Writing on reconciling culture and national constitutions, Ibhawoh

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1 Article 27 of the Universal Declaration of Human Rights (adopted 10 December) 1948 UNGA RES 217 A(III); arts 1 and 27 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; arts 1 and 15 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

2 Article 20 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

3 Articles 18 (2), 17 and 29(7).

4 Articles 5, 6 and 17 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 01 July 2003, entered into force 25 November 2005) (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

5 S Tamale "The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa" (2008) 16 *Fem Leg Stud* 47, 55.

6 V Benneker, K Gerxhani & S Steinmetz "Enforcing Your Own Rights? The Role of Social Norms in Compliance with Human Rights" (2020) 8 *Social Inclusion* 185.

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acknowledges the futility of subordinating cultural traditions to national constitutional standards through legislation and executive orders and instead calls for adapting cultural practices to complement human rights.[7] Tamale, in her work on women's sexuality rights in Uganda, demonstrates how positive aspects of culture can be harnessed to protect women's rights.[8] Fraser takes issue with the reliance on legalism in the implementation of human rights standards and advocates for tapping into the very cultural contestations and the dynamism of culture.[9] Writing on cultural rights, Donders acknowledges that while harmful cultural practices are often censured by national laws, the elimination of such cultural practices is more effectively achieved by engaging the positive elements of culture that resonate with human rights norms.[10] Zwart introduced the concept of socio-cultural receptors and similarly makes a case for using local social and cultural arrangements for the implementation of international human rights.[11] An-Na'im points to the need for alignment of international human rights standards with domestic cultural values for successful implementation.[12]

This article broadly fits in this debate on tapping into cultural dynamism and adaptation to create cultural legitimacy for international human rights standards to aid in their national implementation. It makes a case for drawing on the positive aspects of African culture and infusing international human rights standards into domestic cultural values in state responses to gender-based violence, with a focus on Kenya. While the article acknowledges that the concept of culture remains shackled in ambiguities and confusion, it does not descend into the debate on the definition of culture and on the diversity of culture. It adopts a narrow definition of culture as the belief systems, values, practices, and norms that govern social behaviour in a given social group or society, which are dynamic and non-monolithic. This article thus uses the term "African culture" to refer to the totality of traditional and cultural practices of the Kenyan people.

The article proceeds as follows. Part 2 maps the interplay between law and culture by briefly examining the relationship between law and culture, African customary law and international human rights standards and then discusses culture and international human rights law. Part 3 focuses on the Constitution of Kenya's, 2010 provisions on culture and human rights to provide the context in which cultural values intertwine with constitutional norms. Part 4 reviews legislative and judicial approaches in dealing with dominant cultural traditions that conflict with constitutional norms through

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7 B Ibhawoh "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African state" (2000) 22 *Human Rights Quarterly* 836, 853-857.

8 Tamale (2008) *Fem Leg Stud* 59-63.

9 J Fraser "Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of Human Rights Law" (2019) 23 *International Journal of Human Rights* 979.

10 Y Donders "Cultural Rights in International Human Rights Law: From Controversy to Celebration" (2020) 20 *Amsterdam Law School Legal Studies* 15.

11 T Zwart "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach" (2012) 34 *Human Rights Quarterly* 546.

12 A Ana-Na'im "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws" in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 171.

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two optics: female genital mutilation and marital rape. The aim is not to prop up one branch of government against the other, but rather to demonstrate the tension between constitutional norms and cultural rights and culture in lawmaking and adjudication and the approaches in resolving the tension. Part 5 concludes the article by reflecting on the approaches by the judiciary and Parliament and making proposals on evening out the divide by tapping into cultural adaptation and dynamism, positive culture and invoking egalitarian values common in both African culture and human rights.

2 Law, culture and international human rights

As pointed out above, culture and in this context, African culture is often at odds with the universal human rights discourse. Broadly, international law has been viewed as a reflection of Western culture and values, which became the defining international order through imperialism and hegemony. However, the world is culturally diverse, hence non-western societies are inclined to express and promote their culture and norms which often differ from the rule of international law. International human rights law is no exception to this view bringing to fore the debate on human rights and culture.

Studies on jurisprudence propound various approaches to law and culture. The historical school locates law in the national culture of a state, thus the law of a state is thought to originate from the social life, and law reflects the culture of a society.[13] The constitutive approach makes a counter argument and views law as constructive of the social realities and practices and values of people and society. Law is thus seen as enabling or constraining culture.[14] A third approach views law as a cultural system that people and society use to explain and understand their realities.[15] This article is anchored in the constitutive approach and takes the position that legal norms transition to culture and influence daily social interactions in society, it puts law before culture and views law as turning legal norms into culturally accepted values and persuading society of no other alternative.[16] Even then, the constitutive approach grapples with the question of how and when law succeeds in constituting culture, pointing to the well-known gap between law in theory and law in action.[17] Scholars of the constitutive approach identify one of the reasons for the gap between law in theory and law in action as a lack of alignment between culture and the contents of the law.[18] This resonates with the overall thesis of this article on the need to align international human rights law standards with the domestic cultural values for national level implementation. On the question of "how" law would succeed in constituting culture, Ana-Nai'm writing on implementation of international human rights

[13] M Mautner "Three Approaches to Law and Culture" (2011) 96 *Cornell L Rev* 844; H Yazdiha "The Relationality of Law and Culture: Dominant Approaches and New Directions for Cultural Sociologists" (2017) 11 *Sociology Compass Journal* 3.
[14] Mautner (2011) *Cornell L Rev* 849.
[15] Yazdiha (2017) *Sociology Compass Journal* 4-5.
[16] Mautner (2011) *Cornell L Rev* 853.
[17] 855-856.
[18] 855-856.

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standards in the context of Islam offers a framework for cultural legitimacy of international human rights standards at the domestic level through "internal discourse" supplemented by "cross-cultural dialogue".[19]

At a broad level, debates on infusing international human rights standards into the domestic culture call to question the process of cultural integration. Mazrui in his seminal work on colonisation in Africa identifies various stages of cultural integration.[20] He identifies the first stage as culture contact in which the two sets of values are introduced to each other, then follows culture conflict when the differences in two sets of values become apparent and clash.[21] At the third stage is culture conquest in which one set of values takes primacy over the other, sometimes characterised by cultural confusion when members of the weak culture attempt to resist.[22] The final outcome is cultural integration which he describes as "a fusion of two or more cultures".[23] Applying Mazrui's thesis of cultural integration to the fusion of African culture and international human rights law, the discernible picture is that human rights values have taken primacy over African cultural practices, though the process of cultural integration is yet to be achieved. The argument is developed as follows.

In pre-colonial Africa, law was intertwined with the customs and practices of society. Law was thus customary in character and enforced cultural norms and community practices.[24] Customary law drew its legitimacy from the fact that it was natural, as it reflected people's identity and way of life and was passed on from and to successive generations. While the colonial period in Kenya was characterised by the imposition of colonial law, the colonial government recognised and preserved African customary law, though with a number of limitations: it only applied to Africans; that it was not to be repugnant to justice, equity and good morality; and that it was not in conflict with any written law.[25] Ndulo argues that subjecting African customary law to the repugnancy clause meant that African customary law was inferior to the common law and that the legitimacy of African customs was to be measured against Western values.[26] This demonstrates the stages of culture contact and culture conflict and partly informs the enduring clash between cultural relativists and universalists in Africa. In post-colonial nation-building, Kenya akin other African states adopted a national constitution in which the Bill of Rights sought to embrace Western human rights standards, while at the same time reasserting the place of African customary law. For instance, the Kenya independence Constitution in its Bill of Rights immunised customary law from the provisions outlawing discrimination.[27] The effect of this was that it allowed the exercise of discriminative practices based on African

[19] Ana-Nai'm "State Responsibility under International human rights law" in *Human Rights of Women* 174.
[20] AA Mazrui The *Africans: A Triple Heritage* (1986) 239.
[21] 239.
[22] 240.
[23] 239.
[24] M Ndulo "African Customary Law, Customs and Women's Rights" (2011) 18 *Indiana Journal of Global Legal Studies* 88.
[25] Section 3(2) of the Judicature Act, 1967.
[26] Ndulo (2011) *Indiana Journal of Global Legal Studies* 95.
[27] Section 82(4)(b) and (c) of the Repealed Constitution of Kenya, 1966.

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customary law. This resonates with the stage of cultural confusion and further highlights the conflict between human rights standards and prevalent customary practices. Subsequent national constitutions adopted in the post-1990 democratisation era recognise and protect African customary law but subordinate it constitutional human rights standards.[28] This clearly demarcates the reach of customary norms and gives primacy to human rights culture, signifying culture conquest, particularly when African values conflict with international human rights standards. However, the gap that still persists is the cultural integration stage; aligning the human rights standards with domestic cultural values, hence national level implementation. This discussion is fully taken up in part 5 of this article.

International human rights law in its foundational documents references the right to participate in one's cultural life.[29] The right conceived cultural life as high culture associated with arts, literature, music and theatre, and thus it envisaged granting access to high culture for the masses.[30] Today, international human rights law has adopted a broad conception of culture.

The Universal Declaration on Cultural Diversity adopts a broad view and defines culture as:

> "the set of distinctive, spiritual, material, emotional and intellectual features of a society or social group, that it encompasses, in addition to art and literature lifestyles, ways of living together, value systems, traditions and beliefs."[31]

Drawing from the Declaration on Cultural Diversity, the Committee on Economic, Social and Cultural Rights has since departed from the originally narrow formulation of culture to a broader concept that includes religion and belief systems, rites and ceremonies, man-made environment, food, customs and traditions.[32] The UN Independent Expert on Cultural Rights also expounded on the concept of culture, stating that culture is to be understood as a process, way of life, product and as broader than religion, ethnicity and language.[33]

Closely tied to culture are cultural rights which despite textual expression in the UDHR and the ICESCR, are not defined. The UN Special Rapporteur on Cultural Rights in the interpretation of the mandate views cultural rights as referring to "rights in the field of culture".[34] Donders describes cultural rights as rights with a cultural character, in that they refer to culture or have a direct link to culture.[35]

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[28] Ndulo (2011) *Indiana Journal of Global Legal Studies* 98-99.

[29] Article 27 of the UDHR and art 15 of the ICESCR.

[30] J Ringelheim *The Rise of Cultural Rights in International Human Rights Law*, CRIDHO Working papers series 2017/3 (2017) 6.

[31] Preamble to the UNESCO Universal Declaration on Cultural Diversity, 2 November 2001 <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/5_Cultural_Diversity_EN.pdf> (accessed 12-02-2022).

[32] UN Committee on Economic, Social and Cultural Rights, "General Comment No 21" in "Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies" (21 December 2009) UN Doc E/C.12/GC/21 para 13.

[33] UNCHR "Report of the Independent Expert in the Field of Cultural Rights" (2010) UN Doc A/HRC/14/36 para 5.

[34] UNCHR "Report of the Special Rapporteur in the Field of Cultural Rights" (2016) UN Doc A/HRC/31/59 para 7.

[35] Donders (2020) *Amsterdam Law School Legal Studies* 4.

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The scope of these rights remains largely underdeveloped as a result of what scholars have termed as initial neglect of this category of rights due to their association with the concept of culture, their labelling as "second generation rights" and fear that they would be a placeholder of harmful cultural practices.[36] Nonetheless, the Committee on Economic, Social and Cultural Rights and recent scholarly work have elaborated on the scope and content of the right to participate in cultural life. The right imposes both positive and negative state obligations. In its negative dimension, the state should not interfere with the exercise of the right, while the positive obligation requires states to ensure access to cultural resources, facilitate and promote cultural life and create ideal conditions for participation.[37] The right has both individual and collective dimensions. The individual dimension implies that one can exercise cultural rights individually, while the collective dimension implies in association with others or as a member of a community.[38]

Further, to participate in cultural life has three elements: participation, access and contribution to, while the elements of the right are: availability; accessibility; acceptability; appropriateness and adaptability.[39]

The Committee twins negative practices with violations indicating that failure of a state to prevent harmful cultural practices violates the right to participate in cultural life.[40] In this regard, the Committee deems harmful practices as not constituting cultural rights but as violations of the right to participate in cultural life. In addition, it lists women, children, older persons, persons with disabilities, indigenous peoples, minorities, persons living in poverty and migrants as persons requiring special protection in the exercise of cultural rights.[41]

In addition to the UDHR and the ICESCR which provide for cultural rights, other international human rights treaties allude to culture and cultural rights in their provisions. The International Convention on Elimination of All Forms of Discrimination Against Women ("CEDAW") addresses itself to culture in the context of women's rights. CEDAW focuses on culture, social and cultural norms as drivers of discrimination and gender-based violence against women. CEDAW broadens the theatre of discrimination and gender-based violence to include private, social and cultural spheres.[42] In addition, it enjoins states to modify or abolish customs and practices that constitute discrimination and violence against women.[43] Further, states are required to put in place appropriate measures to ensure the development of women in the social and cultural fields.[44] Drawing from this provision, harmful cultural practices are

[36] A Fagan "Cultural Harm and Engaging the Limits of a Right to Cultural Identity" (2017) 39 *Human Rights Quarterly* 323; Ringelheim *The Rise of Cultural Rights in International Human Rights Law* 4; Donders (2020) *Amsterdam Law School Legal Studies*.

[37] UN Committee on Economic, Social and Cultural Rights, General Comment No 21 para 6.

[38] Para 9.

[39] Paras 14, 15 and 16.

[40] Paras 19 and 64.

[41] Paras 25-39.

[42] Article 1 of the International Convention on Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 49.

[43] Article 2(f) of CEDAW.

[44] Article 3.

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inimical to the state's obligation to ensure the development of women in the socio-cultural field. CEDAW further requires states to modify social and cultural relations between men and women and eliminate customary practices that perpetuate discrimination against women by viewing them as inferior.[45] The use of the term 'modify' speaks to the dynamism and adaptability of culture thus supporting the general thesis of this article. In the context of marriage, it guarantees women full and free consent to contract a marriage and equal rights at the time of marriage, during and at the dissolution of marriage.[46] This provision can be construed to imply that forced sex in marriage is at odds with the concept of equality in marriage.

In addition, in General Recommendation 19 on Violence against Women, the CEDAW Committee construes violence against women as a form of discrimination and draws attention to the deployment of traditional values to institutionalise violence against women such as forced marriages, dowry-related deaths and female circumcision.[47] Further, the complementary General Recommendation 35 is more incisive on the prohibition of gender-based violence against women. It characterises the prohibition of gender-based violence against women as a norm of customary international law and some forms of gender-based violence as constituting torture, inhuman and degrading treatment thus connoting binding obligations to all states.[48] It also elaborates on state obligations in the prohibition of gender-based violence against women. In the specific context of marital rape, the Committee recommends criminalisation.[49] In the context of female genital mutilation, states should implement effective measures to counter customs and practices that promote institutionalised gender-based violence and support notions of inequality between men and women.[50]

In relation to cultural life, CEDAW recognises the right of women to participate in all aspects of cultural life and requires states to eliminate discrimination against women and guarantee cultural rights on the basis of equality between men and women.[51] The Convention of the Rights of the Child ("CRC") contains similar provisions guaranteeing children the right to participate in cultural and artistic life.[52] The ICCPR provides for culture in the context of minority rights and guarantees ethnic, linguistic and religious minorities the right to enjoy their culture.[53]

At the African regional level, the African Charter expounds on the international human rights standards while considering African cultural values and traditions. In this sense, the African Charter references African culture, traditional values, and morality in a number of instances.

[45] Article 5.
[46] Article 16.
[47] General Recommendation No 19 para 11.
[48] General Recommendation No 35 para 16.
[49] Para 33.
[50] Para 35.
[51] Article 13.
[52] Article 31(c) of the UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[53] Article 27 of the ICCPR.

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It guarantees the right of the individual to freely participate in cultural life.[54] It also defines the place of cultural traditions by requiring the state to promote and protect them.[55] It designates the family as the embodiment of morals and cultural values and requires the state to protect the family unit.[56] In the same vein, it outlaws discrimination against women and requires states to protect women and children in the family unit in line with international human rights standards.[57] It also twins preservation of traditional values and morals to the concept of duties with the individual bestowed with a duty to preserve and strengthen positive African cultural values as a member of society.[58]

Reflecting on these provisions, undoubtedly the African Charter gives primacy to the African culture and attaches a lot of agency to group and community values. For instance, the African Charter expressly domiciles culture in the family unit and designates it as the theatre of African cultural expression requiring state protection. Comparatively, this may be contrasted with the protection of the family unit in the European and Inter-American regional systems, which prohibit state interference. There are competing views as to the import of this provision. On the one hand, it has been argued that the African Charter's defence of traditional values and domiciling the same in the family set-up, which is in the private sphere and out of the reach of the law in many instances, portrays culture as a justification for institutionalised gender-based violence.[59] Conversely, adopting a holistic view of the provision, it may be argued that the African Charter alludes to the conflict between cultural rights and universal human rights standards and attempts to reconcile them without discarding African culture. The argument is developed as follows. The African Charter domiciles African culture in the family unit out of a recognition that the family unit is a gendered space and the theatre of expression of cultural rights. There is thus a likelihood of conflict between cultural traditions and universal human rights standards and to address that the provision echoes universal human rights standards for the protection of the rights of women and children.[60]

In the context of institutionalised gender-based violence, it is worth noting that the African Charter is not explicit in its protection regime. It could nonetheless be argued that its express reference to international declarations and conventions in the protection of the rights of women and children invokes the protection regime enshrined in CEDAW and the CRC.[61] Even then, it is notable that the African Charter has no guarantees on consent to and equality in marriage, which exposes women to violations of rights such as forced and

54 Article 17(2) of the African Charter.
55 Article 17(3).
56 Article 18 (1) and (2).
57 Article 18(3).
58 Article 29(7).
59 NI Anwieku "The Additional Protocol to the African Charter on Human and Peoples' Rights: Indications of Capacity for African Municipal systems" (2009) 2 *Law, Democracy and Development* 26-27; FNA Adejetey "Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture" (1995) 44 *The American University Law Review*.
60 Tamale (2008) *Fem Leg Stud* 54-55.
61 Article 18(3) of the African Charter.

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child marriages, wife inheritance, sexual violence in marriage and denial of sexual and reproductive health rights. In addition, the African Charter's failure to expressly criminalise female genital mutilation and the resounding silence on harmful cultural practices seemingly implies that culture could be a defence to the practice of female genital mutilation.

Importantly, the weak protection regime in the African Charter was addressed by the adoption of the Maputo Protocol. The Maputo Protocol echoes and buttresses CEDAW by requiring states to take steps to eliminate social and cultural patterns that are discriminative to women. It confronts African culture by expressly addressing itself to institutionalised forms of gender-based violence such as female genital mutilation, wife inheritance and sexual and reproductive autonomy. First, it defines harmful cultural practices to include female genital mutilation and para-medicalisation of female genital mutilation and requires states to prohibit female genital mutilation and similar harmful practices through legislation accompanied by sanctions.[62] The Maputo Protocol thus strengthens the point that harmful cultural practices are not protected under cultural rights, thus demolishing the defence of culture. In relation to marriage, while not prohibiting polygamy, it guarantees equality in marriages and requires states to protect the rights of women in plural marriages and the recognition of all marriages through registration.[63] On marital rape, the Maputo Protocol calls on states to enact legislation prohibiting marital rape.[64]

Finally, the Maputo Protocol guarantees the rights of women to live in a positive cultural context, which includes their right to participate in the determination and formulation of cultural policies at all levels.[65] The import of the right to a positive cultural context for women in Africa is two-pronged. First, it echoes the African Charter regarding African positive culture buttressing the point that culture has elements that are supportive of universal human rights standards. Second, it resonates with women as the custodians of African culture and tradition, when viewed from the perspective of the African Charter's domiciling of traditional values in the family unit and alludes to cultural dynamism and cultural adaptation.[66]

3 Culture and human rights in the Constitution of Kenya, 2010

The Constitution of Kenya, 2010 ("Kenyan Constitution") represents the post-1990s wave of democratic constitution-making, marking a transition from an oppressive past legal regime characterised by denial and abuse of rights, discrimination and marginalisation of certain groups. It signifies a rebirth of Kenya, and hence a chance to re-examine individual and collective values, identities, sense of belonging and community and to forge new institutions of nationhood. As pointed out above, the post-democratisation constitutions have

62 Article 5 of the Maputo Protocol.
63 Article 6.
64 Article 4(2)(a).
65 Article 17.
66 Tamale (2008) *Fem Leg Stud* 57-58.

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tended to give primacy to human rights culture by recognising and protecting African customary law, while subordinating it to constitutional human rights standards. Implied in this constitutional formulation is the apparent tension and contradiction between constitutional norms and the socio-cultural values and practices of citizens. Drawing from the earlier discussions on law and culture, the expectation is that the human rights culture will be integrated through the constitutional norms being aligned with the socio-cultural values.

The Kenyan Constitution recognises African culture in two distinct ways. First, the Preamble celebrates culture and the cultural diversity of the Kenyan nation.[67] Second, in describing the nation, culture is designated as emblematic and the sum of the peoples and Kenya's civilisation.[68] The state is then obligated to promote all forms of national and cultural expressions.[69]

Importantly, the Constitution contains a comprehensive Bill of Rights that protects civil and political, economic, social and cultural rights as well as collective rights.[70] The Bill of Rights also contains guiding provisions on its application, interpretation and scope which aim at reconciling competing interests and values such as cultural traditions and universal human rights standards.

The Bill of Rights extends its application to all law and all persons.[71] The implications are twofold: that customary law, which would be considered as customary practices, are subordinated to constitutional norms; and that constitutional norms are enforceable against individuals and private entities such as the family, clan and community in which institutionalised gender-based violence often occurs.

The Constitution further impels the courts in the application of the Bill of Rights to develop the law to bring it in conformity with rights and freedoms enshrined in the Constitution.[72] Viewed from the context of institutionalised gender-based violence, this provision authorises the courts to adapt customary practices to bring them within the ambit of equality, freedom and human dignity. This point is particularly relevant to the thesis of this article on adapting cultural practices to conform to constitutional norms rather than discarding cultural values in favour of human rights standards.

Finally, the Constitution addresses itself to the interpretation of the Bill of Rights. It directs the courts, tribunals or any other authority to promote the spirit, purposes and objectives of the Bill of Rights and twins these with the values of an open and democratic society based on human dignity, equality and freedom.[73] The implication for cultural practices is that they must support the spirit, purpose and objects of the Bill of Rights. In addition, the provision gives primacy to the egalitarian principles of freedom and equality so that

[67] Preamble, para 3 of the Kenyan Constitution.
[68] Article 11(1).
[69] Article 11(2).
[70] Chapter 4.
[71] Article 20(1). Importantly, Article 2(4) defines "law" to include customary law.
[72] Article 20(3)(a).
[73] Article 20(4).

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the autonomy and freedom of the individual is elevated above the group and collective rights.

Subsumed in the Bill of Rights is the specific protection of cultural rights and rights of a cultural character. To this end, the Constitution protects the right to language and culture in its individual and collective dimensions.[74] In the individual dimension, every person is guaranteed the right to use language and participate in the cultural life of their choice.[75] The collective dimension safeguards a person's right to associate with members of a cultural or linguistic community and enjoy the culture or language as well as to form, join and maintain cultural and linguistic associations.[76] In addition, it guards individual freedom by outlawing compulsion to perform, undergo or observe any cultural rite or practice.[77] From the foregoing, the Constitution provides for cultural autonomy of the individual and of communities while protecting individual freedom by subordinating cultural rights to individual autonomy. The Constitution also protects other rights of a cultural character. These are ancestral and community land, protection of traditional knowledge and languages facing extinction and intellectual property.[78]

The question then turns on the limitation of cultural rights and how the Constitution addresses harmful cultural practices. Literature on cultural rights points to a general ambivalence at the international level to protect and promote these rights based on the fear that they could promote harmful cultural practices.[79] The Constitution addresses this by expressly outlawing harmful cultural practices in relation to youth and children, even though it fails to outline harmful cultural practices.[80] The discussion on limitations is presented towards the end of this section.

Besides the protection of cultural rights, the Constitution also protects a broad scope of individual rights based on human dignity, equality and freedom. In the specific context of gender-based violence, it provides for equality and outlaws discrimination, outlaws violence against the person, protects human dignity and provides for family rights.

In regard to equality and non-discrimination, the Bill of Rights guarantees equal treatment to all in all spheres, including cultural and social spheres.[81] The state is prohibited from discriminating either directly or indirectly on the basis of a list of non-exhaustive grounds, which include culture, social or ethnic origin, belief or religion.[82] The prohibition of direct or indirect discrimination is further extended to private persons.[83] The above provisions reinforce the limitation imposed on cultural rights which places individual

74 Article 44.
75 Article 44(1).
76 Article 44(2).
77 Article 44(3).
78 See generally, arts 11(2)(3), 56 and 63.
79 Donders (2020) *Amsterdam School of Law Legal Studies* 12; Ringelheim *The Rise of Cultural Rights in International Human Rights Law* 4.
80 See arts 53(1)(d) and 55(d) of the Kenyan Constitution.
81 Article 27(3).
82 Article 27(4).
83 Article 27(5).

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autonomy above the exercise of cultural rights by further guaranteeing equal treatment for individuals who choose not to exercise their cultural rights. In addition, by expressly mentioning "cultural and social spheres" as spaces in which equal treatment is constitutionally guaranteed, the Bill of Rights confronts institutionalised forms of gender-based violence and gives primacy to the constitutional norms of equality, human dignity, and freedom. Further, by extending the prohibition of discrimination to private persons, social institutions such as community, clan and family in which cultural practices find expression and gender-based violence is institutionalised, are brought under the ambit of equality.

The Bill of Rights also outlaws violence against the person from either public or private sources.[84] The express prohibition of personal violence from private sources prohibits gender-based violence in private spaces such as the clan, community, family and within marriage.

The individual and cultural rights discussed above are not absolute, they are limited. The Bill of Rights contains a general limitation clause that permits limitations and restricts all limitations to the test of proportionality, reasonableness and what is justifiable in an open and democratic society.[85] The stinging criticism of the limitation clause, which has a direct bearing on cultural practices, is the exemption of persons who profess Muslim religion in matters relating to personal status, marriage, divorce and inheritance from the equality provisions.[86] The import is that religion for persons professing Muslim faith trumps the equality provisions in relation to personal matters. The choice of reference to freedom of religion rather than to culture in the exemption clause is not difficult to discern. Religion carries more legal weight as it touches on the sacredness of human life and unlike culture, it is codified in seemingly binding texts, has institutions for enforcement and predates human rights.[87] Yet, the link between culture and religion is not hard to acknowledge when culture is viewed as key in the manifestation of religion and belief.

Returning to the earlier issue of tension and contradiction between constitutional norms and socio-cultural practices of citizens, as demonstrated above, the Constitution addresses this by broadening the scope of rights to include both individual rights and collective rights which aim to preserve cultural traditions and values. In addition, it prohibits harmful practices and places individual rights above cultural autonomy as well as extends the application of human rights norms to cultural practices and spheres. Further, to address any incompatibilities between culture and human rights it expressly subordinates customary law to the Constitution.

Pointedly, to enforce the human rights norms, a number of laws have been enacted, some of which have banned harmful cultural practices and have been the subject of a court challenge, while other laws have leaned towards upholding the prevailing social and cultural order. Undoubtedly, it gives

[84] Article 29(c).
[85] Article 24.
[86] Article 24(4).
[87] MA Abdulla "Culture, Religion and Freedom of Religion or Belief" (2018) 16 *The Review of Faith and International Relations* 104.

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credence to the view expressed by Ibhawoh that the inclusion of cultural rights in the Bill of Rights, prohibition of harmful cultural practices and articulation of individual rights does not resolve the tension between cultural practices and human rights standards.[88]

The following part, part 4 discusses judicial and legislative approaches in Kenya concerning institutionalised gender-based violence, specifically, female genital mutilation and marital rape, in addressing the tension between dominant cultural traditions and individual rights.

4 Reconciling constitutional norms on gender-based violence and cultural notions of gender

This part reviews judicial and legislative approaches with a view to mapping out the interplay between culture and human rights and to demonstrate how Kenya has attempted to reconcile constitutional norms on the prohibition of gender-based violence and dominant cultural notions of gender. The first part examines the approach of the Judiciary in female genital mutilation, while the latter part examines the approach of Parliament in marital rape.

The Judiciary in *Kamau v Attorney General*[89] ("*Kamau*") was confronted with a petition against the prohibition of female genital mutilation through the Prohibition of Female Genital Mutilation Act, 2011. The petitioner, a medical doctor, challenged the constitutionality of the Prohibition of Female Genital Mutilation Act arguing that it violated the rights of adult women to human dignity, equality, language and culture and religious belief by discriminating between men and women. She argued that the Act was a form of cultural imperialism as it imposed different cultural beliefs and values. In addition, she argued that the Act violated the right to the highest attainable standard of health as it prohibited medical practitioners from carrying out female genital mutilation on consenting adult women. The main thrust of the case was that it limited women's right to uphold their culture, religious beliefs, ethnic identity and discriminated between men and women since men can undergo male circumcision. She invoked the right to religious freedom and social and cultural rights in the UDHR. The issues for determination before the Court included whether female genital mutilation is a harmful cultural practice, whether the prohibition of female genital mutilation violates the right to culture and cultural identity and the rights to non-discrimination and human dignity. The Court held that the Act was constitutional and found that it did not violate the rights set out by the petitioner.

The Court made important pronouncements on how cultural rights intermingle with the protected human rights standards on gender-based violence. On the issue of harmful cultural practices, drawing from the definition of harmful cultural practices in the Maputo Protocol, the Court found that female genital mutilation constituted a harmful cultural practice.[90] The Court based

[88] Ibhawoh (2000) *Human Rights Quarterly* 848.

[89] *Kamau v Attorney General; Equality Now (Interested Parties); Katiba Institute (Amicus Curiae)* [2021] eKLR (Constitutional Petition 244 of 2019) (17 March 2021).

[90] Paras 131-133.

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its finding on that the practice had serious and long term health, psychological and emotional effects on women and girls on whom it was carried out, noting that these effects could not be limited by the medicalisation of female genital mutilation as suggested by the petitioner.[91] On its prohibition as a harmful cultural practice, the Court pointed out that in its cultural foundations, it was carried out in the interest of the community and the type carried out in each community was also determined by community elders, hence it was not at the agency of or of any benefit to individual women, but rather it was a cultural tradition.[92] This finding is anchored on the view that the Bill of Rights gives primacy to individual autonomy over cultural rights.

On violation of the right to culture and cultural identity, the Court first noted that the right to participate in the cultural life of one's community was not absolute and was subject to certain limitations.[93] In addition, the Court emphasised the inbuilt limitation in participation in cultural life: the issue of personal choice, which connotes individual freedom. Pointedly the textual provision of the right to language and culture in the Constitution includes the words "of the person's choice".[94] The Court opined that since female genital mutilation was carried out in the interest and at the behest of the community, accompanied by social pressure and sanction, this did not guarantee personal choice.[95] The Court thus found that allowing female genital mutilation for adult women would violate the very right to participate in the cultural life of one's community as the freedom of choice cannot be guaranteed, resulting in the compulsion to undergo female genital mutilation.[96] The Court further found that even in the instance of consent and choice by adult women, freedom and liberty of the individual restrain individuals from self-harm.[97] The implication is that female genital mutilation and other harmful cultural practices do not find protection under cultural rights as one cannot consent or choose to undergo a harmful cultural practice.

Regarding the violation of the right not to be discriminated against, the petitioner had argued that prohibition of female genital mutilation demonstrated intolerance towards adult women participating in cultural life, while for men, there was no similar prohibition. The Court took the view that the prohibition of female genital mutilation had a legitimate reason, in that it was a harmful cultural practice, hence its prohibition could not be considered discriminatory.[98]

Importantly, the Court's pronouncement also settles outstanding issues in Kenya in regard to the prohibition of female genital mutilation. Often, the constitutional right to participate in one's culture has been invoked as a defence in relation to adult women, and at a more general level, debate on

[91] Para 134.
[92] Para 145.
[93] Para 149.
[94] Article 44(1) of the Kenyan Constitution.
[95] *Kamau v Attorney General; Equality Now (Interested Parties); Katiba Institute (Amicus Curiae)* [2021] eKLR (Constitutional Petition 244 of 2019) (17 March 2021) para 135.
[96] Para 159-215.
[97] Paras 211-212.
[98] Para 193.

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criminalisation of African culture in order to protect the rights of women has been ongoing. The Court thus provided clarity on the fact that prohibition of female genital mutilation does not violate the right to culture for adult women, it is a harmful practice overtaken by culture.

The discussion now turns to marital rape. The Sexual Offences Act, 2006 de-criminalises marital rape by exempting any criminal liability to persons who are lawfully married to each other.[99] Admittedly, the Sexual Offences Act was enacted in 2006, prior to the promulgation of the Constitution, 2010. Nonetheless, the Parliamentary debates surroundings its enactment, particularly the provisions on marital rape, are informative of the tension between dominant cultural traditions and universal human rights standards. Initial drafts of the Act, the Sexual Offences Bill, contained a provision criminalising marital rape. However, during the Parliamentary debate, the marital rape provision was expunged as legislators argued that marital rape was against African culture and it connoted the westernisation of African marriages and culture.[100] Illustratively, one male legislator stated:

> "I have paid dowry for my wife and we are formally married. I cannot rape her by any chance. You can see the damage that western indoctrination has done to us. I cannot rape my wife! I do not think any man can rape his wife, you can only rape someone else."[101]

Notably, the tension between culture and human rights in the Parliamentary debate also drew in another form of institutionalised gender-based violence, payment of dowry. This buttresses the proposition that institutionalised gender-based violence finds support in cultural notions that promote structural inequalities between men and women.

As stated earlier, the promulgation of the Constitution, 2010 required the enactment of statutory laws to concretise the constitutional norms on the prohibition of gender-based violence. This resulted in the enactment of the Protection Against Domestic Violence Act, 2015, to address institutionalised gender-based violence within the family set-up, thus bringing the family into the ambit of equality and non-discrimination provisions of the Constitution. Imperatively, the family in the African setting is the theatre of cultural expression, and therefore it is plausible to argue that the Protection Against Domestic Violence Act confronts negative cultural practices and customary rites within the family unit. It recognises physical, psychological, economic and sexual forms of abuse. Specifically, the Act defines domestic violence to include institutionalised gender-based violence that occurs within the family set-up such as child marriage, female genital mutilation, sexual violence within marriage, widow inheritance, virginity testing and widow cleansing.[102] The regime for the protection of victims under the Act is administrative, civil and criminal. First, victims or their representatives can apply for protection

[99] Section 43(5) of the Kenya Sexual Offences Act, 2006.

[100] Kenya National Assembly Parliamentary Hansard, Second Reading of the Sexual Offences Bill, 27 April, 2006 780 <https://info.mzalendo.com/hansard/sitting/national_assembly/2006-04-27-14-30-00> (accessed 03-02-2022).

[101] Kenya National Assembly Parliamentary Hansard, Second Reading of the Sexual Offences Bill, 27 April, 2006 780.

[102] Section 3 of the Protection Against Domestic Violence Act.

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orders aimed at deterring the perpetrator from physically accessing the victims or initiating any contact.[103] Second, the Act provides that victims may seek compensation for injuries, damage to property, loss of financial income and expenses incurred by the victim such as safe shelter and lodging, transport and moving, in cases of separation from the perpetrator.[104] Finally, the victim can lodge a criminal complaint if a criminal offence has been committed, and arrest and detention may be invoked for perpetrators who violate the protection orders.[105]

Revisiting the issue of marital rape, while the Protection Against Domestic Violence Act does recognise marital rape as a form of gender-based violence within the family unit, it does not criminalise it. More aptly, the Act does not criminalise any of the forms of institutionalised gender-based violence, but rather recognises them as forms of violence against women and provides for the possibility of the victim to lodge a complaint if a criminal offence has occurred.[106] In the case of marital rape, as alluded to earlier, the Sexual Offences Act expressly de-criminalises marital rape, meaning that victims would have to contend with lesser offences such as physical assault or grievous bodily harm. The Act's protection regime for institutionalised gender-based violence arising from cultural practices is primarily through protection orders. This is illustrated by the Act's express provision for issuance of protection orders against "engaging or threat to engage in cultural or customary rites or practices that abuse the protected person".[107] The failure of the Act to criminalise marital rape was highlighted by the Human Rights Committee in its 2021 Concluding Observations to Kenya, as a continued driver of gender-based violence against women.[108] Resultantly, the Human Rights Committee recommended that Kenya criminalise marital rape.[109]

Reflecting on the foregoing, it is plausible to argue that failure of the Protection Against Domestic Violence Act to criminalise marital rape, and other forms of institutionalised gender-based violence recognised in the Act, echoes the 2006 Parliamentary debate during the enactment of the Sexual Offences Act. Therefore, the legislative approach to the tension between dominant cultural traditions and constitutional norms on the prohibition of gender-based violence has been an attempt to strike a balance by protecting individual rights while not criminalising or discarding culture. In the case of marital rape, this balance seems more inclined towards upholding dominant cultural values and traditions, since the legislators had occasion to expressly repeal the provisions of the Sexual Offences Act, which de-criminalise marital rape, but failed to.

[103] Section 19.
[104] Section 32.
[105] Section 24(c).
[106] Section 24(c).
[107] Section 19(1)(g).
[108] Office of the High Commissioner for Human Rights, Kenya Homepage, Human Rights Committee Concluding Observations on the Fourth Periodic Report of Kenya, CCPR/C/KEN/04 11 May 2021 para 18(d), <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx? symbolno= CCPR/C/KEN/CO/4&Lang=En> (accessed 03-02-2022).
[109] Para 19(d).

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Even then, one can draw comparisons between the 2014 Parliamentary debate on the enactment of the Protection Against Domestic Violence Act and the 2006 debate on the enactment of the Sexual Offences Act. The debate on the enactment of the Protection Against Domestic Violence Act appears more receptive to universal human rights standards on protection against gender-based violence. Illustratively, legislators in the debate acknowledged that forced female genital mutilation was a form of domestic violence.[110] Contrastingly, during the 2006 debate on the Sexual Offences Act, legislators expressly expunged the provisions prohibiting female genital mutilation on the premise that prohibition of female genital mutilation amounted to the criminalisation of African culture.[111] This supports the assertion that culture is dynamic and adaptable and that cultural practices can adapt to respect universal human rights values.

The foregoing has demonstrated the interplay between cultural traditions and human rights standards in the context of female genital mutilation and marital rape. The analysis indicates that courts have upheld constitutional values in the case of competing aims and interests while alluding to cultural adaptation and balancing between collective and individual rights. On the other hand, legislative approaches have tended to uphold dominant cultural traditions while attempting to protect human rights. The next part will reflect on the judicial and legislative approaches and make proposals on how positive African culture can be deployed to address gender-based violence in Kenya.

5 Mobilising positive African culture to address gender-based violence in Kenya

The foregoing has situated culture and cultural values within the international human rights framework and the Kenyan Constitution. The analysis of the judicial and legislative approaches has amplified the inherent tension between dominant cultural traditions and human rights standards in relation to female circumcision and marital rape.

Drawing from the above, three themes emerge, which can be explored in addressing the main question of this article: how the gap between human rights standards and implementation can be bridged when cultural contestations arise. The themes are cultural dynamism and adaptation, positive African culture and egalitarian values. The themes are explored in the discussion below.

Part 2 explored the constitutive approach of the relationship between law and culture and proposed drawing from Ana-Naim's framework of internal discourse and cross-cultural dialogue for human rights standards to acquire cultural legitimacy within domestic cultural practices. In addition, Mazrui's work on stages of cultural integration is informative as it clearly demonstrated

[110] Kenya National Assembly Parliamentary Hansard, Second Reading of the Protection Against Domestic Violence Bill, 19 August 2014 34-35 <https://info.mzalendo.com/hansard/sitting/national_assembly/2014-08-19-14-30-00> (accessed 03-02-2022).

[111] Kenya National Assembly Parliamentary Hansard, Second Reading of the Sexual Offences Bill, 26 April 2006 755 <https://info.mzalendo.com/hansard/sitting/national_assembly/2006-04-26-14-30-00> (accessed 23-01-2022).

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that the human rights culture has taken primacy in Kenya highlighted by the subordination of customary law to constitutional human rights values. However, the discussion pointed to incomplete cultural integration characterised by cultural confusion and conflict.

On cultural dynamism and adaptation, writing on culture and human rights in Africa, Ibhawoh observes that traditional societies are constantly changing in response to different internal and external pressures, including new ideas which individuals adapt.[112] Mazrui in his thesis on cultural integration implies that culture is dynamic and capable of adaption,[113] while similarly, Ana-Nai'm calls for anchoring international norms within cultural traditions, signifying cultural adaptation.[114] International human rights treaties also allude to the dynamism of culture and its capacity for adapting to new values, in this case, human rights values. Illustratively, CEDAW requires states to modify "social and cultural patterns of conduct between men and women" to eliminate discrimination against women.[115] Equally, the Maputo Protocol echoes the same provision requiring states to modify social and cultural patterns of conduct between men and women to eliminate harmful cultural and traditional practices.[116] Deliberating on this provision in *APDF & Institute for Human Rights and Development in Africa v Republic of Mali*, the African Court on Human and Peoples' Rights elaborated on the tangible aspects of state obligations.[117] In the African Court's finding states have an obligation to modify dominant cultural traditions that promote institutionalised gender-based violence by teaching, educating, and sensitising the populace on human rights standards.[118] The Court's findings echo Ana-Nai'm's framework on internal discourse as a means of promoting the cultural legitimacy of international human rights standards at the domestic level. He describes "internal discourse" as dialogue and debate at the domestic level on the application and implementation of international human rights norms.[119]

In addition, the Maputo Protocol introduces the right to positive cultural context which enshrines a distinct right for women: to live in a positive cultural context and to participate in the determination and formulation of cultural policies at all levels.[120] As pointed out above, the import of these provisions and the African Court's pronouncement is an acknowledgement that culture is dynamic and can be adapted through exposure to new values. The phrase "modify" implies that culture is capable of adaptation to eliminate gender-based violence, including harmful cultural and traditional practices. This is position is further buttressed by the right to positive cultural context

[112] Ibhawoh (2000) *Human Rights Quarterly* 841.
[113] Mazrui *A Triple Heritage* 239.
[114] Ana-Nai'm "State Responsibility under International Human Rights" in *Human Rights of Women* 174.
[115] Article 5 of CEDAW.
[116] Article 2(2) of the Maputo Protocol.
[117] African Court of Human and Peoples' Rights *APDF & Institute for Human Rights and Development in Africa v Republic of Mali* (Judgement) Application No 046/2016 11 May 2018.
[118] Para 135.
[119] Ana-Nai'm "State Responsibility under International Human Rights" in *Human Rights of Women* (1994) 169.
[120] Article 17 of the Maputo Protocol.

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which gives women agency to participate in determination and formulation of cultural policies at all levels as it implies that culture is constantly changing, and women must participate to influence cultural policies in ways that ensure the protection of their rights.

At the national level, the Constitution requires courts in application of the Bill of Rights to adapt customary law to bring it in conformity with the human rights.[121] This also acknowledges that cultural practices are capable of adaptation. The Court in *Kamau* expressly alluded to the dynamism of culture. The Court in reference to female genital mutilation and dynamism of culture stated:

> "FGM is certainly harmful to the physical and no doubt physiological and sound well-being of the victim… That kind of custom could be truly well discarded and buried in the annals of history, just as we no longer remove our 2,4 or 6 teeth from our lower jaw or adorn our face, cheeks with healed blisters."[122]

In stating the above, the Court beyond acknowledging cultural dynamism also pointed to the fact that culture is receptive to new ideas and values and capable of adapting. In the context of Parliament, the contrast between the Parliamentary debates on female genital mutilation in 2006 during the enactment of the Sexual Offences Act, and the debate in 2014, during the enactment of the Protection Against Domestic Violence Act, equally point to inferences on cultural dynamism. It demonstrates that culture is receptive to new ideas and this instance, is capable of accommodating universal values to protect individual rights.

From the foregoing, the question that presents is how culture can then be exposed to new ideas and values to bring about the process of cultural adaptation. The question is twofold. First, "how" in terms of the content, what new ideas and values is culture to be exposed and adapted to protect women against gender-based violence. Second, "how" in terms of the process of exposing culture to new ideas and cultural adaption. On the question of what new ideas and values are required for cultural adaptation, the discussion on female genital mutilation and marital rape in part 4, points to competing interests and aims of group and community values and traditions against women's individual rights and autonomy. Illustratively, in both the petition to the courts and in the Parliamentary debates, culture, which signifies group/community values and traditions has been held up against constitutional norms that aim to protect individual women against gender-based violence.

While African values embody greater group and community identity, they also recognise individual identity meaning that both collective rights and individual rights can find expression within African culture. Therefore, culture should be adapted to complement individual identity and autonomy which is at the core of human rights. In this case, cultural values and traditions should be adapted to accommodate and respect the rights of women thus eradicating gender-based violence. On the question of the process of exposing culture to

[121] Article 20(3)(a) of the Kenyan Constitution.

[122] *Katet Nchoe v Republic* [2011] eKLR as cited in *Kamau v Attorney General; Equality Now (Interested Parties); Katiba Institute (Amicus Curiae)* [2021] eKLR (Constitutional Petition 244 of 2019); (17 March 2021) para 139.

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new ideas, Ana-Nai'm's framework on internal discourse is instructive. As pointed out in the foregoing it connotes national level dialogue and debate on the application and implementation of human rights standards. Even then, it is imperative to acknowledge that while seeking to promote the cultural legitimacy of international norms in the domestic cultural values, institutions that are custodians of culture must be at the fore. Mazrui in his analysis of culture confusion alludes to partial conquest in which some custodians of culture have embraced the new cultural value and there is a clash of values within the custodians.[123] Ibhawoh, in his discussion on cultural legitimacy identifies two competing groups at the domestic level, the "conservative paradigm" of cultural legitimacy and the "dynamic paradigm" of cultural legitimacy. He defines the "dynamic paradigm" as women's groups and civil societies that recognise individualism in cultural relations while advocating for positive aspects of culture.[124] Conversely, the "conservative paradigm" is defined as "male dominated urban elites" who propagate collective and definitive gender roles as the notions of African culture and the retention of cultural domination in the private spheres.[125] Revisiting the judicial and legislative approaches to the tension between dominant cultural traditions and international human rights standards in the prohibition of gender-based violence, it is possible to draw inferences of Parliament as representing this "conservative paradigm" and as the drivers of the cultural confusion. Pointedly, Parliament makes laws which the judiciary interprets, thus bringing to the fore the complexity of infusing cultural traditions with human rights standards. This then poses the question of what should Kenya do in the face of this "conservative paradigm" and as demonstrated in the context of marital rape? Ibhawoh makes a case for cross-paradigmatic dialogue that is, internal dialogue between the two cultural paradigms,[126] similar to Ana-Nai'm's call for internal discourse. This approach makes reaching consensus on how and what culture can be mobilised to support human rights, possible. In the context of marital rape, this proposition suggests that the cross-paradigmatic dialogue would explore and build consensus on the aspects of individual autonomy for women that should be protected within the family unit. The proposition also suggests the state obligation to carry out educational and sensitisation programmes on universal human rights standards on the prohibition of gender-based violence, including to legislators.

On positive culture, as already discussed above, both the African Charter and the Maputo Protocol refer to positive culture. The Maputo Protocol, in its provision on the right to a positive cultural context, implies a context in which women participate in the determination and formulation of cultural policies at all levels. It is imperative to note that the Maputo Protocol's overarching aim is to eliminate all forms of discrimination and harmful practices against women which are grounded on custom and traditional practices. This article argues that by giving women agency to determine and formulate cultural

[123] Mazrui *A Triple Heritage* 240.
[124] Ibhawoh (2000) *Human Rights Quarterly* 850.
[125] 850.
[126] 855.

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policies, the Maputo Protocol reinforces the individual autonomy of women above group and communal interests. In addition, and borrowing from the case analysis in part 4, the Court in *Kamau* thrust aside the petitioner's argument on ethnic and cultural identity and upheld equality, human dignity and freedom of individuals. Viewed from these perspectives it is plausible to associate positive African culture with aspects of culture that uphold equality, human dignity and freedom for women thus subordinating communal values to the individual rights of women.

Finally, on egalitarian values, the starting point is to reiterate that while African values and culture give greater primacy to group identity, they do not deny individual identity which speaks to the autonomy of the individual. Drawing from the UDHR, human rights are grounded on equality, dignity and freedom.[127] In the judicial approach, upholding individual dignity, equality and freedom is a recurring theme. Pointedly, culture also gives primacy to these values. For instance, cultural life is linked to the idea of human dignity, it is about self-identification without which human beings would be stripped off the self. The Committee on Economic, Social and Cultural Rights General Comment 21 also links participation in cultural life to human dignity. This illustrates that culture embodies within in it, values on which human rights standards are based. These common values should be harnessed to counter gender-based violence.

6 Conclusion

This article addressed the broad area of implementation of human rights standards at the national level with a focus on institutionalised forms of gender-based violence and the cultural contestations that impede implementation. The article proceeded from the premise that there exists tension between human rights standards and dominant cultural traditions on gender and these impede implementation of human rights standards on the prohibition of gender-based violence at a national level. The primary argument made in the article is on the need to mobilise positive aspects of culture to confer social legitimacy on human rights standards thus bridging the gap between human rights norms and implementation. Examining the legislative and judicial approaches, the article has demonstrated how Kenyan courts and Parliament have addressed the tension between culture and constitutional human rights standards. While the courts have upheld constitutional norms without discarding African culture, Parliament has been inclined towards the protection of dominant cultural values. In conclusion, the article advocates for tapping into the dynamism of African culture to infuse in it positive culture which gives primacy to women's individual autonomy and rights anchored on the overarching values of equality, human dignity and freedom. The article also points to the need for internal dialogue within society, particularly with legislators to build consensus on aspects of culture that can be mobilised to support norms prohibiting gender-based violence against women.

[127] Article 1 of the UDHR.

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