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FOREWORD

This special edition of the *Stellenbosch Law Review* is a product of the conference titled: *The Responsiveness of the African Human Rights System to Sexual and Gender-Based Violence*, hosted in September 2021 by the Faculty of Law, University of Stellenbosch in partnership with the Centre for Human Rights, University of Pretoria to commemorate the centenary of the Faculty of Law, University of Stellenbosch and the 30th edition of the African Human Rights Moot Competition.

The conference presented two main themes. The first focused on cisgender women and sexual and gender-based violence ("SGBV") while the second focused on SGBV and diverse gender identities and expressions. The research presented at the conference and included in this special edition was/is presented at a time when the African continent is witnessing a scourge of SGBV against diverse women intensified, by the COVID-19 pandemic. In this regard, the conference presenters and the authors of the contributions to this special edition offer their critique of the effectiveness and responsiveness of the different mechanisms present in the African human rights system, to recommend how the system can be improved to (better) respond to SGBV.

It is important to acknowledge, at the outset, that terminology, labels, and descriptions matter. In exploring different aspects of SGBV from a legal perspective we unavoidably conform to language that in some instances forces individuals into categories and, as expressed by Snyman and Rudman, makes static what might be fluent. Research in this regard is an educational journey, for the reader but also for the author. Diversity is a central theme in this special edition, and this should be understood as signalling inclusiveness and open-endedness.

SGBV is violence that is meted out on an individual because of their perceived gender or gender identity/expression. It incorporates physical, sexual, psychological, and economic violence among others. It disproportionately affects women and girls, with one in every three women having suffered some form of SGBV in their lifetime.* Individuals whose gender identity does not fit into individuals whose gender identity does not fit into society's binary and fixed perception of "male" and "female" are also regularly victims of SGBV. As repeated throughout this special edition, SGBV towards cisgender women and gender diverse persons is the result of unequal power relations and deep-rooted patriarchal structures that stereotype women and gender diverse individuals as inferior. As presented in this special edition, the prevalence of SGBV against cisgender women, transgender women and gender diverse persons brings to the fore the importance of legal and judicial systems that work to protect the rights of the individuals most affected by SGBV at domestic, sub-regional and continental levels.

* UN Women <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (accessed 01-03-2022).

In his opening address, the Chancellor of Stellenbosch University, former Constitutional Court justice and renowned LGBTI+ activist, Justice Edwin Cameron, closely connected the two themes of the conference, explaining that anti-queer attitudes on our continent are linked to the oppression of women. He pointed out that gender equality is indispensable to human flourishing, to human rights, to democracy, and to the rule of law and that SGBV, in all its forms, damages our pursuit of these. SGBV, the Chancellor went on to say, promotes a heteronormative society and perpetuates patriarchy which strips dignity and rights from women, girls, lesbian, gay, bisexual, transgender, intersex, and queer/questioning persons. In her opening address, Ms Liberty Matthyse, the Executive Director of Gender DynamiX, the first and oldest Africa-based NGO to focus solely on trans and gender diverse communities, passionately spoke about the need to protect transgender persons from the plight of SGBV and the marginalisation of trans and gender diverse communities across the continent. Together their statements reaffirmed the core of the conference theme and thus this special edition, that all persons, self-identifying as women or perceived by society as women are at a heightened risk of experiencing SGBV and therefore we must take every opportunity to find innovative ways to reduce this risk and in doing so we must listen to the voices of *all* women.

The prohibition of violence against women ("VAW") is clearly articulated in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"). Article 3 implores member states to adopt and implement measures to protect women's right to dignity and protect them from all forms of violence "particularly sexual and verbal violence". Article 4 provides that "[e]very woman shall be entitled to respect for her life and the integrity and security of her person". As discussed by Snyman and Rudman in their contribution, the Maputo Protocol importantly defines women according to "gender" and not "sex" thus making sure that transgender women and diverse women, as referred to in the contribution by Shoko, Vermaak and Rudman are also protected.

The African Commission on Human and Peoples' Rights ("African Commission") has created a specific mandate on women's rights, and continuously adopts soft law that augments the instruments on the protection of women and girls. Some of these relevant soft laws are the Guidelines on combating sexual violence and its consequences in Africa (the "Niamey Guidelines"), as discussed by Durojaye and Lawal in their contribution, as well as Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation and gender identity ("Resolution 275"), as discussed by Shoko, Vermaak and Rudman.

This special edition contains seven articles and commences with a novel take on SGBV-related data presented by Vollmer and Vollmer. Their contribution sets the stage by examining the responsiveness of the African human rights system to SGBV from a collaborative framework combining both legal and computational methodologies. This novel, alternative lens is proposed by the authors to address the need for urgent attention to the increasing SGBV

and other human rights violations of persons based on their real or perceived sexual orientation, gender identity and expressions, and/or sex characteristics, because, as argued by Vollmer and Vollmer, current research has not yet fully understood the reasons for the enduring gap between the norms and their implementation.

In further analysing the continental system, the contribution, by Kariseb, assesses the responsiveness of the mechanism of the Special Rapporteur on the Rights of Women in Africa ("SRRWA") in combating VAW. In this regard, the author argues that the mechanism of the SRRWA has taken up the challenge of contributing, in a substantive manner, to norms development relating to VAW.

The following contribution by Snyman and Rudman, as alluded to above, analyses Article 1 of the Maputo Protocol where "women" are defined as "persons of the female gender". Notwithstanding this definition, transgender women, persons whose gender is female but who were assigned male at birth, are yet to be recognised or protected under the Maputo Protocol. They argue that transgender women are frequently misidentified as homosexual men and that widespread criminalisation of homosexuality on the African continent, regularly leads to their discrimination, stigmatisation, and subjects of violence. Snyman and Rudman utilise a teleological approach to treaty interpretation, together with postmodern intersectional feminist legal theory and queer legal theory as well as fundamental principles of international human rights law such as dignity, equality and non-discrimination to continuously argue for the inclusion of transgender women under the Maputo Protocol.

Following the analysis of different aspects of the continental protection in the first three contributions, Durojaye and Lawal present the first of four engagements with SGBV on the national level. In their contribution they argue that domestic violence and sexual harassment are two of the major factors that deprive women of access to the formal labour market; and thus, dealing with sexual harassment in the workplace remains a challenge. They argue that the adoption of the Niamey Guidelines by the African Commission is both a necessary and timely response to combat issues of sexual violence including sexual harassment in Africa. Against this backdrop, using Nigeria as a case study, they examine the importance of the provisions of the Niamey Guidelines in addressing sexual violence, including sexual harassment.

In continuing with the important national perspectives, Kuria and Maranya, examines the complex issue of legal gender recognition of intersex, transgender, and gender diverse persons. Their research reveals that SGBV against intersex, transgender, and gender diverse persons in Kenya is intricately conjoined with a lack of social-cultural and legal recognition of their gender identities. This exclusion, they argue, engenders social and cultural segregation, arbitrary arrests and harassment by state actors, and pervasive societal violence. Kuria and Maranya further argue that notwithstanding the growing use of public interest litigation, as a mechanism for pursuing the goals of legal recognition and social, economic and political emancipation of intersex, transgender, and gender diverse persons in Kenya, there is scant improvement in policy and practice in Kenya.

The contribution by Shoko, Vermaak and Snyman and Rudman interrogates the lived realities of diverse women in Zimbabwe in terms of how the police

respond when they report cases of SGBV. Using qualitative data, the authors interrogate institutional practices questioning the alignment of laws and actions to the Zimbabwean Constitution. As supported by the findings of Snyman and Rudman, the research shows that the reluctance of the police to efficiently and appropriately engage with SGBV cases reported by diverse women is encouraged by the homophobic context in which these take place and that the ability of the police to provide justice to diverse women who experience SGBV can be strengthened by repealing the laws that criminalise same-sex relations and sodomy and by implementing regional human rights law as interpreted through Resolution 275.

In returning to the Kenyan context, Kabata, in further engaging with the meaning and importance of culture in tackling SGBV in the final contribution, addresses cultural contestation and cultural adaptation in relation to the national implementation of international human rights standards on SGBV. She 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. Applying doctrinal research methodology, Kabata analyses case law on female genital mutilation and legislative initiatives on the prohibition of marital rape to identify and distil the judicial and legislative approaches on the interplay between the prohibition of SGBV norms and culture. Based on this, she makes a case for drawing on the positive aspects of African culture in state responses to SGBV.

It is the hope that the conference, which drew participants from a diverse audience of academics and practitioners from across the continent and beyond, together with this special edition will contribute to further discussions on how we can combat SGBV against *all* women and girls. It is furthermore the hope that this contribution will shine a light on the close relationship between cisgender women's plights and diverse women's vulnerabilities as sufferers of the worldwide patriarchal system. It is evident from the research presented that any person not able to fit into the narrow male heteronormative standard that controls all aspects of human life, be it as a cisgender woman, a transgender man or woman, a lesbian woman, a gay man, an intersex person, or a bisexual person, will face challenges different to those of heterosexual men. Importantly, the lived realities that are presented in some of the contributions to this special edition also factor in some intersectional identities such as being African, poor or an employee.

SGBV has an impact on an individual's rights to peace, bodily integrity, liberty, life, health and human dignity among others. It is well established that SGBV hinders development as it prevents the victim from fully participating in economic activities, causes the victim to withdraw from social and political participation and thus perpetuates the cycle of poverty and exclusion.[1] SGBV

[1] World Bank "Violence against women and girls resource guide" (2014) *World Bank* <https://documents1.worldbank.org/curated/en/135811611148441047/pdf/Violence-Against-Women-and-Girls-Resource-Guide-Transport-Brief.pdf> (accessed 01-03-2022).

in the workplace and in educational spaces also impacts the economic growth of nations, as victims are hindered from fully contributing their expertise. It has both a physical and psychological impact on the individuals who experience it and must come to an immediate end.

Prof Annika Rudman & Susan Mutambasere
1 March 2022, Stellenbosch/Pretoria

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GLOBAL PERSPECTIVES OF AFRICA: HARNESSING THE UNIVERSAL PERIODIC REVIEW TO PROCESS SEXUAL AND GENDER-BASED VIOLENCE IN SADC MEMBER STATES

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Abstract

This article examines the responsiveness of the African human rights system to sexual and gender-based violence ("SGBV") from a collaborative framework combining both legal and computational methodologies. This alternative lens is proposed to address the need for urgent attention to the increasing SGBV and other human rights violations of persons based on their real or perceived sexual orientation, gender identity and expressions, and/or sex characteristics ("SOGIESC"), as current research has not yet fully understood the reasons for the enduring gap between the norms and their implementation. Primarily, the focus of this research provides an intersection of the (un)responsiveness of the African human rights system to SGBV and the (in)adequacy of state responses to SGBV, including laws and practices that exacerbate SGBV, with a focus on the Southern African Development Community ("SADC").

The Universal Periodic Review ("UPR"), under the auspices of the United Nations Human Rights Council, was used to determine to what extent African states recognise and articulate positions on SGBV – results of which were used to assess further support through human rights mechanisms under the African human rights system. This article considers the international human rights record of African states on the issues of SGBV SOGIESC-based discrimination and violence. Through a systematic evaluation of the UPR record, the work presented here provides a framework for developing recommendations and/or observations for an integrated approach to advancing SOGIESC rights under the African human rights system. An artefact of the work is the development of a preliminary computational software program that was demonstrated to have captured trends in the aforementioned information with increased efficiency, potentially lowering costs and increasing accessibility.

Keywords: *sex and gender-based violence, Maputo Protocol, Universal Periodic Review, African human rights system, natural language processing, data mining, pattern recognition*

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1 Introduction

Quantifying and assessing the extent of human rights violations remains a challenge for human rights defenders, legal professionals, and other individuals and organisations seeking to hold states accountable. Difficulties are encountered in both the breadth of infringements and the resources required to track and analyse such violations. Developing tools that can be used to identify and track instances of violations more easily, including improvements or regressions, is increasingly important in the age of data. Violations of the rights of women and girls,[1] as well as sex and gender-based violence ("SGBV") perpetrated on the basis of sexual orientation, gender identity and expressions, and/or sex characteristics[2] ("SOGIESC"), remains high across the globe.[3] The Special Rapporteur on the Rights of Women in Africa, recognising the effects of the COVID-19 pandemic, recently stated that women "continue to suffer from gender inequality, discrimination and all forms of gender-based violence including Female Genital Mutilation and early and unwanted pregnancies which have been exacerbated during the advent of COVID-19".[4]

The Universal Periodic Review ("UPR"), established along with the Human Rights Council ("HRC") in 2006,[5] remains a unique mechanism for tracking global progress on the realisation and protection of human rights by United Nations ("UN") Member States. Under the auspices of the HRC, the UPR, currently undertaking its third cycle, is a peer review mechanism to "prompt, support, and expand the promotion and protection of human rights on the ground",[6] by reviewing the human rights records of every UN member state during each four- and half-year cycle. Reviews are conducted through a meeting of the UPR Working Group, consisting of the current members of the HRC, with discussions, questions, comments, and recommendations open to all UN Member States. The UPR Working Group reviews: (i) information provided by the state under review; (ii) reports provided by independent human rights experts and groups; and (iii) information from stakeholders, including national human rights institutions and non-governmental organisations.[7]

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1 The authors explicitly intend for the "woman" and "women" signs to include all persons whose gender identity and expression includes identifying as a "woman" or "girl".

2 Please note the authors' intentional use of "SOGIESC", "SOGI" and/or "SOGIE" is context-specific and meant to correspond with the use or non-use of the respective terms by reviewed and reviewing states during the UPR cycle.

3 Note that SGBV is used throughout this paper and includes references to gender-based violence, VAW, violence against girls, and all violence based on sex or gender.

4 Honourable Commissioner Maria Teresa Manuela, Special Rapporteur on the Rights of Women in Africa, "Statement of the Special Rapporteur on the Rights of Women in Africa on the occasion of Pan African Women's Day" (31 July 2021).

5 The Human Rights Council was established by UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251. The UPR was created as a standalone mechanism by the HRC through the institution building resolution HRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1 with further articulation of the basis, principles and objectives of the UPR and its processes through HRC Dec 6/102 (27 September 2007) HRC/Dec/6/102, HRC Res 16/21 (25 March 2011) UN Doc A/HRC/RES/16/21, and HRC Dec 17/119 (17 June 2011) UN Doc A/HRC/DEC/17/119.

6 HRC "Basic facts about the UPR" (undated) *United Nations Human Rights Council* <https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (accessed 30-06-2021).

7 HRC "Basic facts about the UPR" (undated) *United Nations Human Rights Council*.

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The UPR assesses human rights obligations and adherence to the UN Charter,[8] the Universal Declaration of Human Rights,[9] human rights treaties ratified by the state, voluntary human rights pledges and commitments made by the state, and applicable international humanitarian law. Every state is subject to a review of its human rights record and, unlike UN treaty bodies, the UPR process allows for a uniquely broad assessment and overview of the entirety of human rights obligations of UN Member States in a mechanism that is arguably more equal and equitable.

In the African context, where states have ratified the African Charter on Human and Peoples Rights (the "ACHPR"),[10] the Protocol to the ACHPR on the Rights of Women (the "Maputo Protocol"),[11] and the Southern African Development Community ("SADC") Protocol on Gender and Development (the "SADC Protocol"),[12] these human rights instruments are further sources of obligations under the UPR. Article 4 of the Maputo Protocol offers a point of departure for analysing SGBV against women.[13] Article 4(1) of the Maputo Protocol provides that every woman shall be entitled to respect for her life and the integrity and security of her person. Articles 4(2)(a), (b), and (c) provide that state parties are to enact and enforce laws to prohibit and eradicate all forms of violence against women ("VAW") and to identify the causes and consequences of VAW and to take appropriate measures to prevent and eliminate such violence. The protection against violence on the basis of SOGIESC continues to find expression in Resolution 275 adopted by the African Commission on Human and Peoples' Rights in 2014.[14] Resolution 275 recognises the intersecting issues associated with countering violence based on SOGIE, and urges states to "end all acts of violence and abuse … including those targeting persons on the basis of their imputed or real sexual orientation or gender identities".[15] Resolution 275 identifies the need to end acts of violence and abuse and to enact and apply laws and accountability measures for perpetrators of violence. The UPR review provides an effective means to broadly consider whether laws targeting SGBV, inclusive of violence on the basis of SOGIESC, have been enacted in African member states and potentially consider whether such laws are effective in reducing the incidence of such violence.

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8 Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI.

9 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III).

10 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

11 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6.

12 SADC Protocol on Gender Development (adopted 17 August 2008, entered into force 22 February 2013) as amended by the Agreement Amending the SADC Protocol on Gender and Development (adopted 31 August 2016, entered into force 20 August 2018).

13 See DT Vollmer *Queer families: An Analysis of Non-heteronormative Family Rights under the African Human Rights System* LLD dissertation, Stellenbosch University (2017) 244 and 267 where Vollmer argues that Art 3 of the Maputo Protocol can be used to advance the rights of, *inter alia*, trans women.

14 African Commission on Human and Peoples' Rights "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" (adopted at the 55th Ordinary Session, 28 April-12 May 2014) ("Resolution 275").

15 Resolution 275.

https://doi.org/10.47348/SLR/2022/i1a1

2 Methodology and limitations

2 1 Computational methodology

Natural language processing[16] ("NLP") is a computational methodology within the artificial intelligence ("AI") framework. NLP systems are specifically developed to extract meaning from, and identify the patterns of, language in a similar way to which a human mind uses and understands vocal and textual manifestations of language. In carrying out the analysis introduced under section 1, an existing toolkit was customised and trained to read the formal documents of the UPR's digital library.[17] Selected texts were obtained through the authors' own automated computational program that downloaded a selection of publicly available UPR documents of interest from SADC states,[18] and using the developed NLP system, extracted meaningful information on SOGIESC-related SGBV. The process by which an NLP system "understands" the available text is through the structuring of unstructured data. By assigning, or tagging, the text into constituent parts through entity identification or word patterns,[19] the system is able to identify selected keywords, patterns, context, tense, and, depending on the internally defined code-structures,[20] a number of additional complex linguistic methods of natural language understanding.

2 2 Categorisation of document text

The keywords indicated in Table 1 below were used to guide the research and focus the report summaries generated by the model. A number of keyword substitutions were first assigned to generalise the system such that variations in terminology were considered within the same context, such as documents where hyphens are used or where alternative wording is presented. Further, condensing the keywords list to SGBV and adjacent contexts provided a consistent basis to evaluate the UN Member States of interest using a common baseline.

[16] Not to be confused with neuro-linguistic programming.

[17] The Natural Language Toolkit ("NLTK") is an open-source Python library for natural language processing. Required reference: S Bird, E Klein & E Loper "Natural Language Processing with Python" (2009) *O'Reilly Media Inc.* <http://nltk.org/book> (accessed 10-01-2022).

[18] Web Scraping is a software tool or program designed to gather massive amounts of data from digital sources.

[19] Such as parts of speech (verb, noun etc.), suffixes and prefixes, and stemming and lemmatisation for word roots.

[20] The NLP system itself is built or further customised from a number of mathematical or statistical methodologies depending on the desired context of use – for example, *Markov* Chains assist in parts-of-speech tagging and recurrent neural networks assist in generating appropriate responses.

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Table 1: List of each keyword and its subset

Keywords	Includes
women	women(s), woman(s), female(s), girl(s)
violence	violence, assault(s)(ed)(ing), attack(s)(ed)(ing), abus(e)(es)(ed)(ing)
bisexual	bisexual(s)
gay	gay(s)
gender-based	gender-based, gender based, based on gender
gender-identity	gender-identity, gender identit(y)(ies), gender orientation(s)
homosexual	homosexual(s)(ity), homophobia
intersex	intersex, inter-sex,
lesbian	lesbian(s)
lgbti	lgbti, lgbt, lgb, lgtbi, lgtb
same-sex	same-sex, same sex
sexual-orientation	sexual-orientation(s), sexual orientation(s), sexual identit(y)(ies)
trans	transgender(ed), trans-gender, transsexual(s)

2 3 Summary reports

In total, five primary summary reports were generated for each state and UPR cycle and further refined to highlight any SGBV focus found within the UPR Working Group documents. Excerpts from the preliminary *Botswana Working Group Cycle 1 Reports* are provided below as sample sections for each type of report. First, a unique "subset keywords" list is generated based on which of the aforementioned keywords are represented in the document. The total count of each occurrence is also tracked. Documents that either contain no keywords or where the keywords are referred to in a non-SGBV context, were disregarded.

Report 1: A generated list of identified keywords

Sample Report 1

{"gay": 1, "lesbian": 1, "violence": 4, "sexual": 9, "violence-sexual": 5, "violence-domestic": 12, "same-sex": 9, "women": 28, "homosexual": 3, "sexual-orientation": 5, "sex": 1, "violence-against-women": 1}

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Report 2: A generated shortlist of found keywords and occurrences

Sample Report 2

```
#date            : 20210815
#country         : BOTSWANA
#generated by    : WG1.pdf
#notes           : SGBV keyword counts and scores
============================================================
Root Word          Root Count   Sentence Score
        =>SGBV Keywords
============================================================
sex                          1              51
        sex lgbti same-sex sexual sexual-orientation

violence-domestic      12                48
        violence-domestic violence-domestic violence-domestic violence-domestic
```

The second report generated was used to track which keyword first appears in a paragraph determined of interest. Then, a shortlist of any additional and extended keywords found within the immediate text was generated. A parallel and simplistic ranking system was used to sort the summary content where each additional keyword increases the ranking of the paragraph and where "person keyword"[21] found within the same context as "violence keyword"[22] further increased the ranking. This assisted in sorting the content numerically and textually, where only keywords are identified along with their relative overall presence in the document as ranked comparatively.

Report 3: A generated list of ranked articles and sentences of interest

Sample Report 3

```
#date            : 20210815
#country         : BOTSWANA
#generated by    : WG1.pdf
#notes           : Sentences of interest in UPR Documents
============================================================
Score    Sentence
============================================================
45       18. botswana indicated that it is constructing new prisons and exploring alternative
measures to imprisonment. the delegation confirmed that the law in botswana criminalizes
same-sex sexual activities; however it allows for the registration of civil society
organizations that are not set up to advocate for the rights of lesbians gays and bisexuals
to nonetheless advocate for the rights of such groups.

40       90. on gender issues botswana is currently reviewing its policy on women in
development and it also enacted the violence-domestic act of 2008 and has conducted
gender mainstreaming activities within a number of ministries.

40       11. strengthen the application of the violence-domestic bill and the abolition of the
marital power act (united kingdom); establish a specific timeline for the implementation of
the amendment in the marriage act (norway); take measures to eliminate the persistence of
traditions harmful to the rights of women including early contract marriage and polygamy
(argentina): and to elevate penal responsibility to the level of international standards and
delete the marital prerogative in customary and religious marriage (cameroon).

29       15. regarding marital violence-sexual it was noted that there are deficiencies in the
existing legislation and this may require the enactment of legislation after due consultation
to prevent violence-domestic the government has embarked on a rigorous public
education campaign that includes radio television print media and kgotla meetings to
educate and sensitize members of the public also on the provisions of the violence-
domestic act the botswana police service has started to employ social workers to provide
counselling and to be responsive to the needs of victims.
```

[21] Note "person keyword": eg, women, transgender, sexual-orientation.
[22] Note "violence keyword": eg, domestic violence, rape, assaulted.

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Next, the generated shortlist of localised context-dependent keywords from the second report was used to populate an associated ranked summary of the fully expanded paragraphs in which the SGBV keywords are found to provide a greater level of detail and context. This is summarised by sample Report 3.

The fourth report is a temporally ordered list of paragraphs within the document that contain at least two keywords and provides a greater sense of a UN Member State's overall focus on sexual and gender-based language. In addition to paragraphs highlighting SGBV, the fourth report also includes those paragraphs where LGBTI language is indicated.[23] Report 4 follows the original order of discussion from the source UPR document rather than list ranked excerpts generated by the model as shown in Reports 2 and 3.

Report 4: A generated list of tagged articles of interest in order of appearance

Sample Report 4

#date : 20210815
#country : BOTSWANA
#generated by : WG1.pdf
#notes : logfile: sentences and root words
==========
****

---
keywords:
violence-domestic => [violence-domestic women]
---
11. strengthen the application of the ***violence-domestic*** bill and the abolition of the marital power act (united kingdom); establish a specific timeline for the implementation of the amendment in the marriage act (norway); take measures to eliminate the persistence of traditions harmful to the rights of *women* including ***early contract marriage*** and polygamy (argentina): and to elevate penal responsibility to the level of international standards and delete the marital prerogative in customary and religious marriage (cameroon).

****

---
keywords:
violence => [violence sexual women violence-sexual]
---
13. continue to incorporate the provisions of the convention on the rights of the child and the african charter on the rights and welfare of the child into national legislation (cuba); take further measures to adopt legislation ensuring the implementation of the convention in particular in the area *violence* prevention and *sexual* exploitation of children (czech republic argentina) and ensure *women* are protected from ***violence-sexual*** (argentina).

****

---
keywords:
homosexual => [homosexual same-sex sexual-orientation same-sex]
---
23. decriminalize ***homosexual*** relations and practices/consensual ***same-sex*** activities between adults (spain netherlands slovakia czech republic canada); and outlaw discrimination on the basis of ***sexual-orientation*** (netherlands)

****

[23] LGBTI is used in the paper to correspond with its use in the UPR. The authors note the limiting use of LGBTI which may not necessarily include all non-heteronormative SOGIESC.

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The final generated report is a numerical output of keyword counts for each SADC state. Included in Report 5 are "total counts" across individual keywords for each UPR cycle. The format allows easy identification of the incidence of SGBV and LGBTI content as compared to other states.[24]

Report 5: A generated list of keyword counts for each cycle

Sample Report 5

BOTSWANA				
Keyword	Cycle 1	Cycle 2	Cycle 3	TOTAL
bisexual	0	1	7	8
gay	1	1	7	9
gender-based	0	3	0	3
gender-identity	0	0	9	9
homosexual	5	1	1	6
intersex	0	0	7	7
lesbian	1	1	7	9
lgbti	0	0	0	0
same-sex	13	12	7	32
sexual-orientation	6	3	8	18
transgender	0	1	10	11
violence-against-women	1	8	3	12
violence-domestic	14	9	1	24
violence-gender-based	0	12	19	31
violence-sexual	6	10	30	46
TOTAL	46	61	116	223

2 4 Limitations

This work is limited in scope by analysing the keywords identified as indicators of SOGIESC-related SGBV in the UPR record. The summary reports are limited to SGBV and LGBTI[25] content in UPR Working Group documents.[26] In addition, the limitation of adequate data analysis suggests that there is a substantial amount of content that can be analysed in numerous ways, in addition to the methods considered herein. As a preliminary report, a conservative computational approach was chosen such that all SADC states

[24] In addition to the five generated reports, a sixth report for mathematical analysis was compiled for isolating general trends across SADC members in SGBV keyword tracking across all cycles of the UPR.

[25] The authors use of the term "LGBTI" is only meant to correspond with the use of that term in the UPR.

[26] UPR documents used include those found within each reporting cycle under the section "Outcome of the Review" and entitled "Report of the Working Group", including any and all Addendum(s) and/or Corrigendum(s).

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could be reviewed within the length constraints of the article. Further, a case study approach to individual states or a much larger and depth-driven trend analysis across all SADC, African and UN Member States may also be warranted. At the time of writing, cycle 3 ("C3") of the UPR was still in progress and therefore comparable analysis for all member states may not be reflected herein.[27]

3 Global perspectives: UPR comments and recommendations for SADC states

3 1 Introduction

This section analyses the SGBV and LGBTI keywords of SADC states, as perceived by the broader global community and UN Member States. This is done by counting and analysing comments and recommendations made by reviewing states during each cycle of the UPR. For each SADC state, a table is provided to quantify the references to the keywords, as tracked over the three cycles. An integrated assessment of the data and excerpts generated by the NLP system identified the relative frequency of specific issues as they relate to the keywords, as well as provided a method to track what, if any, progress had been made on key issues between UPR reviews. In addition, all keywords that identified violence in the context of SGBV were tallied as an *overall* SGBV count for each evaluation.

3 2 SADC states

3 2 1 Angola

Angola ratified the Maputo Protocol on 30 August 2007, prior to its first review, and has ratified the SADC Protocol. Angola has completed three cycles of review under the UPR. A review of the excerpts indicates that the SGBV issues in Angola received widespread recognition throughout the review process of the three UPR cycles. LGBTI keywords were almost non-existent until the third cycle where a relatively high frequency can be observed. The incidence of comments are as follows:

Table 2: Angola

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	45	46	59
Lesbian	0	0	5
Gay	0	0	5
Bisexual	0	0	5
Transgender	0	0	4
Intersex	0	0	4

[27] At the time of publication, two of the three remaining states completed C3 of the UPR. The authors note that identified trends presented in this article remain consistent.

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Same-sex	1	0	3
Sexual orientation	0	0	9
Gender identity	0	0	4
Homosexuality	1	0	0

During cycle 1 ("C1") , numerous states noted widespread SGBV while also commending Angola for actions taken to combat such violence, including a national strategy regarding domestic violence.[28] Italy, Ireland, Slovenia, Norway, and the Netherlands all recommended that Angola enact domestic violence legislation that was before parliament. Stakeholders commented on the lack of specific legislation regarding domestic violence, with the African Commission noting that VAW "is quite widespread".[29] During cycle 2 ("C2"), Angola was commended for adopting and ratifying international human rights instruments and enacting legislation to combat VAW, as recommended in the first cycle. Angola was also recognised for measures taken, since the first cycle, on gender equality and addressing gender-based violence ("GBV"). Recommendations by Canada and the Netherlands indicated a need to fully implement enacted domestic violence legislation. Lacking, in the reports of the first two cycles, are any mentions of the intersecting and specific violence perpetrated against trans individuals. The C3 report is significant for an exponential increase in awareness, responses, comments, and recommendations with respect to SOGI.[30] Specifically, there was increased awareness of violence against LGBTI individuals by Honduras, Ireland, and Norway, each recommending guaranteeing the rights of LGBTI individuals and implementing measures to investigate violence perpetrated on the basis of SOGI, including by investigating allegations and implementing a national action plan to address violence and discrimination based on SOGI.[31] In addition, numerous states welcomed the progress made in combating SGBV. It is noteworthy that the C3 review occurred after Angola amended its penal code to criminalise discrimination based on sexual orientation, commensurate with recommendations in C1.

3 2 2 Botswana

Botswana has completed three cycles of review under the UPR but is not currently a signatory to the Maputo Protocol; however, on May 10, 2017, prior to its third review, acceded to the SADC Protocol. SGBV issues received extensive comments and recommendations during Botswana's three reviews. In addition, Botswana received a relatively higher incidence of comments and recommendations on trans issues. A review of the excerpts extracted by

[28] HRC *Report of the Working Group on the Universal Periodic Review* (24 March 2010) UN Doc A/HRC/14/11.
[29] HRC *Summary of Stakeholder's Information* (6 November 2009) UN Doc A/HRC/WG.6/7/AGO/3.
[30] The use of "SOGI" corresponds to its use in the UPR.
[31] HRC *Report of the Working Group on the Universal Periodic Review* (Angola) (11 December 2019) UN Doc A/HRC/43/11 para 146.69, comments of Ireland.

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the NLP system indicates that three of them were not linked to other LGBTI keywords, suggesting increased attention to trans rights by reviewing states. The NLP system indicates that the use of "transgender" is not limited to broad comments and recommendations on the typically expressed recommendations to prohibit discrimination based on SOGI as it has a higher frequency than "lesbian" or "gay". This indicated a need to further consider the third cycle excerpts to better understand the focus on trans issues during this cycle. The incidence of comments are as follows:

Table 3: Botswana

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	21	39	53
Lesbian	1	1	7
Gay	1	1	7
Bisexual	0	1	7
Transgender	0	1	10
Intersex	0	0	7
Same-sex	13	12	7
Sexual orientation	6	3	9
Gender identity	0	0	9
Homosexuality	5	1	1

During the first review, numerous states welcomed action on addressing SGBV, including creating a criminal offence for domestic violence. The United Kingdom noted the limited capacity of law enforcement to adequately respond to domestic violence, with Ireland and the Centre for Human Rights of the University of Pretoria further noting that domestic violence continues to be "pronounced" in Botswana.[32] The rights of LGBTI individuals was considered by several countries and stakeholders,[33] with several noting that homosexuality remained criminalised with corresponding recommendations to decriminalise consensual same-sex relations and prohibit discrimination based on SOGI. During the second review, Botswana remarked on the implementation of SGBV legislation, public education initiatives, and the establishment of an SGBV referral system to support collaboration among service providers for survivors and perpetrators.[34] The only mention of "transgender" occurred from the recognition of the continued and widespread violence against the LGBTI community.[35] The third review provides a positive

[32] HRC *Report of the Working Group on the Universal Periodic Review* (Botswana) (13 January 2009) UN Doc A/HRC/10/69 and HRC *Summary Prepared by the Office of the High Commissioner for Human Rights* (Botswana) (15 September 2008) UN Doc A/HRC/WG.6/3/BWA/3.

[33] HRC *Summary Prepared by the Office of the High Commissioner for Human Rights* (Botswana).

[34] HRC *Report of the Working Group on the Universal Periodic Review* (Botswana) (22 March 2013) UN Doc A/HRC/23/7

[35] See comments by the Netherlands in HRC *Report of the Working Group on the Universal Periodic Review* (Botswana) (22 March 2013).

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development for trans rights in Botswana, as the increased frequency of the keyword "transgender" followed a court decision enabling trans individuals to change the listed gender on their national identification documents.[36] Other recommendations and comments on trans rights included those of other LGBTI individuals, calling for their protection by prohibiting discrimination based on SOGI and decriminalising same-sex relations.

3 2 3 Comoros

Comoros ratified the Maputo Protocol on 18 March 2004, prior to its first review under the UPR, and is not a party to the SADC Protocol. The below table denotes an increase in recommendations and comments on SGBV issues over the three cycles. Mentions of "trans" issues evidently correspond with broader comments on LGBTI individuals. Comoros has completed three cycles of review under the UPR. The incidence of comments are as follows:

Table 4: Comoros

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	7	25	62
Lesbian	0	0	2
Gay	0	0	2
Bisexual	0	0	2
Transgender	0	0	2
Intersex	0	0	2
Same-sex	1	0	2
Sexual orientation	0	3	6
Gender identity	0	2	2
Homosexuality	0	2	0

During the first review, France and the Netherlands recommended that Comoros take further steps to address SGBV and provide awareness campaigns and policies to prevent violence and protect victims. Comoros indicated that homosexuality was a "taboo" subject, but it was not condemned by the courts except in cases of rape.[37] The Czech Republic recommended that Comoros review the criminalisation of consensual same-sex activity and promote tolerance. During the second review, there was an increase in the frequency of SGBV keywords, with a portion attributable to progress made by Comoros, including adopting SGBV legislation.[38] However, it was noted that levels of

[36] See comments of Canada and the United States in HRC *Report of the Working Group on the Universal Periodic Review* (Botswana) (11 April 2018) UN Doc A/HRC/38/8.

[37] HRC *Report of the Working Group on the Universal Periodic Review* (Comoros) (3 June 2009) UN Doc A/HRC/12/16 para 56 (translated from the original French). Note that the authors are unable to determine whether "l'homosexualité n'est pas condamnée par la justice" indicates *de facto* decriminalisation of homosexuality or non-enforcement of criminal penalties by the courts.

[38] HRC *Report of the Working Group on the Universal Periodic Review* (Comoros) (7 April 2014) UN Doc A/HRC/26/11.

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SGBV remained high and victim protections continued to be lacking. With respect to the rights of LGBTI individuals, France recommended repealing all provisions which discriminated based on SOGI. Comoros indicated that homosexuality remained criminalised under its penal code and there lacked a legislative majority supportive of decriminalisation. In this regard, Spain recommended initiating a debate on decriminalisation. It can be inferred that the recommendation from the Czech Republic during the first cycle was not acted upon. During the third review, there was a noticeable increase in the frequency of the SGBV keywords. Significantly, the third review provides the first comments and recommendations on trans specific rights. Chile, in the context of violence and discrimination, recommended that Comoros strengthen measures to prevent violence and discrimination against members of the LGBTI community.

3 2 4 Democratic Republic of Congo

The Democratic Republic of Congo ratified the Maputo Protocol on 9 June 2008, prior to its first review, and is a signatory to the SADC Protocol. The below table indicates an extremely high frequency of SGBV issues. The incidence of SGBV is the highest out of all SADC states examined. A review of the excerpts generated by the program indicates that comments and recommendations were linked to widespread SGBV in relation to ongoing armed conflicts, as well as recognition of progress to eliminate SGBV and hold perpetrators accountable. The table also indicates that there was an increase in recommendations and comments on LGBTI issues by C3. The incidence of comments are as follows:

Table 5: Democratic Republic of Congo

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	88	120	82
Lesbian	0	0	1
Gay	0	0	1
Bisexual	0	0	1
Transgender	0	0	1
Intersex	0	0	0
Same-sex	1	0	1
Sexual orientation	0	0	3
Gender identity	0	0	3
Homosexuality	0	0	0

A review of the excerpts from C1 indicates that comments and recommendations regarding SGBV include support for legislation on sexual violence and an announced zero-tolerance policy towards sexual violence, with several countries remarking on the lack of enforcement and implementation

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of existing legislation.[39] Of note is the sole mention of a non-heteronormative keyword in the Czech Republic's recommendation to decriminalise consensual same-sex activities as mentioned in the list of recommendations that were not supported by the Democratic Republic of Congo.[40] The Democratic Republic of Congo's second review lacks any mention of non-heteronormative keywords but shows an increase in the frequency of SGBV keywords. The second report indicates that the Democratic Republic of Congo implemented an action plan to reduce SGBV, which had been recommended during the first review.[41] As a result of the continued high levels of SGBV, many reviewing states recommended an increase in efforts to combat SGBV and ensure that perpetrators were held accountable. C3 provides greater recognition of efforts by the Democratic Republic of Congo to combat SGBV.[42] The third cycle also provides a return to raising issues affecting the LGBTI community. Uruguay, Chile, and Iceland all explicitly recommended criminalising discrimination based on SOGI,[43] and Argentina recommended adopting measures to prevent and punish acts of violence against LGBTI individuals. The Democratic Republic of Congo noted these recommendations but did not support them, a position commensurate with its previous rejection of the recommendation to decriminalise consensual same-sex activities during the first cycle.

3 2 5 Eswatini

Eswatini ratified the Maputo Protocol on 5 October 2012, after its first review, and has ratified the SADC Protocol. The below table indicates a relatively high increase in the frequency of SGBV keywords from C1 to C2, as well as a clear decrease in the raising of LGBTI issues. Eswatini has completed two cycles of review under the UPR. The incidence of comments are as follows:

Table 6: Eswatini

Keyword	Cycle 1	Cycle 2
SGBV	11	38
Lesbian	1	0
Gay	1	0

[39] HRC *Report of the Working Group on the Universal Periodic Review* (Democratic Repubic of Congo) (4 January 2010) UN Doc A/HRC/13/8, for examples see comments and recommendations by Canada, Belgium, Belarus, Denmark.

[40] HRC *Report of the Working Group on the Universal Periodic Review* (Democratic Repubic of Congo) (4 January 2010) para 97.10. The summary of comments by the Czech Republic provides that recommendations were made in the area, *inter alia*, of right to privacy and non-discrimination without explicitly stating the recommendation for decriminalisation.

[41] HRC *Report of the Working Group on the Universal Periodic Review* (Democratic Repubic of Congo) (7 July 2014) UN Doc A/HRC/27/5.

[42] HRC *Report of the Working Group on the Universal Periodic Review* (Democratic Repubic of Congo) (5 July 2019) UN Doc A/HRC/42/5.

[43] HRC *Report of the Working Group on the Universal Periodic Review* (Democratic Repubic of Congo) (5 July 2019). See recommendations of Uruguay, Chile, and Iceland. Chile's recommendation includes reference to gay, lesbian, bisexual, and transgender.

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Bisexual	1	0
Transgender	1	0
Intersex	0	0
Same-sex	4	3
Sexual orientation	7	2
Gender identity	3	2
Homosexuality	1	0

During the first review, Eswatini indicated that a draft bill on GBV was pending. As a result, numerous states recommended expediting the enactment of the legislation.[44] The rights of LGBTI individuals were supported by the United States, Spain, and Portugal, each recommending decriminalising same-sex relations and preventing discrimination based on SOGI.[45] Although each recommendation was rejected, Eswatini did indicate it would examine the United States' recommendation to implement measures to combat violence against the LGBTI community. The second review indicates an increase in attention to SGBV by reviewing states, with many states again recommending the enactment and implementation of proposed SGBV legislation.[46] Concerning LGBTI issues, Eswatini indicated that same-sex relations remained criminalised but consensual same-sex relations were not prosecuted.[47] Interestingly, Eswatini stated its support for recommendations on prohibiting discrimination based on SOGI, as it considered them already implemented or in the process of being implemented.[48]

3 2 6 Lesotho

Lesotho ratified the Maputo Protocol on 26 October 2004, prior to its first review, and has ratified the SADC Protocol. The below table indicates a gradual increase in the frequency of SGBV keywords, as well as all non-heteronormative keywords. Lesotho has completed three cycles of review under the UPR. The incidence of comments are as follows:

Table 7: Lesotho

Keyword	**Cycle 1**	**Cycle 2**	**Cycle 3**
SGBV	48	66	86
Lesbian	1	2	6
Gay	1	2	6

[44] HRC *Report of the Working Group on the Universal Periodic Review* (Swaziland) (12 December 2011) UN Doc A/HRC/19/6.

[45] HRC *Report of the Working Group on the Universal Periodic Review* (Swaziland) (12 December 2011). See recommendations of the United States of America, Spain, and Portugal.

[46] HRC *Report of the Working Group on the Universal Periodic Review* (Swaziland) (13 July 2016) UN Doc A/HRC/33/14.

[47] Para 68.

[48] Para 68. See recommendations of Slovenia and Spain.

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Bisexual	1	2	6
Transgender	1	2	6
Intersex	0	1	6
Same-sex	2	1	5
Sexual orientation	0	2	7
Gender identity	0	2	7
Homosexuality	3	2	0

During the first review, comments and recommendations were focused on persistent and increasing incidences of SGBV and the need to enact specific legislation in this regard.[49] With respect to LGBTI rights, the Netherlands indicated that sexual relations between consenting adult men remained illegal, and recommended, along with Australia and France, the decriminalisation of homosexuality.[50] Australia also recommended introducing policies to end discrimination based on SO. Lesotho did not support any of these recommendations. During the second review, Lesotho indicated that it had adopted a national plan on ending GBV and had engaged in government and civil society capacity building and noted that draft SGBV legislation had been referred for further consultation.[51] Many recommendations by reviewing states encouraged the adoption and enactment of the draft legislation. Lesotho also indicated that LGBTI individuals had not been prosecuted and that the government was engaged with the issue. Lesotho did not support any recommendations on decriminalising consensual same-sex relations or enacting measures to combat discrimination based on SOGI.[52] During the third review, Lesotho noted the persistent nature of SGBV and indicated that progress had been made on addressing SGBV, including the development of specific legislation.[53] Lesotho was again encouraged to decriminalise consensual same-sex relations and enact legislation prohibiting discrimination based on SOGI. In this regard, Lesotho supported the recommendation of Costa Rica to take steps to combat SOGI-based discrimination but did not accept recommendations seeking the decriminalisation of homosexuality and specific legislative protections against SOGI-based discrimination.[54] In addition, Lesotho did not support the recommendation of Honduras to criminalise homophobia and transphobia as a means to prevent violence against LGBTI individuals. It is noteworthy that Lesotho supported the

[49] HRC *Report of the Working Group on the Universal Periodic Review* (Lesotho) (16 June 2010) UN Doc A/HRC/15/7.

[50] HRC *Report of the Working Group on the Universal Periodic Review* (Lesotho) (16 June 2010). See comments and recommendations by the Netherlands.

[51] HRC *Report of the Working Group on the Universal Periodic Review* (Lesotho) (13 April 2015) UN Doc A/HRC/29/9.

[52] HRC *Report of the Working Group on the Universal Periodic Review* (Lesotho) (13 April 2015). See recommendations from Slovenia, Australia, Canada, Argentina, Netherlands, and Chile.

[53] HRC *Report of the Working Group on the Universal Periodic Review* (Lesotho) (18 March 2020) UN Doc A/HRC/44/8.

[54] HRC *Report of the Working Group on the Universal Periodic Review* (Lesotho) (18 March 2020). See noted recommendations of Iceland, Mexico, New Zealand, Australia, and Germany.

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recommendation of Costa Rica, recognising the need to combat discrimination while paradoxically rejecting recommendations to prohibit same. This may suggest an encouraging erosion of resistance to promoting and protecting LGBTI rights over the three UPR cycles and the importance of consistently raising SGBV and SOGIESC issues.

3 2 7 Madagascar

Madagascar signed but not ratified, the Maputo Protocol on 28 February 2004, and has signed the SADC Protocol. The table below indicates a gradual increase in the frequency of comments and recommendations on SGBV and a very minimal increase for LGBTI keywords. The excerpts indicate that the increase of SGBV recommendations and comments is attributable to encouraging the adoption of SGBV legislation. Madagascar has completed three cycles of review under the UPR. The incidence of comments are as follows:

Table 8: Madagascar

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	46	78	100
Lesbian	0	0	1
Gay	0	0	1
Bisexual	0	0	1
Transgender	0	0	1
Intersex	0	0	1
Same-sex	0	0	0
Sexual orientation	0	0	2
Gender identity	0	0	2
Homosexuality	0	0	0

During the first review, Madagascar indicated that it had included all forms of VAW in its criminal code, after adopting a national policy for the promotion of women.[55] In this regard, CEDAW and Australia made specific observations on the high prevalence of SGBV. There were no recommendations or comments on the rights of LGBTI individuals and, therefore. During the second review, Madagascar indicated that it intended to further monitor SGBV and adopt a national SGBV action plan.[56] It is noteworthy that several African states made recommendations on SGBV, which may indicate increased attention on the issue at the regional level, and arguably supporting the notion of "action" on SGBV under the African human rights system. There were no specific recommendations or comments regarding LGBTI issues. During the third

[55] HRC *Report of the Working Group on the Universal Periodic Review* (Madagascar) (26 March 2010) UN Doc A/HRC/14/13.

[56] HRC *Report of the Working Group on the Universal Periodic Review* (Madagascar) (23 December 2014) UN Doc A/HRC/28/13.

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review, Madagascar indicated that legislation on SGBV had been submitted for adoption, with many states supporting steps taken to address SGBV.[57] Recommendations from reviewing states that were supported by Madagascar included increased efforts to combat SGBV through the implementation of a national strategy and the adoption of the proposed SGBV legislation. Madagascar noted but did not support any of the recommendations with respect to the rights of LGBTI individuals or prohibiting SOGI-based discrimination.[58]

3 2 8 Malawi

Malawi ratified the Maputo Protocol on 20 May 2005, prior to its first review, and has ratified the SADC Protocol. The below table indicates an increase in the frequency of SGBV keywords as well as an increasing frequency of LGBTI keywords over each of the three cycles. Malawi has completed three cycles of review under the UPR. The incidence of comments is as follows:

Table 9: Malawi

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	34	74	100
Lesbian	1	10	13
Gay	6	10	13
Bisexual	1	10	13
Transgender	1	9	14
Intersex	0	7	13
Same-sex	11	12	9
Sexual orientation	15	7	6
Gender identity	7	5	6
Homosexuality	16	1	0

During the first review, Malawi indicated that perceived increases in SGBV were a result of increases in reporting and not necessarily an increase in the overall prevalence of SGBV. Several states recognised and supported the adoption of specific SGBV legislation.[59] Malawi indicated that it did not intend to decriminalise homosexuality and specifically noted that there was no homophobia or incitement against gay people. In addition, Malawi did not provide any support for recommendations to prohibit discrimination based on SOGI or to decriminalise same-sex relations, including a recommendation by the United Kingdom to review legislation that discriminates against

[57] HRC *Report of the Working Group on the Universal Periodic Review* (Madagascar) (17 December 2019) UN Doc A/HRC/43/13.

[58] HRC *Report of the Working Group on the Universal Periodic Review* (Madagascar) (17 December 2019). See recommendations from Australia, Chile, and Iceland.

[59] HRC *Report of the Working Group on the Universal Periodic Review* (Malawi) (4 January 2011) UN Doc A/HRC/16/4.

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individuals on the basis of SOGI as a means to combat violence.[60] During the second review, Malawi indicated that SGBV legislation was under review, while several states commented on the continued prevalence of SGBV.[61] Malawi also supported recommendations to take effective measures to protect "LGBI" individuals from violence[62] and to guarantee access to health services for LGBTI individuals.[63] Malawi did not support recommendations to decriminalise homosexuality or to prohibit SOGI-based discrimination.[64] During the third review, Malawi was commended for efforts to protect LGBTI individuals from violence; however, concern for ongoing violence and SOGI-based discrimination was also noted.[65] Malawi noted, but did not support, recommendations to decriminalise the SOGIE of trans individuals, as well as recommendations to combat violence against LGBTI individuals.[66] This demonstrates an interesting trend, as seen with Lesotho, of both recognising and rejecting certain SOGIESC and LGBTI rights.

3 2 9 Mauritius

Mauritius ratified the Maputo Protocol on 16 May 2017. Mauritius remains the only SADC state not a signatory to the SADC Protocol. The below table indicates a relatively high frequency of LGBTI keywords in C1 and C3. Mauritius has completed three cycles of review under the UPR. The incidence of comments are as follows:

Table 10: Mauritius

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	50	59	67
Lesbian	1	0	7
Gay	1	0	7
Bisexual	1	0	7
Transgender	1	0	7
Intersex	0	0	5
Same-sex	0	7	6

[60] HRC *Report of the Working Group on the Universal Periodic Review* (Malawi) (4 January 2011). See recommendations from Canada, Germany, Sweden, Australia, United Kingdom, Austria, Italy, United States of America, Spain, Luxembourg, Ireland, France.

[61] HRC *Report of the Working Group on the Universal Periodic Review* (Malawi) (20 July 2015) UN Doc A/HRC/30/5; see comments from Ireland and Canada.

[62] Note that the recommendation did not include "transgender".

[63] Note that the recommendation did not include "transgender". See recommendations from Austria and Honduras.

[64] Note that the recommendation did not include "transgender". See recommendations from Brazil, Chile, Germany, Italy, United States of America, Slovenia, France, Australia, Norway, Argentina, Luxembourg, Netherlands, Sweden, Switzerland, Spain, and Uruguay.

[65] HRC *Report of the Working Group on the Universal Periodic Review* (Malawi) (23 December 2020) UN Doc A/HRC/46/7; see comments from Mexico and the Netherlands respectively.

[66] HRC *Report of the Working Group on the Universal Periodic Review* (Malawi) (23 December 2020). See recommendations from Spain, the United States of America, Canada, Chile, France, Switzerland, Iceland, Ireland, Italy, Netherlands, New Zealand, Norway, Australia, and Portugal.

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Sexual orientation	10	2	10
Gender identity	2	0	8
Homosexuality	4	2	2

During the first review, recommendations to address SGBV were supported by Mauritius.[67] In addition, the United Kingdom commented on discrimination against LGBTI communities and the perceived inability to seek acknowledgement and compensation for discrimination and violence. Mauritius indicated that human rights training is provided to law enforcement and judicial officers concerning the protection of the human rights of LGBTI individuals. In addition, the Czech Republic commended Mauritius for supporting the 2008 joint statement on human rights and SOGI at the UN General Assembly. During the second review, Mauritius noted the enactment of legislation that prohibited discrimination on the basis of sexual orientation.[68] There were no comments or recommendations specific to SOGIESC-based violence; however, Canada inquired as to the status of the decriminalisation of homosexuality with Australia making recommendations on same. Mauritius supported the recommendations of numerous states for continued action on addressing SGBV.[69] During the third review, several reviewing states recommended Mauritius combat all forms of discrimination including on the basis of SOGI.[70] Brazil specifically recommended action to combat SOGI-based violence, Chile recommended that hate crimes motivated by SOGI be an aggravating circumstance, and Iceland recommended the repeal of all laws criminalising persons based on their SOGI.

3 2 10 Mozambique

Mozambique ratified the Maputo Protocol on 9 December 2005, prior to its first review, and has ratified the SADC Protocol. Mozambique has completed three cycles of review under the UPR. The incidence of comments is as follows:

[67] HRC *Report of the Working Group on the Universal Periodic Review* (Mauritius) UN Doc A/HRC/11/28; see recommendations from Malaysia, Germany, Palestine, Pakistan, and Mexico.

[68] HRC *Report of the Working Group on the Universal Periodic Review* (Mauritius) (26 December 2013) UN Doc A/HRC/25/8.

[69] HRC *Report of the Working Group on the Universal Periodic Review* (Mauritius) (26 December 2013). See recommendations from Tunisia, Senegal, Rwanda, Ecuador, Malaysia, Netherlands, Singapore, Spain, United Kingdom, Canada, and the Czech Republic.

[70] HRC *Report of the Working Group on the Universal Periodic Review* (Mauritius) (27 December 2018) UN Doc A/HRC/40/9; see recommendations from Italy, Honduras, Uruguay, Argentina, France, Netherlands, Australia, Belgium, Canada, Ireland, and Argentina.

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Table 11: Mozambique

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	27	41	88
Lesbian	1	2	4
Gay	1	2	4
Bisexual	1	2	4
Transgender	1	2	4
Intersex	0	2	3
Same-sex	2	3	0
Sexual orientation	8	8	7
Gender identity	3	5	7
Homosexuality	3	1	0

During the first review, Canada encouraged Mozambique to eliminate SOGI-based discrimination.[71] Spain recommended decriminalising homosexuality and ensuring the right to association of LGBTI individuals and, along with the Netherlands, recommended enabling the registration of NGOs working on and specialising in SOGI issues. In this regard, Mozambique noted that its constitution made no reference to sexual orientation, that homosexuality is not criminalised, and there are no restrictions on freedom of association. During the second review, Denmark commented on the new penal code decriminalising homosexuality, with Sweden commenting that it did not prohibit SOG-based discrimination;[72] interestingly, this appears inconsistent with Mozambique's remarks during the first review. Australia, Chile, and Sweden all made recommendations for Mozambique to adopt legislation specifically prohibiting SOGI-based discrimination. Argentina recommended specific measures to protect LGBTI individuals, with Canada recommending ensuring non-discrimination for applications for accreditation by civil society organisations including the LGBTI Association of Mozambique. During the third review, Denmark noted that laws prohibiting SOGI-based discrimination had not been adopted, although Mozambique indicated that action had been taken to combat such discrimination.[73] Numerous states commended Mozambique on actions taken to combat SGBV, with several states making recommendations to enact legislation and take further steps to prohibit and combat SOGI-based discrimination and protect the rights of LGBTI persons.[74] Arguably, Mexico made a recommendation that may be ascribed to preventing violence against trans individuals, with a recommendation to guarantee the

[71] HRC *Report of the Working Group on the Universal Periodic Review* (Mozambique) (28 March 2011) UN Doc A/HRC/17/16.

[72] HRC *Report of the Working Group on the Universal Periodic Review* (Mozambique) (12 April 2016) UN Doc A/HRC/32/6.

[73] HRC *Report of the Working Group on the Universal Periodic Review* (Mozambique) (25 June 2021) UN Doc A/HRC/48/6.

[74] HRC *Report of the Working Group on the Universal Periodic Review* (Mozambique) (25 June 2021). See recommendations from Sweden, Spain, Denmark, Iceland, and Netherlands.

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exercise of rights of individuals in vulnerable situations, including transgender persons. As a review that occurred during the COVID-19 pandemic, there are indications of increased incidences of SGBV occurring in the context of the pandemic.[75] However, the full effects of the pandemic will likely not be known until the next cycle.

3 2 11 Namibia

Namibia ratified the Maputo Protocol on 11 August 2004, prior to its first review, and has ratified the SADC Protocol. The table below indicates a relatively high increase in the frequency of SGBV keywords over the three completed cycles. There is also a clear trend of increasing attention to LGBTI keywords, with a large increase between C2 and C3. Namibia has completed three cycles of review under the UPR. The incidence of comments is as follows:

Table 12: Namibia[76]

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	58	68	109
Lesbian	0	4	11
Gay	0	4	11
Bisexual	0	4	11
Transgender	0	5	12
Intersex	0	3	10
Same-sex	4	8	10
Sexual orientation	1	4	10
Gender identity	1	1	9
Homosexuality	4	0	0

During the first review, Namibia noted that its constitution prohibited all forms of discrimination and that no individuals had been prosecuted on the basis of sexual preference or sexual orientation.[77] Namibia also acknowledged that SGBV remained a serious and increasing issue which was echoed by numerous other reviewing states.[78] However, Portugal commented and expressed its concern on discrimination, violence, and punitive acts against homosexuals. In addition, Namibia did not support any of the recommendations on decriminalising homosexuality and adopting legislation prohibiting

[75] HRC *Report of the Working Group on the Universal Periodic Review* (Mozambique) (25 June 2021). See comments of New Zealand and recommendations from Spain, Indonesia, and Malaysia.

[76] Note that the recommendation from Liechtenstein during the third cycle refers to decriminalising sexual acts between consenting adults of the same *gender*.

[77] HRC *Report of the Working Group on the Universal Periodic Review* (Namibia) (24 March 2011) UN Doc A/HRC/17/14.

[78] See comments by Ghana, France, Pakistan, Canada, the United States of America and others.

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SOGI-based discrimination.[79] During the second review, Namibia noted that one of the themes and objectives of its "National Human Rights Action Plan" was the right not to be discriminated against, including enhancing affirmation of the rights of LGBTI persons, having information on the extent of infringements, and enacting non-discrimination legislation.[80] This is a clear departure and positive development from its earlier rejection of similar proposed legislation. Namibia asserted that LGBTI persons were not victimised or persecuted on the basis of their sexual orientation. Although Namibia did not support all recommendations related to LGBTI individuals,[81] it did support recommendations from Honduras on eradicating discriminatory laws and practices and Brazil to adopt measures to combat violence and discrimination based on sexual orientation. It is interesting to note that Namibia supported the eradication of laws that discriminate based on sexual orientation but would not support proactively adopting legislation to prohibit such discrimination. During the third review, Australia and Denmark expressed concerns about discrimination based on sexual orientation and the infringement of the rights of LGBTI persons.[82] In addition, numerous reviewing states again recommended the decriminalisation of consensual same-sex relations and the repealing of laws that discriminate based on SOGI.[83] Malta provided a unique recommendation for Namibia to consider appointing a government diversity liaison officer from the LGBTI community. In one of its recommendations, Finland explicitly recognised the increased need for accessible health services for trans individuals. A review of the NLP system excerpts suggests that by the third cycle there was a growing interest in LGBTI rights and a growing push by many "Western" states for the decriminalisation of homosexuality,[84] a recommendation that had been made since the first cycle.

3 2 12 Seychelles

Seychelles ratified the Maputo Protocol on 9 March 2003, prior to its first review, and has ratified the SADC Protocol. The below table indicates a clear increase in the SGBV keywords. There is also a limited increase in LGBTI keywords, especially the same-sex keyword. Seychelles has completed three cycles of review under the UPR. The incidence of comments is as follows:

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[79] See comments by Ghana, France, Pakistan, Canada, the United States of America and others; see recommendation from Portugal, France, and Spain.

[80] HRC *Report of the Working Group on the Universal Periodic Review* (Namibia) (15 April 2016) UN Doc A/HRC/32/4.

[81] HRC *Report of the Working Group on the Universal Periodic Review* (Namibia) (15 April 2016). See recommendations from Spain, Iceland, France, Argentina, and Netherlands.

[82] HRC *Report of the Working Group on the Universal Periodic Review* (Namibia) (29 June 2021) UN Doc A/HRC/48/4.

[83] HRC *Report of the Working Group on the Universal Periodic Review* (Namibia) (29 June 2021). See recommendations from Uruguay, Denmark, Austria, Austria, Costa Rica, the United States of America, Spain, Canada, Dominican Republic, Finland, France, Germany, Iceland, Ireland, Italy, Liechtenstein, Malta, Mexico, Netherlands

[84] Note: The implications of recommendation and comments on LGBTI issues from "Western" states along with consistent recommendations from specific South and Central American states (Uruguay, Honduras, Argentina, Brazil, Mexico) and how this relates to concepts such as "decolonization" and other privileged understandings of LGBTI rights is beyond the scope of this paper.

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Table 13: Seychelles

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	16	74	100
Lesbian	2	2	6
Gay	2	2	3
Bisexual	2	2	6
Transgender	2	2	5
Intersex	0	1	4
Same-sex	5	6	13
Sexual orientation	6	5	8
Gender identity	1	3	6
Homosexuality	0	0	0

During the first review, Seychelles noted that its constitution prohibited discrimination on any ground, which included sexual orientation, with Australia noting that Seychelles' 1995 Employment Act explicitly prohibited discrimination based on sexual orientation, and France noting that Seychelles supported joint statements made by the HRC in 2011 on ending violence and human rights violations based on sexual orientation and identity.[85] Specific recommendations concerning LGBTI rights included calling for the decriminalisation of same-sex relations and enacting specific legislation prohibiting SOGI-based discrimination.[86] During the second review, Seychelles noted that a review of the penal code was underway, including a review of the section which criminalised same-sex relationships.[87] Seychelles supported all recommendations on LGBTI issues, including recommendations to decriminalise same-sex relations, adopt comprehensive anti-discrimination legislation, and guarantee the rights of LGBTI persons to fully enjoy their human rights.[88] During the third review, there was a clear increase in the frequency of the same-sex keyword. A review of the NLP system excerpts indicates this is largely a result of the decriminalisation of same-sex relations and the numerous commends commended Seychelles for its actions.[89] In addition, Seychelles noted the approval of a "Law Reform Commission" which would consider SOGI matters including marriage equality. Recommendations from Spain included enacting amendments to legislation and introducing policies to eliminate persistent social discrimination and *violence* against LBT women. These recommendations

[85] HRC *Report of the Working Group on the Universal Periodic Review* (Seychelles) (11 July 2011) UN Doc A/HRC/18/7.

[86] HRC *Report of the Working Group on the Universal Periodic Review* (Seychelles) (11 July 2011). See recommendations from Canada, Australia, Norway, France, and Spain.

[87] HRC *Report of the Working Group on the Universal Periodic Review* (Seychelles) (8 April 2016) UN Doc A/HRC/32/13.

[88] HRC *Report of the Working Group on the Universal Periodic Review* (Seychelles) (8 April 2016). See recommendations from Netherlands, Italy, the United Kingdom, Australia, France, Chile, Canada, Argentina, and Germany.

[89] HRC *Report of the Working Group on the Universal Periodic Review* (Seychelles) (9 July 2021) UN Doc A/HRC/48/14.

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are echoed in those of Argentina and Australia. It appears, from a review of recommendations, that a more nuanced and specific approach was taken by the third cycle with respect to LGBTI issues considered by reviewing states and is commensurate with the progressive realisation of LGBTI rights.[90]

3 2 13 South Africa

South Africa ratified the Maputo Protocol on 17 December 2004, prior to its first review, and has ratified the SADC Protocol. The below table indicates a relatively high increase in the LGBTI keywords over the three cycles, especially the "same-sex" and "gender identity" keywords during C2. South Africa has completed three cycles of review under the UPR. The incidence of comments is as follows:

Table 14: South Africa

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	20	43	72
Lesbian	1	2	8
Gay	1	2	8
Bisexual	1	2	8
Transgender	0	2	8
Intersex	0	1	9
Same-sex	0	0	0
Sexual orientation	6	20	9
Gender identity	0	11	8
Homosexuality	1	0	0

During the first review, South Africa indicated that there was no specific legislation regarding sexual orientation, but that its constitution prohibits discrimination based on sex and gender.[91] South Africa received recommendations to continue to promote and protect the rights of all persons without discrimination based on sexual orientation and to ensure more accessible remedies to victims of such discrimination.[92] During the second review, South Africa noted recent violence targeting LGBTI persons and indicated that a national task team had been established. South Africa also noted strong judicial admonishment of the so-called "corrective rape" phenomenon perpetrated against identified or perceived lesbians.[93] A review of the NLP system excerpts, from the second review, indicates that the issue of

[90] For a broad overview of the progressive realisation of LGBTI rights under the UN and regional human rights systems see DT Vollmer "Queer Families", chapters 3-5.

[91] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (23 May 2008) UN Doc A/HRC/8/32. It should be noted that section 9(3) of the South African Constitution, 1996 specifically prohibits discrimination based on sexual orientation, as was noted by Belgium.

[92] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (23 May 2008) UN Doc A/HRC/8/32. It should be noted that section 9(3) of the South African Constitution, 1996 specifically prohibits discrimination based on sexual orientation, as was noted by Belgium; see recommendations of the United Kingdom and Belgium.

[93] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (9 July 2012) UN Doc A/HRC/21/16.

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SOGI-based hate crimes and violence remained prevalent.[94] Recommendations on the issue of SOGI-based violence were made by numerous states, each supported by South Africa, except for the recommendation by Slovenia.[95] The C2 excerpts highlight the seemingly specific and extreme levels of violence against LGBTI individuals in South Africa, not observed in any of the other SADC states analysed and captured by the above NLP system generated table. During the third review, South Africa noted actions taken to combat SOGI-based discrimination based; however, although commending such actions, it was noted by some states that there remained persistent levels of violence against LGBTI individuals.[96] Recommendations on LGBTI issues were all supported by South Africa and included strengthening protections for LGBTI individuals against stigmatisation, harassment, and discrimination, the necessity to take urgent action against perpetrators of violence against LGBTI individuals, and ensuring better monitoring and reporting of such violence.[97]

3 2 14 Tanzania

Tanzania ratified the Maputo Protocol on 3 March 2007, prior to its first review, and has ratified the SADC Protocol. The below table indicates a relatively low frequency of LGBTI keywords over the two cycles. Tanzania has completed two cycles of review under the UPR. The incidence of comments is as follows:

Table 15: Tanzania

Keyword	Cycle 1	Cycle 2
SGBV	62	103
Lesbian	1	2
Gay	1	2
Bisexual	1	2
Transgender	1	2
Intersex	0	2
Same-sex	1	1
Sexual orientation	2	1
Gender identity	1	0
Homosexuality	1	3

[94] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (9 July 2012). See comments by New Zealand, Slovenia, the United Kingdom, the United States of America, Belgium, France, Finland, and Norway.

[95] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (9 July 2012). See recommendations from Slovenia, Uruguay, Argentina, New Zealand, Denmark, Netherlands, the United Kingdom, Canada, Austria, Finland, the United States of America, and Belgium.

[96] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (18 July 2017) UN Doc A/HRC/36/16. See comments by Netherlands, and the United States of America.

[97] HRC *Report of the Working Group on the Universal Periodic Review* (South Africa) (18 July 2017) UN Doc A/HRC/36/16. See comments by Netherlands, and the United States of America. See recommendations from the United States of America, Chile, Belgium, Argentina, Israel, and Netherlands.

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During the first review, Tanzania noted that homosexuality was both criminalised and against its traditional, cultural, and religious rights.[98] Slovenia noted its concern as to the ongoing criminalisation of consensual homosexual relationships. Tanzania did not support any of the recommendations on protecting the rights of LGBTI persons, adopting legislation to prohibit SOGI-based discrimination, or decriminalisation consensual relationships.[99] During the second review, Tanzania again noted that homosexuality remained illegal.[100] Canada recommended the implementation of the "National Human Rights Action Plan" as well as an end to attacks, abuses, and discrimination against LGBTI individuals. Chile and Uruguay recommended the decriminalisation of homosexuality.[101] It is noteworthy that Norway specifically recommended the implementation of the Maputo Protocol into national legislation, including provisions on women's rights to medical abortions – this recommendation was rejected.

3 2 15 Zambia

Zambia ratified the Maputo Protocol on 2 May 2 2006, prior to its first review, and has ratified the SADC Protocol. The below table indicates a relatively low and consistent incidence of LGBTI keywords, although there is a general trend of increased frequency. Zambia has completed three cycles of review under the UPR. The incidence of comments is as follows:

Table 16: Zambia

Keyword	Cycle 1	Cycle 2	Cycle 3
SGBV	15	51	58
Lesbian	0	1	5
Gay	1	1	5
Bisexual	0	1	5
Transgender	0	1	5
Intersex	0	0	4
Same-sex	5	3	5
Sexual orientation	1	5	5
Gender identity	1	2	4
Homosexuality	0	1	1

[98] HRC *Report of the Working Group on the Universal Periodic Review* (Tanzania) (8 December 2011) UN Doc A/HRC/19/4.

[99] HRC *Report of the Working Group on the Universal Periodic Review* (Tanzania) (8 December 2011). See recommendations from Sweden, Spain, and Slovenia.

[100] HRC *Report of the Working Group on the Universal Periodic Review* (Tanzania) (14 July 2016) UN Doc A/HRC/33/12.

[101] Note that Tanzania's response to these recommendations is not provided in the documents on the UPR website.

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During the first review, Zambia explained the criminalisation of same-sex relations as a reflection of its socio-economic development.[102] Several reviewing states referred to the HRC's concerns as to the criminalisation of homosexuality, recommending its decriminalisation.[103] During the second review, Zambia indicated that it was undergoing a constitution-making process, providing Zambians with the opportunity to determine whether to enshrine LGBTI rights in its new constitution.[104] The United Kingdom encouraged Zambia to adopt legislation that would protect the rights of LGBTI individuals. Australia and Norway noted the continued criminalisation of consensual same-sex relationships. LGBTI-related recommendations by reviewing states were noted, but not supported by Zambia, and included decriminalising homosexuality and addressing discrimination and inequality based on sexual orientation.[105] During the third review, Zambia noted that investigations of attacks against individuals based on their SOGI were done without discrimination.[106] The Netherlands commented on Zambia's rejection of all LGBTI-related recommendations from previous review cycles. Reviewing states made LGBTI-related recommendations, which were noted but not supported, on adopting legislation to protect the rights of LGBTI individuals and on SOGI-based discrimination, decriminalising same-sex relationships, and ending degrading practices such as forced anal examinations.[107] The review of Zambia's UPR record arguably demonstrates the limits of the UPR process for states that refuse to engage with SOGIESC-related issues, as numerous recommendations were rejected throughout each of the three cycles.

3 2 16 Zimbabwe

Zimbabwe ratified the Maputo Protocol on 15 April 2008, prior to its first review, and has ratified the SADC Protocol. The below table indicates an almost complete lack of LGBTI keywords in the first cycle with a noticeable increase by the second cycle. Zimbabwe has completed two cycles of review under the UPR. The incidence of comments are as follows:

[102] HRC *Report of the Working Group on the Universal Periodic Review* (Zambia) (2 June 2008) UN Doc A/HRC/8/43.

[103] HRC *Report of the Working Group on the Universal Periodic Review* (Zambia) (2 June 2008). See comments and recommendations from Canada, Netherlands, and Ireland.

[104] HRC *Report of the Working Group on the Universal Periodic Review* (Zambia) (31 December 2012) UN Doc A/HRC/22/13.

[105] HRC *Report of the Working Group on the Universal Periodic Review* (Zambia) (31 December 2012). See recommendations from Spain, Australia, Canada, France, and Uruguay.

[106] HRC *Report of the Working Group on the Universal Periodic Review* (Zambia) (9 January 2018) UN Doc A/HRC/37/14.

[107] HRC *Report of the Working Group on the Universal Periodic Review* (Zambia) (9 January 2018). See recommendations from Honduras, France, Spain, Sweden, Canada, Australia, Argentina, and Uruguay.

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Table 17: Zimbabwe

Keyword	Cycle 1	Cycle 2
SGBV	13	40
Lesbian	0	4
Gay	0	4
Bisexual	0	4
Transgender	0	4
Intersex	0	4
Same-sex	1	2
Sexual orientation	0	6
Gender identity	0	6
Homosexuality	0	0

During the first review, and as a result of the limited occurrence of the LGBTI keywords, the only excerpt provided by the NLP system, is a recommendation from France to decriminalise same-sex relations which was not supported by Zimbabwe.[108] During the second review, Zimbabwe did not directly address LGBTI-related issues.[109] However, numerous states made recommendations on decriminalising same-sex sexual relations, ensuring the rights and fundamental freedoms of LGBTI individuals, measures to combat discrimination and violence based on real or imputed SOGI by state and non-state actors, allow for a change of gender markers on identification documents, and adopt measures to eliminate discrimination, stigmatisation, and violence on the basis of SOGI. Zimbabwe has not supported any of these recommendations.[110] As was the case with Zambia, it is difficult to draw conclusions as to the effectiveness of the UPR process where Zimbabwe refused to engage on SOGIESC-related issues and all recommendations on same were rejected.

3 3 General trends in sexual and gender-based violence

The following observances of the extracted data and individual state analysis above are based on cycle-to-cycle comparisons of individual SADC states as well as between different SADC states within a single cycle. Percentages here indicate the normalised number of tagged occurrences of the specified SGBV keyword when compared to the number of all SGBV keywords contained within the UPR document(s) of either a single SADC state or across all states in the given range of UPR cycles. From C1 to C2, GBV increased in total representation across all SADC states by nearly double and accounts

[108] HRC *Report of the Working Group on the Universal Periodic Review* (Zimbabwe) (19 December 2011) UN Doc A/HRC/19/14.

[109] HRC *Report of the Working Group on the Universal Periodic Review* (Zimbabwe) (28 December 2016) UN Doc A/HCR/34/8.

[110] *Ibid*., see recommendations from Uruguay, France, Argentina, Spain, Canada, Brazil, Israel, Chile, Czechia, and Italy.

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for approximately 20% of all SGBV violence mentions through to C3. The specific increase was from 10% in C1 to 19% in C3.[111] Changes in tagged violence against-women mentions decreased from 18% to 11% in C3.[112] Further analysis regarding changes in terminology used and whether this is reflected in the similarly increasing change in GBV mentions and decreasing VAW mentions is of interest. "Sexual-violence" tagged content consistently remains the most prevalent form documented and accounts for 55% of total SGBV mentions in each cycle. The authors chose to align "trafficking" with sexual violence as this was the most consistently confirmed context throughout the selected texts. Alternative categorisation of 'trafficking' could potentially reflect a change in whether the perceived patterns in violence are more prevalent as "gender-based" or as "sexual".

Zambia, Namibia, and Botswana have all shown "gender-based-violence" as tagged to be most prevalent in at least one cycle each. An in-depth analysis of these SADC states is of interest as the patterns in documented SGBV and GBV keywords across the UPR cycles may assist in predicting positive and negative responses in other states (SADC, or other). Botswana changed significantly where GBV mentions appeared least often of all SADC states, lowest (0% in C1) to highest (31% in C2) mentions across any two consecutive cycles. Of interest is whether this can be attributed to legal recourse, commitment to UPR recommendations, or shifts in cultural and societal ideals. It is also noteworthy that Botswana is the only SADC state to not have ratified the Maputo Protocol. Further, a rate-of-change ("ROC") was extracted from all available data. Here, an ROC refers to the direct change in individually reported incidents of SGBV as documented across the cycles. The Democratic Republic of Congo had the highest change in GBV mentions between cycles and this is associated with an ROC that increased by 21 individual counts; second: Namibia, with an ROC increased by 18 counts of individual GBV mentions; and third: Madagascar, with an ROC increased by 17 counts. However, the prevalence of violence tagged through the computational system as specifically sexual in nature is overwhelmingly present and may obscure other forms of violence that are in fact more prevalent as a measure per capita than other SADC states. Namibia had the greatest increase overall in both count and ROC from C1 to C3 for GBV with a ROC increased by 29 counts (13 to 31) and GBV accounting for 22% of Namibia's SGBV mentions in C1 to 39% in C3. Of note is Namibia having the highest GBV mentions overall at 46% in C2. Zambia is the only member state to have GBV as first or second highest mentioned form of violence for all three cycles and while Zambia's overall SGBV keyword counts on violence are only 5% of all member states totals per cycle, the GBV mentions account for 53%, 33%, and 19% of Zambia's totals for C1 to C3 respectively. Although it appears that Zambia's GBV mentions are decreasing, they still sit at first, second, and sixth place in GBV specific mentions across all SADC states during C1, C2, and C3 respectively. Compared to other violence-tagged categories, Zambia reflects

[111] 18% in C2.
[112] 10% in C2.

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an increasing trend for "sexual-violence" with 33% in C1, 55% in C2 and 64% in C3. Further analysis would clarify if GBV of a sexual nature is identified or mentioned instead as "sexual violence" in context or if GBV is becoming less reported due to certain factors not identified. By C3, 7 out of 16, or 44%, of SADC states list GBV as either the 1st or 2nd most reported type of violence and the average overall reporting percentage of GBV increased from 12.5% in C1 to 18.2% in C3 where this represents GBV changing from least to second most reported on type of violence as tagged. Further analysis and review of the documentation are required to identify what percentage of GBV is also sexual, whether the distinction is statistically significant to the extent that separate recommendations should be evaluated, and whether these findings further include all SOGIESC individuals.

4 Concluding remarks, general comments, and recommendations

4 1 Overview and general comments

Section 3 provided an overview of the types of data that can be easily harvested and computed, demonstrating possible extraction methodologies of ascertainable trends concerning the perceived international focus of the defined keywords. It was not possible as a result of the limitations, in time and scope, of this article to put a value judgement on the extracted information.[113] Value judgements would allow for a consideration of the frequency of a keyword that may appear in the context of a "positive" development, such as where a member state is commended for taking action to improve human rights or a "negative" development such as where a member state fails to take a previously recommended action. After reviewing the reports generated by the computational model, it was initially possible to plausibly extract common words used in the UPR documents associated with either "negative"[114] or "positive"[115] sentiment-in-context; however, this linguistic style was not consistent across all cycles and member states and was therefore removed from further analysis in the present article. In future iterations of the model used herein, it is possible to further refine the program to make value judgements on the sentence(s) surrounding a keyword. A categorical sort of this kind enables the model to automatically include or exclude these "negative" or "positive" recommendations and comments in the generated reports. The sentiment-in-context analysis could then be developed where the model would assign an appropriately defined value judgement, separate the tallied keyword

[113] Value judgements within the context of NLP models identify secondary analyses of, in this case, written language and intended sentiments. "Positive" and "negative" are often used to describe opposite intent, not unlike, for example, "happy" would be to "sad" or "kind" to "mean". Specific to this work, there is additional value in enhancing the computational model to automatically extract the intended context of a tagged Keyword. At present a "human" reviewer is required to verify if the identified keywords are indications of accolade or admonishment.

[114] Examples of identified negative actionable associative words: concern[ed], alarm[ed][ing], urg[ed], ensure[ing], disappointed, referred, serious.

[115] examples of identified positive actionable associative words: commend[ed], welcom[ed], appreciat[ed], acknowledg[ed], encourag[ed], invit[ed], affirm[ed].

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counts, and extract the relevant paragraph or sentence, assisting in expediting a general understanding of the progress made by a reviewed state, and where specific references are readily available for interested parties.

The specific usefulness of the model can be understood in terms of its efficiency and execution time, filtering and sorting of content, generation of summary reports, and ability for customisation. For example, it took an average of 60 seconds to download, sort, and scan, all Working Group documents of the UPR.[116] This short timeframe also includes the time it takes for the model to sort SGBV and LGBTI keywords, rank paragraphs according to relevancy, and produce five reports per cycle per country. The authors would also like to identify a perhaps overlooked, but rather important aspect to the usefulness of this and other models: the cost of reproducibility and error correction. Without the model, the additional cost of re-doing or extending a completed report without the benefits of the AI-based model may be prohibitive where human and capital resources are limited. Conversely, the additional time to generate alternative reports using the model is minimal and cost-efficient. Likewise, comparisons to other African sub-regional communities such as the Economic Community of West African States or extensions to additional continents and super/supranational bodies are both straightforward and accomplished with little additional oversight. The authors suggest this has the potential to provide additional insight into the global connection of SGBV on the basis of SOGIESC. Solutions, or lack thereof, found on this much larger scale may reflect larger systems of cause and effect, providing a deeper analysis and understanding of the global experience of LGBTQ individuals, women, and other identifiable and vulnerable groups. Further, when, for example, SGBV is broken down into sub-categories, key insights into the nature and type of problem are further uncovered. Below is an excerpt from *Report 5 Keyword Count Totals of the Democratic Republic of Congo* indicating sub-categories of violence, of which the dominant form was identified as being significantly of a sexual nature.

Table 18: Specific Keyword counts of violence sub-categories

CONGO (DR)				
Keyword	**Cycle 1**	**Cycle 2**	**Cycle 3**	**TOTAL**
violence-domestic	0	0	8	8
violence-gender-based	2	23	20	45
violence-sexual	79	83	51	213

While conflict-based sexual violence is well documented in this case,[117] this may not be the reality of other forms of SGBV in both the Democratic Republic of Congo and elsewhere. Thus, the ability to easily customise summary reports

[116] The specific range of files can be found in section 2 – note that in total this context refers to the analysis of approximately 50 PDF documents with an average of 25 full text pages each, for a grand total of approximately 1500 pages – all obtained and reviewed within one or two minutes (including report generation).

[117] See the text to part 3 2 4 above.

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for targeted insight on real or perceived factors is a unique and important tool for country-specific and broader regional and global insights. This provides interested members with the ability to quickly identify, quantify, and assess instances of SGBV for further study, report generating, monitoring, and/or accountability measures. Specifically, this cost- and time-effective approach to accountability and monitoring may be an invaluable tool where resources and time are limited to ensure that SGBV is well documented and analysed as a means to ending the elevated levels of SGBV in SADC states, Africa, or globally.

4 2 Future adaptability

Further refinement of the model for language interpretation uniquely tuned to the UPR documents and their formatting is a natural extension. At present the UPR documents are not consistent in terms of presentation: individual member states may respond to the Working Group in multiple accepted formats, document files are displayed in PDF or Word Documents, several broken links were identified (where the document in question was also found to exist at an alternative address), terminology and textual structure of responses and recommendations vary from cycle to cycle, among other inconsistent indications. However, during the preparation of this article, the authors noted that updates to the UPR documents were actively occurring to remedy some of these issues. Changes within the documentation itself are noted as "cycle dependent" in that each cycle of the UPR demonstrates refinement in the format of responses and recommendations where consistent language is being favoured. This change makes greater efficiency and ease of sentiment analysis through computational methods possible. This is imperative for efficiently isolating context-specific judgement valuations, as discussed under 4 1. It is anticipated that as additional cycles of the UPR review are completed, a standardised form will emerge as an evolution of tested best practices.

The extraction of SGBV, LGBTQ+, and SOGIESC content from additional sources both contained within other UPR cycle reports and of generalised global reporting of significant events may permit further pattern analysis opportunities such as matching relevant trends to instances of political or economic significance during the relevant time period. Further, with accessibility and identification as central concepts to the work presented here, the authors suggest that replications of the model as developed can be expanded to interpret these same SGBV, SOGIESC, and LGBTQ+ results in all five official languages of the UN. Finally, producing reports in line with the format of either the UPR documents themselves (structural), or a format suitable to the task at hand (field-specific) is perhaps more desirable. At present, the generated documents are minimalistic with no discerning formal characteristics. While this choice maintains an uncomplicated clarity, it still requires adjustments to be used in communicating the summary outcomes.

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4 3 Recommendations

Harnessing AI and data scraping technology to quickly extract information from online human rights sources such as the UPR provides an important tool to reduce costs associated with research and advocacy and may improve and accelerate access to justice for many victims of human rights violations. Reducing costs and barriers to justice, as well as reducing the costs associated with holding perpetrators accountable for persistent human rights violations, suggests the potentiality of integrating stability into judicial processes, directly impacting outcomes, and supporting the appearance of consistent action. This, in turn, may further support an increase in seeking justice by the survivors of SOGIESC- and SGBV-based human rights violations. Consistent with addressing a problem, is the acknowledgement and identification that the problem exists. It is well documented that SGBV is used as a weapon of war,[118] while it is simultaneously recognised that communities, economies, and the general quality of life are improved *for all* when *all* members of society are held on equal ground, respected at the same level, and afforded the same opportunities. Yet, as we see in the cycles of reports, during periods of political and economic instability, some of the first rights to be infringed are specifically those which allow for women, LGBTQ+ members, and often specifically trans individuals, to assert their independence and retain self-autonomy and respect. Consequently, the erasure of gendered human dignity becomes a repeatedly expected, and therefore accepted, outcome. Tolerating the deterioration of these rights is a course of action that should be altered and supported by human rights institutions.

Measuring the prevalence of SGBV is difficult, in general, due to typical factors affecting reporting, documenting, and maintaining data on incidences of occurrences. This is further exacerbated where instability exists. It is therefore vital for computational models to handle what data does exist and to streamline all formats of data when incidents are documented. Actively seeking and searching for updates with methods that can be automated, or with those that add efficiency and ease of regular compilation and assessment of accumulated data, may provide fundamental support not easily obtained through more traditional means. This may be of particular benefit where amassing coherent information is divided by departments or institutions which are separated by geography, language, time, support, or directive. In particular, the unique nature of SOGIESC rights is, at present, transitive in nature with regards to gaining or losing traction on human rights and is often dependent on volatile and impermanent social and cultural standards for acceptance or understanding. Continuing to sift through the immense level of available data, and by producing consistent, explicit, and irrefutable indications on the prevalence of SGBV and SOGIESC-based violations in SADC states, whenever possible, will arguably force these human rights issues to remain at the forefront while ensuring accountability for perpetrators.

[118] See A Arieff "Sexual Violence in African Conflicts" (30-11-2010) *Congressional Research Service Report for Congress* <https://sgp.fas.org/crs/row/R40956.pdf> (accessed 12-02-2022).

THE RESPONSIVITY OF THE MECHANISM OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF WOMEN IN AFRICA IN COMBATING VIOLENCE AGAINST WOMEN

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Abstract

By using the mechanism of the Special Rapporteur on the Rights of Women in Africa (SRRWA) as a matrix, this article assesses the responsivity of the mechanism of the SRRWA in combating violence against women ("VAW"). The article argues that the mechanism of the SRRWA has taken up the challenge of contributing, in a substantive manner, to norms development relating to VAW. It finds that although VAW is not an explicit thematic area in the mandate of the SRRWA, compared to the United Nations Human Rights Council's special rapporteur on violence against women, its causes and consequences, in practice it features quite distinctly in the work of the mechanism. This is indicative of the modest focus, response and contribution of the mechanism to this intractable human rights issue.

Keywords: *Africa, women, violence against women, special procedures, Special Rapporteur on the Rights of Women in Africa*

1 Introduction

The African human rights system is often criticised for its weak protection and inadequate promotion of women's rights.[1] These criticisms range from normative shortcomings, institutional neglect, states' failure to domesticate and implement women's rights and the general gender insensitive nature of the system. This notwithstanding, efforts have been made to pay particular attention to the plight of African women. One of these efforts can be traced to the creation of the mechanism of the Special Rapporteur on the Rights of Women in Africa ("SRRWA").

[1] See generally, A Rudman "Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol" (2018) 18 *African Human Rights Law Journal* 319-345; F Viljoen "An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11-46; F Banda "Protocol to the African Charter on the Rights of Women in Africa" in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006* (2008) 445; F Banda "Blazing a trail: The African Protocol on Women's Rights comes into force" (2006) 50 *Journal of African Law* 74-76; A Budoo "Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union" (2018) 18 *African Human Rights Law Journal* 58-74.

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Being the only mechanism with a categorical mandate on women's rights, the SRRWA has through its working modalities and standard operating procedures advanced the cause of women on the African continent. Despite its broad mandate, generally oriented towards women's rights, the SRRWA has focused specifically on issues pertaining to violence against women ("VAW"). This is not to suggest that the SRRWA focuses exclusively on VAW. On the contrary, it carries out a wide range of initiatives and measures, whether promotional or protective, on a variety of thematic issues relating to women's rights. Informed by the prevalence of VAW on the continent, the various mandate holders of this mechanism continue to prioritise VAW as a thematic determinant in the working modalities and standard operating procedures of the mechanism.

The creation of the mechanism of the SRRWA was an important step in ensuring that women's rights, including protection against violence, find a permanent scope within the human rights architecture of the African human rights system. Moreover, it ensures that women's issues are consistently viewed through the prism of human rights and states' obligations. Within the context of VAW, the mechanism remains important in addressing states and holding them accountable for violations as well as in monitoring that they act with due diligence to prevent and respond to VAW. The SRRWA is arguably well-positioned as a response mechanism in the fight against gendered forms of violence experienced by women on the continent. To this end, this article considers the responsivity of the SRRWA in the fight against violence perpetrated against women based on their gender. Responsivity in this context bears reference to the general reactions, measures, engagements, interventions, and initiatives undertaken under the auspices of the mechanism of the SRRWA in combating VAW.

The article argues that the mechanism of the SRRWA has contributed, in a positive manner, to norm development relating to VAW, both in terms of hard and soft law. The responsivity of the mechanism of the SRRWA in norms development relating to VAW provided a much-needed framework to states to tailor their measures aimed at addressing VAW in terms of required international standards. This argument is depicted throughout the various parts of this article, which is divided into four parts. In addition to this introduction, the next part sets out the mandate of the mechanism of the SRRWA. As a precursor to the substantive discussion on the role of the responsivity of the SRRW, part 2 provides a general context by setting out the determinants that gave rise to its establishment and broad mandate, which includes *inter alia* VAW. The third part presents the contributions of the mechanism to norms development relating to VAW. This is followed by the concluding part that sets out the conclusions and recommendations.

2 Establishment and mandate of the mechanism of the Special Rapporteur on the Rights of Women in Africa

The SRRWA is one of fifteen of the African Commission's special procedure mechanisms. Being amongst the first generation of special

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procedure mechanisms of the African Commission, it has endured the test of time, having remained unaltered since its initiation in 1998. The continued durability and consistency of this mechanism arguably speaks of its model nature for the African Commission's other special procedure mechanisms, if not, its success as an apparatus for human rights promotion and protection within the African Commission.

The mechanism of the SRRWA has its own historical context that marked its establishment. Its creations were, as is the case with most human rights mechanisms, necessitated by prevailing historical circumstances.[2] In the case of the mechanism of the SRRWA, historical events with specific reference to the then prevailing women's rights developments on the continent and beyond had some significant influence on its initiation. Within a geopolitical context, the early 1990s saw the entrenchment of a global women's rights movement, eager to promote and affirm women's rights as human rights. The Vienna Conference on Human Rights of 1993 set the tone for states' affirmation of women as subjects worthy of the clothing of the law, including its normative and institutional framework as well as its processes and mechanisms.[3] This was followed by the Beijing Conference of 1995, which not only confirmed women's rights as human rights but also adopted the Beijing Declaration and Platform for Action resulting in the initiation of the United Nations ("UN") Special Rapporteur on violence against women, its causes and consequences.[4]

Although global conferences such as the Vienna and Beijing Conferences served as an antecedent to subsequent developments concerning the advancement of women's rights, it was rather regional and local developments pertaining to women on the African continent that gave the African Commission the much-needed thrust to create the mechanism of the SRRWA. One such development was the seminar on the Rights of Women in Africa and the African Charter on Human and Peoples' Rights ("African Charter"),[5] held

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2 See generally, C Heyns "A struggle approach to human rights" in C Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader* (2006) 15-16. Such an argument may be cogent when one has regard to the creation of the African Commission's first thematic special mechanism on extrajudicial, summary, or arbitrary executions created in 1994 which was largely birthed out of the political developments of the time. Historically, the political unrest in Southern Africa, particularly apartheid in South Africa (and, to a lesser extent South-West Africa (now Namibia)) and the systematic killings of Tutsi and Pygmy Batwa in Rwanda, were typical developments to which the African Commission could not respond through its existing working methods. However, this was not the only political reality. In fact, since the inception of the Organisation of African Unity ("OAU") in 1963, civilian unrest marked the continent from almost all corners. This was even to a greater extent corroborated by colonialism that was still prevalent on the continent. A notable development worth mentioning that left an imprint on the state of human rights protection on the continent were the erratic atrocities of the Amin regime in Uganda (1971–1979) which was marked by political repression, ethnic cleansing and the general commission of crimes against humanity. Events of this nature not only shed light on the dire state of human rights on the continent but equally placed pressure on the stakeholders of the OAU to act on atrocious human rights situations without delay.

3 See generally the outcome document of this conference, namely the Vienna Declaration and Programme of Action 12 July 1993, UN Doc A/CONF.157/23, which equivocally declared women's rights as human rights.

4 Special Rapporteur on violence against women, its causes and consequences <https://www.ohchr.org/en/issues/women/srwomen/pages/srwomenindex.aspx> (accessed 22-02-2022).

5 Adopted 27 June 1981, entered into force 21 October 1986.

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in the wake of the 17th Ordinary Session of the African Commission,[6] from 8 to 9 March 1995 in Lomé, Togo, by the African non-governmental organisation ("NGO"), Women in Law and Development in Africa ("WiLDAF"). This seminar not only proposed the introduction of an additional Protocol on the Rights of Women but also called for a Special Rapporteur on the Rights of Women.[7] These proposals from the Lomé seminar were raised at the African Commission's 17th Ordinary Session by the (then) Commissioner, Vera Duarte Martins, who had been an active participant in the seminar. While the African Commission positively responded to the proposal,[8] the actual materialisation of the mechanism only bore fruit much later in 1999 when the African Commission adopted Resolution 38 On the Designation of the Special Rapporteur on the Rights of Women in Africa, on 5 May 1999, on the occasion of its 25th Ordinary Session held in Bujumbura, Burundi.[9] This resolution sets out the mandate of the mechanism obligating the SRRWA to amongst others assist African governments to promote and protect women's rights. Since its inception, the mandate of the SRRWA has been renewed four times equating to the number of individual special rapporteurs that have headed the mandate.[10]

One of the most striking features of the mandate of the SRRWA is its generic nature.[11] For example, there is no explicit mention of any concrete human rights issue in the mandate of the SRRWA. On closer scrutiny of the mandate, it is self-evident that VAW is not explicitly stated in the SRRWA's mandate. In fact, no specific women's rights issue is expressly stated. The assumption is that the mechanism broadly has to cover every aspect relating to women's lives, especially the rights and issues covered in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Maputo Protocol").[12] One of these is the right of women to be free from gendered forms of violence.

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6 The 17th Ordinary Session of the African Commission on Human and Peoples' Rights took place from 13-22 March 1995, at Lomé, Togo, three days after the seminar.

7 J Geng "Maputo Protocol and the reconciliation of gender and culture in Africa" in SH Rimmer & K Kate Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (2019) 12; See also M Nsibirwa "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2001) 1 *African Human Rights Law Journal* 41.

8 The African Commission entrusted Commissioners Vera Duarte Martins and Victor Dankwa with the task of starting work on the drafting of an additional Protocol on the Rights of Women, and the initiation of a special rapporteur, including the identification of a suitable candidate to fill the rapporteurship.

9 See generally, Resolution 38: Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa, adopted on 5th May 1999, on the occasion of its 25th Ordinary Session held in Bujumbura, Burundi ACHPR/Res.38(XXV)99. The Resolution appointed the first Special Rapporteur in May 1999 *retroactively* as from 31 October 1998. The mandate of the first mandate holder of the mechanism of the SRRWA expired in 2002 and has since been renewed four times.

10 The mandate was renewed four times with the adoption of Resolution 63 at the 34th Ordinary Session; Resolution 78 at the 38th Ordinary Session; Resolution 112 at the 42nd Ordinary Session and Resolution 154 at the 46th Ordinary Session.

11 In principle, the overtly wide nature of the above terms of reference of the SRRWA, implies that the holder may be flexible and innovative in meeting the terms of the mandate. Thus, in the discharge of the mandate the SRRWA may receive and transmit urgent appeals and communications to States regarding alleged cases of violations against women, undertake country visits, conduct thematic studies relating to the mandate, and engage in general promotional activities such as campaigns and sensitisation workshops and seminars, although these are not expressly provided for in its terms of reference.

12 Adopted 13 September, entered into force 25 November 2005.

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3 Norms development on violence against women and the mechanism of the Special Rapporteur on the Rights of Women in Africa

3 1 The Maputo Protocol

There is a close connection between the mechanism of the SRRWA and the Maputo Protocol. The causal link between the two can be discerned in two aspects.[13] First, is the peculiar role of the SRRWA in the drafting and eventual adoption of the Maputo Protocol; the second has to do with the role of the SRRWA in popularising the instrument and capacitating states in meeting their obligations in terms of this instrument.

The idea of an African regional instrument addressing explicitly the rights of women began in the early 1990s. As indicated before, the 1995 meeting organised by the NGO, WiLDAF, called for the conceptualisation of the instrument.[14] It was at this meeting that the delegates called for the development of a specific Protocol to the African Charter to address the rights of women in Africa.[15] This was given thrust when the Organisation of African Unity ("OAU") Assembly of Heads of State and Governments at its 31st Ordinary Session held in June of the same year, adopted Resolution 240 (XXXI), mandating the African Commission to develop such a protocol.[16] In line with the directives of Resolution 240 (XXXI), a draft protocol was produced by a three-panel expert working group of the African Commission, of which (then) Commissioner Julienne Ondziel-Gnelenga, the African Commission's first SRRWA was part of right from the onset. Thus, one can argue that the mechanism of the SRRWA has been at the epicentre and progressive evolution of what later became the Maputo Protocol. When (then) Commissioner Julienne Ondziel-Gnelenga was formally appointed as the first SRRWA at the African Commission's 23rd Ordinary Session in April 1998, she was given a directive to work towards the adoption of the draft protocol.[17] This development not only made the SRRWA a focal point of the draft protocol but also marked a direct link between the mechanism of the SRRWA and the draft protocol.

Given this directive, the SRRWA immediately reacted, beginning with thorough engagements and consultations with NGOs relating to the substantive content of the proposed draft protocol.[18] This was however a continuation of the work the SRRWA did as a member of the three-panel

[13] J Mujuzi "The Protocol to the African Charter on Human and Peoples' Rights of Women in Africa" (2008) *Law, Democracy and Development Law Journal* 44; M d'Almeida "African women's organising for ratification and implementation of the Maputo Protocol: Interview with Faiza Jama Mohamed" (2011) *AWID* 1 <https://www.awid.org/news-and-analysis/african-womens-organizing-ratification-and-implementation-maputo-protocol> (accessed 10-01-2022).

[14] M Wandia "Rights of women in Africa: Launch of a petition to the African Union" in F Manji & P Burnett (eds) *African Voices on Development and Social Justice: Editorials from Pambazuka News* (2005) 96.

[15] 96.

[16] See generally Resolution on the African Commission on Human and Peoples' Rights AHG/Res 240 (XXXI).

[17] Wandia "Rights of women in Africa" in *African Voices on Development and Social Justice* 97.

[18] 97.

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expert group that was tasked to draft the initial protocol.[19] The consultative process therefore aimed to gain as much stakeholder input and involvement as possible. Moreover, it gave leverage and legitimacy to the process ensuring that the voices of women were heard and incorporated. While the mobilisation for a women's rights protocol can be attributed to the strength of women's organisations in Africa, as some scholars have correctly argued,[20] one should be mindful not to understate the intricate role of the African Commission in coming up with the first drafts of the proposed Protocol with the support and assistance of such organisations. Without the meaningful involvement of the African Commission, the proposed Protocol would not have been set off, since it was the African Commission that was given the primary mandate for the development of the instrument. This is not to diminish the crucial role that the NGOs played in supporting the African Commission.

Soon after the drafts by the African Commission and women's organisations and the draft by the Inter-African Committee on Harmful Traditional Practices Affecting Women's and Children's Health was merged, the African Commission embarked upon the establishment of a focal point that would coordinate and spearhead this process and increase mobilisation for the eventual adoption of the protocol by African governments. This focal point was the mechanism of the SRRWA. It was therefore the continued mobilisation, coordination and popularisation of the draft protocol by the SRRWA that eventually resulted in the adoption of the protocol in 2003.[21]

The adoption of the Maputo Protocol crafted new ground for the rooting of women's rights within the framework of the African regional human rights system. The Maputo Protocol, unlike the norm with existing international women's rights instruments, explicitly refers to several fundamental rights that have much been neglected in the protection and promotion of the rights of women. For instance, the instrument refers to the protection of women from violence,[22] the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS,[23] the right to control their fertility,[24] and widowhood rights.[25] Some of the rights also covered under other women's rights international instruments are elaborated and given more specificity such as the elimination of harmful practices, and protection of women from armed conflict. The inclusion of these rights provides women with much needed human rights protection given the historical vulnerability

[19] For instance, in 1997 a group meeting was organised by the African Commission and the International Commission of Jurists in Nouakchott, Mauritania, consisting of representatives from NGOs and international observers to discuss the first draft of the (then) proposed Protocol.

[20] Viljoen (2009) *Washington & Lee Civil Rights & Social Justice Journal* 12; R Murray "Womens rights and the Organisation of African Unity and African Union" in D Buss & D Manji (eds) *International Law: Modern Feminist Approaches* (2005) 262.

[21] See *Inter-session Report, Commissioner Soyata Maiga*, 52nd Ordinary session of the African Commission, Yamoussoukro, Cote d' Ivoire (2010) 5 <https://www.achpr.org/public/Document/file/English/achpr48_comrep_2010_maiga_eng.pdf> (accessed 12-02-2022).

[22] See Article 3(4) read with Article 4 (2) of the Maputo Protocol.

[23] Article 14(1)(d).

[24] Article 14(1)(a).

[25] Article 20.

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and marginalisation of women from mainstream international protection mechanisms, processes and instruments.

Within the context of VAW, the instrument makes several inroads. It obligates states under Article 4 to respect the life, integrity and security of the person, specifically that of women. As far as specific interventions are concerned the Maputo Protocol requires states *inter alia* to enact and enforce laws to prohibit all forms of VAW including unwanted or forced sex whether the violence takes place in private or public;[26] adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of VAW;[27] identify the causes and consequences of VAW and take appropriate measures to prevent and eliminate such violence;[28] actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of VAW;[29] punish the perpetrators of VAW and implement programmes for the rehabilitation of women victims;[30] establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of VAW;[31] and prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.[32] In addition, and within the context of VAW, the Maputo Protocol obligates states to "prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards".[33]

In its role as the focal mechanism for women's protection, the SRRWA has increasingly taken it as part of its mandate to popularise the Maputo Protocol. One of the means of doing this is by encouraging states to ratify the instrument. To speed up the ratification of the Maputo Protocol, the mechanism of the SRRWA engages mobilisation campaigns with Ministries of Foreign affairs and Parliaments of African Union ("AU") member states either through country missions, *notes verbales* to diplomatic missions, or during the presentation of State Periodic Reports before the African Commission.[34] These engagements are aimed at encouraging states to ratify the Maputo Protocol and has proved effective over the years as ratifications increase, albeit slowly. To date, the total ratification of the instrument stands

[26] Article 4(2)(a).
[27] Article 4(2)(b).
[28] Article 4(2)(c).
[29] Article 4(2)(d).
[30] Article 4(2)(e).
[31] Article 4(2)(f).
[32] Article 4(2)(g).
[33] See Article 5.
[34] L Asuagbor *Address on the Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2006) 10 <https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed 12-02-2022).

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at 42,[35] with thirteen countries still lagging behind.[36] Three of these have neither signed nor ratified the instrument.[37]

Pursuant to Article 26(1) of the Maputo Protocol, states parties are required to submit every two years a report indicating measures taken to materialise the provisions of the instrument. This provision aims to ensure that states account for their commitments to protect the fundamental rights of its women and girls. The SRRWA has capacitated several states in fulfilment of this requirement.[38] This the SRRWA does in two respects. First, by providing states with a reporting framework that will assist states in their accounting of the measures taken in pursuit of the provisions of the instrument. Second, the SRRWA provides capacity to states parties to account using the reporting framework on their implementation of the provisions of the Maputo Protocol.

State reporting is a tiresome process often leaving states fatigued because of the numerous reporting that they must undertake in terms of the various international instruments they ratify. It is also a process that requires resources, both financially and in terms of capacity on the part of states. The technical and procedural nature of the process also sometimes deters states from fulfilling their commitments report. It is precisely because of these shortcomings that the SRRWA with the assistance of NGOs has engaged in assisting states in reporting in terms of Article 26 of the Maputo Protocol. With the input and assistance of African NGOs, the SRRWA was instrumental in the development of Guidelines for State Reporting under the Protocol to the African Charter on the Rights of Women in Africa ("Reporting Guidelines").[39]

The mechanism of the SRRWA has often utilised the state reporting process to raise issues pertaining to VAW with state delegates. An example may be drawn from Nigeria's 6th periodic report by the African Commission, during the African Commission's 62nd Ordinary Session, held from 25 April to 9 May 2018 at Nouakchott, Mauritania. This state reporting process offers insight into the pertinent role of the mechanism of the SRRWA in raising and addressing issues pertinent to women's rights, including VAW. Nigeria's report to the Commission included an extensive report on Article 18 of the African Charter as well as on measures taken to implement the Maputo Protocol.[40] In terms of this report, the Nigerian government indicated that it had adopted

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[35] See generally the ratification table to the Protocol to the African Charter on the Rights of Women in Africa (2021) <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 12-02-2022) .

[36] These are, Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Madagascar, Morocco, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, South Sudan, Sudan and Tunisia.

[37] These are Botswana, Egypt and Morocco.

[38] Asuagbor *Address on the Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* 11.

[39] Asuagbor *Address on the Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* 11. See also E Durojaye "The Special Rapporteur on the Rights of Women in Africa (SRRWA) 2007-2015" (2018) 16 *Gender and Behaviour* 10710.

[40] See generally, African Charter on Human and Peoples' Rights/ACHPR. 2017. *6th Periodic Report of the Federal Republic of Nigeria to the African Commission 2015-2016*. Banjul: ACHPR, 122-132 <https://www.achpr.org/public/Document/file/English/nigeria_state_report_6th_2015_2016_eng.pdf> (accessed 12-02-2022).

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and was implementing the Violence Against Persons (Prohibition) Act, 2015 ("VAPP"), which *inter alia* prohibits VAW in private and public life. However, during the questions and answers session, the SRRWA noted the limited application of this Act, especially in the Northern States of Nigeria where the Nigeria Penal Code allows a man to physically abuse his wife as long as it does not amount to grievous bodily harm in terms of section 55.[41] The SRRWA, therefore, asked the Nigerian delegation what measures, if any it had taken to advance the nationwide adoption of the VAPP, including measures taken to sufficiently implement the Act.[42] During the same state reporting session the SRRWA also noted that apart from physical, sexual and emotional abuse, many women in Nigeria experience female genital mutilation/ circumcision ("FGM/c"), forceful ejection from home, and other harmful traditional practices stemming from long-held cultural beliefs.[43] Furthermore, the SRRWA also inquired from the delegation what steps were being taken to protect women and girls from GBV and abuse in healthcare facilities and how its government proposes to ensure that women are able to report and seek redress for such abuses?[44]

The above state reporting session of Nigeria not only highlights the nature or quality of questions put forward by the SRRWA in response to states reports, but also serves as an indication of the role of the mechanism of the SRRWA in filling the gaps left in the states reports on pertinent issues affecting women. Considering how the SRRWA has been engaging states, it can generally be argued that this has been done appreciably, including on the issue of VAW. There are however limitations to this process. The questions posed during this session are carried out under the helm of the African Commission. In other words, the dialogue is between a state representative and a country rapporteur acting in their capacity as a Commissioner of the African Commission, as opposed to as a thematic rapporteur. It is also a time-bound process, with both state representatives and (country) commissioners having limited time to comprehensively address the issues at stake. Moreover, and this is a point repetitively raised by the Commissioners of the African Commission, state representatives do not provide conclusive and comprehensive responses to the questions raised. The state reporting process is therefore an appreciable but limited avenue for the mechanism of the SRRWA, as it is generally also for other mechanisms of the African Commission.

3 2 Guidelines on Combating Sexual Violence and the Consequences in Africa

In 2012, the mechanism of the SRRWA took on the role of conducting research on sexual violence and its consequences for women together with

[41] Section 55(1)(d) of the Northern Nigeria Penal Code.

[42] See Report of the African Commission on Human and Peoples' Rights/ACHPR. 2018. *6th Periodic Report of the Federal Republic of Nigeria to the African Commission 2015-2016: Specific Questions from Special Mechanisms,* 14 (on file with author) ("Report of the African Commission on Human and Peoples; Rights/ACHPR, 2018").

[43] Report of the African Commission on Human and Peoples' Rights/ACHPR. 2018.

[44] Report of the African Commission on Human and Peoples' Rights/ACHPR. 2018.

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the International Federation for Human Rights ("FIDH") and Lawyers for Human Rights. This research was predicated only much later by an African Commission resolution,[45] welcoming the initiative by the mechanism of the SRRWA to develop a set of guidelines to combat sexual violence and its consequences culminating in guidelines for states parties. In its depth, the resolution recalls the need for a study of the nature purported by the SRRWA because of the widespread nature of sexual violence in Africa, both during times of war and peace.[46] Moreover, the resolution remain cognisant of the lack of adequate national laws by the African states in addressing sexual violence and its consequences.[47] To comprehensively appreciate the contributions of the SRRWA to this important work, one need not only refer to the role of the mechanism as the initiator but also point to the "added value" of the guidelines themselves.

The Guidelines provides for a wide range of measures. It identifies five prevention strategies, namely awareness-raising,[48] educational programmes,[49] training of professionals,[50] urban and rural planning,[51] as well as cooperation with local stakeholders and civil society organisations.[52] The Guidelines further calls for specific measures protecting and supporting victims of sexual violence;[53] investigation and prosecuting sexual violence crimes in situations of conflict and crisis as international crimes (including reparations);[54] and implementing and harmonising domestic laws and policies in line with states' regional and international obligations.[55]

There are also some essential contributions these Guidelines make to the existing regional and international framework on sexual violence, its causes and consequences. First, the Guidelines contextualises and integrates sexual violence within the peace and security agenda, thus ensuring that no distinction is made between sexual violence constituted during peace and those committed during crisis times. Rather by contextualising sexual violence through this lens, sexual violence is seen as a pattern of discrimination and the additional violence that may come across as a result of conflict is rather viewed as exacerbating.[56] Second, the Guidelines are gender-sensitive in as far

[45] Resolution on Developing Guidelines on Combatting Sexual Violence and its Consequences ACHPR/Res.365 (EXT.OS/XX1) 2017, adopted at the African Commission's 21st Extraordinary session held from 23 February to 4 March 2017, Banjul, The Gambia ("Resolution 365").

[46] Clause 6 of Resolution 365. See also generally, World Health Organisation *Global Status Report on Violence Prevention* (2014) 76-77.

[47] Clause 8 of Resolution 365.

[48] African Commission on Human and Peoples' Rights ACHPR *Guidelines on Combatting Sexual Violence and its Consequences* (2017) 20-21.

[49] 21.

[50] 22.

[51] 22.

[52] 23-24.

[53] 24-29.

[54] 30 -37.

[55] 44-51.

[56] See generally on this point the statement by Statement by Dubravka Simonovic, UN Special Rapporteur on violence against women at the 61st Ordinary Session of the African Commission on Human and Peoples' Rights Banjul, The Gambia on the 4 November 2017, during the launch of the Guidelines <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22357&LangID=E> (accessed 12-02-2022).

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as it recognises the actual and potential reality that such offences can also be committed against boys and men. However, one must criticise the Guidelines for its lack of gender responsiveness in that it excludes and makes no mention of the vulnerability of sexual minorities, based often on their actual or perceived sexual identity and orientation.[57] Third, they are victim-oriented, although as stated, victimhood is restricted to male and female sexes to the exclusion of any other identities. To this end, the Guidelines identifies a wide range of service needs specifically tailored for victims such as shelters, protections order, toll-free call centres etcetera. Fourth, the Guidelines are based on pre-existing jurisprudence emanating from international courts, tribunals, and other (quasi-)judicial mechanisms, thus reinforcing and complementing the existing international legal framework on sexual violence. Lastly, one can also discern the added value of the Guidelines in the succinct, specific, clear, practical, and implementable measures it tenders to states and their agencies in safeguarding the victims from sexual violence.

Undeniably, through these Guidelines, the mechanism of the SRRWA adds to the combating of VAW and girls by assisting states with innovative and practical measures. Moreover, with its formal adoption by the African Commission, the SRRWA's guidelines now form part of the overall corpus of the rich soft law of the African Commission,[58] and therefore have the actual and potential impact of enriching and advancing the jurisprudence on sexual violence in Africa and beyond.

3 3 Resolution 283 on the Situation of Women and Children in Armed Conflict

Since its initiation, the mechanism of the SRRWA has sponsored fifteen resolutions of the African Commission.[59] These resolutions are predominantly administrative with almost no substantive contribution to the protection of the rights of women,[60] more so on issues related to VAW. However, only one of them has direct repercussions for the protection of women's rights, including

[57] The Guidelines for example do not recognise lesbians, gays, bisexuals, transgender persons and intersex persons ("LGBTI") as potential victims of sexual violence but rather restricts the subject of such violence to a binary classification based on men/boys and women/girls.

[58] The Guidelines were adopted by the African Commission at its 60th Ordinary Session held in Niamey, Niger from 8–22 May 2017.

[59] Although in practice the African Commission adopts resolutions that may be applicable directly to the Commission as a whole as in respect of its special mechanisms, often the resolutions with specific thematic concerns are relegated to the different special mechanisms to either implement those resolutions or serve as focal persons for those resolutions. Since the initiation of the mechanism of the SRRWA the African Commission has adopted fifteen resolutions relating to the SRRWA.

[60] These include Resolution 425 On the Renewal of the African Commission on Human and Peoples' Rights' Special Mechanisms' Mandates ACHPR/Res.425(LXV)2019; Resolution 380 On the Renewal of the Mandate of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.380(LXI)2017; Resolution 327 On The Appointment of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.327(LVII)2015; Resolution 205 On the Appointment of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.205 (L) 11; Resolution 154 On the Appointment of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.154 (XLVI) 09; Resolution 112 On the Renewal of the Mandate and the Appointment of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.112(XXXXII) 07; Resolution 78 On the Renewal of the Term of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.78(XXXVIII) 05; and Resolution 63 On the Renewal of the Mandate of the Term of the Special Rapporteur on the Rights of Women in Africa ACHPR/Res.63(XXXIV) 03.

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on aspects relating to VAW, namely Resolution 283 On the Situation of Women and Children in Armed Conflict ("Resolution 283").[61] Adopted in 2014 at the 55th Ordinary Session of the African Commission, Resolution 283 marks the African Commission's first ever resolution on the women, peace and security agenda. While the importance of this resolution lies not only in that it breaks new ground, one should be mindful that the resolution is a joint effort not only between the SRRWA and the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa *inter se* but also that of African NGOs that support the work of these two special mechanisms.

Although in mainstream scholarship there has been an approval of the fact that conflicts in Africa are a natural consequence of Africa's colonial past,[62] international legal processes, including processes in the African regional human rights system, often had difficulty coming to terms with the effects of such conflict on women and girls. The situation has however changed, and the international community has seen greater synergy and acceptance of the physical, social and psychological impacts of conflict on women, girls and children generally. For example, the Beijing Platform for Action of 1995, amongst others, recognises that "while entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex".[63]

The work of the SRRWA, through the initiation of Resolution 238 has been resounding, having formally raised the concerns of women in peace and security at the formal processes of the African human rights system, such as the African Commission. The adoption of the resolution signals an acceptance by the African Commission of the disproportionate and gendered effects of conflict on women and girls in Africa, which has been marked with several political conflicts over the years. It takes into account the fact that conflict in Africa presents unique challenges for women. As Maina has correctly argued within the African context, women in most African conflicts are used as weapons of war through sexual exploitation, often leaving them with social and psycho-social impediments.[64]

Written with a focus on sexual violence, the resolution takes into account the sexual subjugation of women and children during armed conflict. This focus is apposite and responsive as Dyani-Mhango has rightly suggested in one study that sexual violence is arguably one of the greatest concerns for women and girls in the present day armed conflict in Africa and indeed across

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[61] Resolution 283 On the Situation of Women and Children in Armed Conflict ACHPR/Res.283(LV)2014.

[62] See generally C Ake "Why is Africa not developing?" (1985) *West Africa* 1212-1214; O Mokwugo "Africa and political stability" (1977) 74 *Africa* 93-96.

[63] United Nations *Beijing Declaration and Platform for Action, The Fourth World Conference on Women* (1995) para 135 <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> (accessed 10-02-2022).

[64] G Maina "An overview of the situation of women in conflict and post-conflict Africa" (2012) 1 *Conference Paper on Constructive Resolution and Disputes* 4-5 <https://media.africaportal.org/documents/ACCORD_Conference_-_An_overview_of_the_situation_of_women_in_conflict.pdf> (accessed 10-02-2022); A Kirsten "Guns and roses: Gender and armed violence in Africa" (2007) *Background Conference Proceedings* 3 <http://www.genevadeclaration.org/fileadmin/docs/regional-publications/Gender-and-Armed-Violence-in-Africa.pdf> (accessed 10-02-2022).

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the world.[65] The resolution therefore classifies sexual violence in armed conflict within the context of international law as crimes against humanity.[66] Clearly, by such characterisation, the formulation of the resolution situates VAW perpetuated within the context of armed conflict as a violation of international law.

In addition to the provisions of the Maputo Protocol, Resolution 283 gives specificity to the issue of VAW by aligning violence perpetuated within conflict situations with contemporary international legal frameworks regulating this issue. Given that certain parts of the African continent have been the subject of continued armed conflict, this resolution sought to address the status of women (and girls) in such situations more in line with their right to peace as envisaged in the Maputo Protocol. In addition to upholding the right to peace, the resolution also takes note of the prohibition of VAW and women's rights to dignity, life, integrity, security, and freedom from discrimination.

Another notable feature of this resolution is its deviation from the commonly held presumption that the end of conflict either through peace agreements or cessation of hostilities bears positive outcomes for all parties, including women. While the achievement of peace is critical, the role of women during post-conflict processes remains neglected. To this end, this resolution addresses issues pertaining to women's state in post-conflict situations. The resolution in particular calls on states parties to "ensure that women are involved throughout the post-conflict peace-building and consolidation processes".[67]

Surely, and in light of the substantive content underlying this resolution, one cannot overlook the importance of this resolution in protecting women and girls from violence, especially in armed conflict situations. By sponsoring a resolution of this magnitude and importance for women's rights protection, the SRRWA iterates the interconnected nature of the vulnerability of women and conflict processes. Although the SRRWA can be said as making a modest contribution to the protection of women, especially in conflict situations, one must not shy away from criticising the SRRWA for not exploring and making comprehensive use of resolutions in discharging its mandate. As the study by Biegon has shown, this is clearly an undervaluing of the actual and potential impact of resolutions in shaping state parties domestic norm development and overall long term impact of the protection of fundamental human rights and freedoms.[68] One can therefore not overemphasise the importance of these apparatuses in heightening the impact and role of the SRRWA in protecting women from gender-based violence. This is more so given the fact that resolutions generally do not require much. They are less bureaucratic as far as formulating and adopting them are concerned. Resolutions also

[65] D Dyani-Mhango "Sexual violence, armed conflict and international law in Africa" (2007) 15 *African Journal of International and Comparative Law* 230-253.

[66] See generally, Article 11(3) of the Maputo Protocol, Article 7 of the Statute of the International Criminal Court, and Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

[67] See, preamble to Resolution 283 para 16.

[68] J Biegon *The Impact of the Resolutions of the African Commission on Human and Peoples' Rights* LLD dissertation, University of Pretoria (2016) 46.

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require less mobilisation since the SRRWA can address them to the African Commission for adoption. Furthermore, they are also less demanding as far as expertise and financial resources are concerned. For a mechanism such as that of the SRRWA with scarce resources, both financially and technically, resolutions can offer more impact than the current state of underutilisation by the mechanism of such soft law instruments.

4 Conclusion

Since its establishment, the mechanism of the SRRWA has remained consistent in its role and function within the human rights architecture of the African Commission. To this end, the mechanism has raised the concerns of African women through its working modalities, consequently making modest contributions to the human rights promotion and protection mandate of the African Commission as envisaged in Article 45 of the African Charter. VAW, as illustrated in this article, remains an important and frequent thematic consideration in the work of the mechanism.

One of the major contributions of the mechanism of the SRRWA in the area of VAW can be traced to norms development. As illustrated in this article, since the formation of this mechanism, the mandate holders of the mechanism of the SRRWA have actively been involved in developing various conventions and soft laws focusing on VAW. Beginning with the Maputo Protocol the mechanism of the SRRWA has contributed to several soft law instruments pertaining to VAW, setting out the standard requirements that African states must meet in addressing VAW.

This article has shown that the responsivity of the mechanism of the SRRWA in norms development can be attributed to the fact that in the development of these instruments the SRRWA has given specificity and scope to VAW within the human rights architecture of the African Commission. It has integrated VAW as a human rights issue and thus set the much-needed framework on which states can build and tailor their domestic measures in addressing VAW domestically. In addition to developing these norms, the mechanism of the SRRWA has been an influential stakeholder, together with NGOs in popularising and educating states on their norm obligations relating to VAW. The norms development role of the mechanism of the SRRWA illustrates to a considerable extent its appreciable role in the efforts aimed at combating VAW in African states.

Despite this appreciable role, there is room for improvement. Cooperation and complementarity with other mechanisms relating to women's rights should be fostered. The UN special rapporteur on violence against women, its causes and consequences, is a mechanism in question that the SRRWA can closely work with, especially in the context of VAW. Joint action, such as joint country visits between these two mechanisms not only has the potential to reduce the exorbitant costs of country visits but can also yield more results as it involves joint engagements and appeals by two mandate holders. Furthermore, as indicated in this article, the SRRWA also needs to utilise soft law modalities such as the development and moving of motions, letters

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of appeals and press statements. Although these modalities are relatively less bureaucratic and faster means of engagement and intervention, the mechanism of the SRRWA has used these approaches far less. For a mechanism such as that of the SRRWA with scarce resources, both financially and technically, soft law approaches, though not binding have the potential of raising not only the profile of the mechanism but may also contribute positively to the work of the mechanism, especially as far as the promotional aspects of the mandate of the SRRWA are concerned.

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PROTECTING TRANSGENDER WOMEN WITHIN THE AFRICAN HUMAN RIGHTS SYSTEM THROUGH AN INCLUSIVE READING OF THE MAPUTO PROTOCOL AND THE PROPOSED SOUTHERN AFRICAN DEVELOPMENT COMMUNITY GENDER-BASED VIOLENCE MODEL LAW

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Abstract

Under Article 1 of the Maputo Protocol "women" are defined as "persons of the female gender". Notwithstanding this definition, transgender women, persons whose gender is female but who were assigned male at birth, are yet to be recognised or protected under the Protocol. On the contrary, on the African continent, transgender women are some of the most vulnerable persons in society. Due to their frequent misidentification as homosexual men, and widespread criminalisation of homosexuality, these women are regularly discriminated against and victims of stigma and violence. Furthermore, because of the denial of their gender identities, these women are deprived of their legal recognition and subsequent protection of their human rights. This article considers discrimination against transgender women and contrasts it with the provisions of the Maputo Protocol. This article utilises the teleological approach to treaty interpretation, together with postmodern intersectional feminist legal theory and queer legal theory as well as fundamental principles of international human rights law such as dignity, equality and non-discrimination. Finally, the article considers the recognition and protection of transgender women in light of the proposed SADC GBV Model Law.

Keywords: *transgender women, Maputo Protocol, human rights, dignity, gender-based violence, SADC Model Law*

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1 Introduction

In *Nathanson v Mteliso* ("*Nathanson*"),[69] handed down by Bere J in November 2019, the Bulawayo High Court awarded ground-breaking damages to a transgender woman – Ricky Nathanson – for unlawful arrest, unlawful detention and emotional distress.[70] In 2014, Ms Nathanson was arrested at the Palace Hotel in Bulawayo by six police officers in riot gear for using the female bathroom.[71] She was later charged with criminal nuisance.[72] During her three-day detainment, the police repeatedly mocked her and she was forced to undress to reveal her genitals.[73] She was also escorted on two different occasions to different hospitals to "verify" her gender.[74]

The targeting and arresting of African transgender women for activities such as using the women's restroom, dressing femininely or simply being seen in public is common and constant.[75] In cases such as this, the fact that the charges against Ms Nathanson were eventually dropped and that she could successfully access the judicial system to receive justice is a rare occurrence.[76] It must be emphasised that the harassment and vilification of transgender women, as illustrated in *Nathanson*, is a problem not only in Zimbabwe but in all African countries which criminalise homosexuality, "indecency" between males, and fail to legally recognise transgender women.[77]

This article considers the conceptual conflation of "sex" and "gender" as well as the outcome of the misidentification of transgender women as homosexual men in domestic contexts where homosexuality and/or indecency between males is criminalised.[78]

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69 [2019] ZWBHC 135.

70 Para 132.

71 Para 9.

72 Para 17.

73 Paras 11-12.

74 Paras 13-15.

75 For example, in 2018, two South African transgender women were forced to use the male bathroom at their college campus. They were thereafter harassed while attempting to use the bathroom, having to go so far as to endure being filmed and having male students reveal their genitals to them: C Collison "Trans toilet access still a struggle" (22-06-2018) *Mail & Guardian* <https://mg.co.za/article/2018-06-22-00-trans-toilet-access-still-a-struggle> (accessed 10-10-2021); in 2014 in Malawi, a transgender woman and her partner were arrested for trying to get married: M Gevisser *The Pink Line* (2020) 42-69; in Zambia in 2015 a transgender woman was arrested and convicted of sodomy and for having "deceived" a man to have sex with her: R Igual "Zambian hairdresser faces 15 years in jail for sodomy" (03-11-2015) *Mamba Online* <https://www.mambaonline.com/2015/11/03/zambian-hairdresser-faces-15-years-jail-sodomy/> (accessed 10-10-2021). In Namibia in 2020, a video of an assault of a transgender woman went viral with impunity for both the attackers and recorders: C Miyanicwe "Namibia: Assault on transgender woman condemned" (08-05-2020) *All Africa* <https://allafrica.com/stories/202005080670.html> (accessed 10-10-2021).

76 Ms Nathanson was granted asylum and she now lives and works in the United States of America.

77 Currently, 32 African countries still criminalise homosexuality, or more specifically, same-sex sexual acts between consenting adults. Furthermore, at the time of writing, consensual same-sex acts are punishable by death (as argued to be part of a strict interpretation of Sharia law) in Somalia, Mauritania, and certain states of Nigeria. See ILGA World: L Ramon Mendos, K Botha, RC Lelis, E López de la Peña, I Savelev & D Tan *State-Sponsored Homophobia 2020: Global Legislation Overview Update* 38 and 113.

78 Transgender women are the singular focus of this article – rather than transgender men or non-binary persons – specifically due to the function of the Maputo Protocol (a women's treaty) and the definition provided for 'women' based on gender rather than sex. It is noted that further research must be done on the experiences and protection of transgender men and non-binary persons in Africa but due to the limitations of this article, this is not a consideration here. This is not to overlook the fact that all persons who are seen to deviate from the gender binary or typical gender expectations and roles are

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Within many African countries, the prevailing culture of religious and traditional conservatism poses a major threat to the human rights of any individual who does not conform to heteronormative gender and sexual identities.[79] Although discrimination based on sexual orientation *per se* is a pervasive and urgent threat to any individual's life and human rights, for the purposes of this article the focus is on discrimination that targets individuals based on their gender identities, particularly transgender women. The article illustrates that as long as sexuality and gender identity continue to be conflated, the violation of the fundamental human rights of African transgender women will continue alongside the inability (or unwillingness) of domestic justice systems to provide redress.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Maputo Protocol" or "Protocol") is the regional human rights treaty that codifies the human rights of African women to ensure that their rights are "promoted, realised and protected".[80] Of specific interest to the arguments put forward in this article, it is noteworthy that Article 1(k) of the Protocol defines women as persons of the female *gender* – not of the female *sex*.[81] Utilising post-modern intersectional feminist legal theory and queer legal theory together with the teleological method of treaty interpretation, the objective of this article is to show that Article 1(k) includes African transgender women; and that read in conjunction with relevant rights in the Maputo Protocol, it can offer protection to African transgender women.

Importantly this article focuses on defining State Party obligations towards African transgender women of value when evaluating domestic law. In this regard, a further objective of this article is to show how the protection generated through the Maputo Protocol should be utilised in the drafting of the Southern African Development Community ("SADC")[82] Gender-Based Violence ("GBV") Model Law, currently being considered. The SADC GBV Model Law is an important step towards establishing domestic GBV laws that effectively protect *all* women against violence.

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at risk to GBV. Due to the limited scope, this article only hoped to emphasise that transgender women by virtue of the definition for women set out in the Maputo Protocol must be recognised and protected from GBV. Transgender men, non-binary, and genderqueer persons all equally deserve recognition and protection under both international, regional, and domestic human rights law. Interpretation of the non-discrimination articles in both the African Charter as well as the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 provide a potential point of departure for such work.

79 A very recent example can be found in Cameroon where earlier this year two individuals were arrested whilst out having dinner. They were convicted of attempted homosexuality, public indecency, and failure to carry identification. They were sentenced to five years in jail. Although they are currently out on bail pending the appeal of their sentence – the basis of their arrest and sentence was not any proven sexual activity but rather that in Cameroon, the two individuals are regarded legally and socially as men because their biological sex at birth was male, but they choose to present as feminine. Cameroon's Penal Code Section 347-1: "Whoever has sexual relations with a person of the same sex shall be punished with imprisonment for from 6 (six) months to 5 (five) years and a fine of from CFAF 20 000 (twenty thousand) to CFAF 200 000 (two hundred thousand)".

80 Preamble of the Maputo Protocol.

81 Emphasis added.

82 SADC refers to the South African Development Community comprising of 16 member states: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.

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To achieve the objectives set out above, this article is divided into four parts. Part 2 sets out the theory and methodology used in this article to conceptualise a space for African transgender women within the Maputo Protocol. This part focuses particularly on the construction of "sex", "gender" and "women" and the offerings of post-modern intersectional feminist and queer legal theories in establishing specific protection for African transgender women. Part 3 presents a teleological interpretation of the Maputo Protocol, highlighting the importance of human dignity, equality, and non-discrimination. This discussion further emphasises the under-utilised potential of the Maputo Protocol to recognise and protect African transgender women. Part 4 considers the anticipated SADC GBV Model Law, in light of the arguments presented under parts 2 and 3. Finally, part 5 sets out the main findings and addresses the key points that the drafters of the SADC Model Law should consider to ensure the protection of transgender women in the SADC region.

2 A theoretical framework to better understand the position of African transgender women

2 1 Introduction

Within the realm of a generally religious and often culturally conservative context, African transgender women are frequently deemed to be "un-African".[83] Due to the prioritisation of masculinity within society, transgender women are seen as threats to "African values".[84] Boswell describes the presence of this "deviant femininity" to be regarded as un-African because it challenges African hegemonic masculinity, patriarchy and heteronormativity which "prescribes, upholds and naturalises traditional, static gender roles".[85] Accordingly, transgender women are a visible yet invisible minority and their misidentification as homosexual men jeopardises the recognition and protection of their fundamental human rights within a majority of African countries. Mukasa, commenting on the misplacement of homophobia towards transgender individuals, sets out how:

> "Any person that expresses [themself] as the opposite sex is a homosexual and so this exposes transgender people to all the mistreatment. All transgender people are seen as the obvious homosexuals. Therefore, on top of all the transphobia, there is homophobia, even if you are not gay".[86]

As emphasised in this article, terminology and meaning is everything in the strive to protect the rights of African transgender women. However, it is conceded that using the terminology "African transgender women" is in itself an attempt to categorise, and ultimately subject individuals to artificial

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[83] AM Ibrahim "LGBT rights in Africa and the discursive role of international human rights law" (2015) 15 *AHRLJ* 266.

[84] S Olaoluwa "The human and the non-human: African sexuality debate and symbolisms of transgressions" in Z Matebeni, S Monro & V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 21.

[85] B Boswell "On miniskirts and hegemonic masculinity: The ideology of deviant feminine sexuality in anti-homosexuality and decency laws" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 52.

[86] Viktor Mukasa, as cited by G le Roux in "Proudly African and transgender" in E Ekine & H Abbas (eds) *Queer African Reader* (2013) 67.

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categories and subjective judgements, far removed from the core argument as presented within post-modern and queer theories as further discussed under 2 2 and 2 3 below. Notwithstanding this fact, as the law is inherently constructed around categories, the legal argument, by necessity, requires some sort of classification. It is recognised and conceded that this is an inherent weakness of the law and that the categories of "African", "transgender" and "women" can all be disputed contextually, based on experience, location, and status. The attempt to disrupt the ordinary meaning of "women" and "gender" to include transgender women, has the unwelcome effect of othering transgender women, forcing individuals into yet another category and making static what might be fluent.

2 2 Constructions of "sex", "gender" and "women"

Considering the above and as a point of departure, "transgender" is an umbrella term used to describe a variety of gender identities and expressions. In general terms, transgender persons are individuals whose gender identity and biological sex diverge, whereas cisgender persons are individuals whose gender identity and biological sex correlate. Thus, considering the objective of this article, transgender women specifically are understood to be individuals who experience themselves as female but whose assigned sex at birth was male.[87]

Gender is a "historically and culturally bound" social construction, which has often been dominated by Western conceptualisations.[88] Oyèrónke explains that conceptualising it as binarily opposed and as a hierarchal social category between "men" and "women" can be in and of itself a mistranslation; as in many African cultures and languages – such as Yoruba – it is not.[89] Notwithstanding, this acknowledgement arguably encourages – rather than discourages – a trans-inclusive legal reading as related to the purposes of this article. Moreover, it is relevant when considering how "gender" is conceptualised within the international legal community, and in turn, informs who is recognised and protected as a "woman".

The term "sex" refers to the biological categorisation of an individual as male, female, or intersex.[90] It distinguishes individuals by accounting for the presence of chromosomes, sex hormones, internal reproductive structures,

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87 This is regardless of whether they have, are yet to have, or never plan to have, gender affirming surgery or hormone treatment.

88 O Oyèrónke *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) 32.

89 32. This article, like many legal instruments, moreover falls into the trap of being limited by English. Many languages, historical and current, have different interaction with gendering their language and gender within their language. Moreover, much work has been done by African scholars and activists alike to highlight and debunk conceptualisations of gender – specific to their context and culture. See further: S Tamale (ed) *African Sexualities: A Reader* (2011); S Ekine & H Abbas (eds) *Queer African Reader* (2013).

90 "Intersex" refers to variances in sexual development, where bodies are not typically male nor typically female but have a combination of typically male or female chromosomes, hormones and sexual characteristics. Some feminist philosophers, such as Butler, argue that both categories of gender and sex, although not the same thing, are constructed. See further: J Butler *Bodies that Matter: On the Discursive Limits of 'Sex'* (1993).

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and external genitalia.[91] Comparatively, "gender" refers to the cultural and social construction within which an individual comprehends their identity, usually accompanied by the experience of feeling male, female, or non-binary. As Ball argues:

> "Identities are not predetermined categories that exist independently of the social forces that constitute them. Individuals do not "discover" their identities so much as adopt them as mechanisms and strategies for making sense of the social world around them".[92]

Stryker explains that after birth, an individual is assigned a sex and a corresponding gender. Whether or not they form an association with that gender is part of constructing their respective gender identity; described by Stryker as a "complex process of socialisation".[93] Consequently, an individual's gender is not determined by their biological sex, but rather it relates to their gender identity.[94] Gender identity, as defined in the Yogyakarta Principles[95] refers to:

> "[A] person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".[96]

Accordingly, because sex and gender are not the same, their conflation impacts how societies commonly understand "gender", gender expression as well as gender roles. As illustrated by the experiences of Ms Nathanson, as presented in the introduction, this often negatively affects the perception and treatment of transgender women.[97] Moreover, within some SADC countries, as is discussed in further detail in part 4 below, this continuous conflation is a key driving force for the violence, stigma and discrimination perpetuated against these women.

Although the term "transgender" is a recent descriptive concept; gender-diverse individuals have been present throughout history. Feinberg states that transgender as a category "only emerged in a collective, institutionalized way in the early 1990s".[98] Stryker argues that although the 1990s saw the term enter widespread use, its history and development is intricate.[99] On the African continent, whether or not Western descriptive terms, such as "transgender" or even the LGBTIQ (lesbian, gay, bisexual, transgender,

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[91] K Govind "Basic Issues of Transgender" in C Subramanian & M Sugirtha (eds) *Transgender Wellbeing an Emerging Issue* (2015) 295.

[92] CA Ball "A new stage for the LGBT movement protecting gender and sexual multiplicities" in CA Ball (ed) *After Marriage Equality The Future of LGBT Rights* (2016) 164.

[93] S Stryker *Transgender History The Roots of Today's Revolution* 2 ed (2018) 14.

[94] Prager *Queer, There* 219, see also P Currah "The transgender rights imaginary" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 255.

[95] The Yogyakarta Principles are non-binding but persuasive international guidelines for the implementation of human rights law with regard to LGBTIQ persons.

[96] The Yogyakarta Principles (2007) 1 <http://www.yogyakartaprinciples.org/principles_en.htm> (accessed 04-05-2021).

[97] M Chamallas *Introduction to Feminist Legal Theory* 3 ed (2013) 217.

[98] L Feinberg *Trans Liberation: Beyond Pink or Blue* (1998) 30.

[99] Stryker *Transgender History* 36.

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intersex and queer) acronym are appropriate is highly contested.[100] Thus, it is important for queer (which is also a contested term) Africans, including African transgender women, to be able to create and use terms that describe and represent their lives and lived realities without having to subscribe to foreign cultural representations. As presented by Nyanzi:

> "It is important to constantly interrogate, debunk, dismantle and queer the culturalist or reified traditional logic when it is appropriated to consolidate oppression, especially when embedding that oppression in legislative processes".[101]

Expecting individuals to conform to a specific categorisation within the LGBTIQ acronym to be (legally) recognised, and, in turn, have their human rights protected is problematic as it stifles and restricts an individual's self-development. It is also fundamentally contrary to the principle of universality as well as a violation of the *jus cogens* norms of equality, dignity, and non-discrimination.

Currently, out of the 42 state parties to the Maputo Protocol, transgender persons are only explicitly legally recognised and provided for in South Africa, through the Alteration of Sex Description and Sex Status Act 49 of 2003.[102] Thus, the absence of regulatory and/or protective legislation for transgender persons in Africa is alarming and has a detrimental effect on the enjoyment of their human rights, as their marginalisation and stigmatisation is continuously overlooked.

The process of transitioning to reflect a person's gender identity (with or without surgery or other medical treatments) often only occurs during adulthood. Especially in the case of transgender women, a late transition results in increased visibility as "non-normative" in their adult life because they go through puberty as biologically male. Being visible, transgender women are more likely to become targets of harassment, discrimination, and violence.[103] Oloka-Onyanga, writing on transgender women in Uganda and Kenya, elaborates that they are subjected to:

> "[A]ll forms of harassment, including hate crimes, especially on account of the charge against transgender women that they are masquerading in order to dupe and extort money from the public, or the alternative claim that they are homosexual, confusing the issue of gender identity and sexual orientation. Others have faced lynch mobs and have been beaten, aside from being ostracized, barred from housing and suffering all manners of discrimination in their places of employment, as well as with immigration officers who accuse them of impersonation".[104]

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[100] D Clarke "Twice removed: African invisibility in Western queer theory" in E Ekine & H Abbas (eds) *Queer African Reader* (2013) 182.

[101] S Nyanzi "Afterword: Sexing the law and legislating gendered sexualities" in D Higginbotham & V≈Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 75.

[102] Although the Act is a step in the right direction, it is important to note that there has been significant criticism regarding it's incorrect implementation as well as the fact that the Act requires applicants to undergo medical or surgical treatment before they may be successful in having their documents altered/gaining legal recognition (compared to potentially a self-declaratory model which is followed in other countries, such as Argentina and Malta). See further, B Deyi, S Kheswa & L Theron (obo Gender DynamiX) & M Mudarikwa, C May & M Rubin (obo the Legal Resources Centre) "Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003" (2019) *Transgendermap* <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> (accessed 02-03-2022)..

[103] Oloka-Onyango (2015) *AHRLJ* 49.

[104] 50.

Moreover, the vulnerability of African transgender women is exacerbated when they are victims of harassment, violence, and rape, and are thereafter subject to repeat victimisation by state officials, such as police officers as exemplified by Ms Nathanson's case. Worldwide, police officers are often the key perpetrators of violence against transgender women.[105] This must be considered against the background that it is a police officer's duty, as an official of the state, to ensure the protection of human rights of all individuals, including the right to life, integrity and security of transgender women. As an example, because transgender women are frequently denied recognition of their gender identity when they are arrested and detained, they are kept in cells with men. This exacerbates their vulnerability and their exposure to general, as well as sexual, violence at the hands of other individuals in detention.[106] Furthermore, police officers are regularly accused of taking advantage of transgender women; forcing them to perform sexual acts, humiliating them or subjecting them to other forms of inhumane or degrading treatment as also observed in Ms Nathanson's case.

2 3 Post-modern intersectional feminist legal theory

As further argued in this article, the post-modern intersectional feminist legal theory allows for the deconstruction of the notion of "gender" and critically engages what encompasses the identity of "women". The application of this theory is especially useful when establishing whether transgender women can be understood to be subsumed under the term "women".

Feminism as a movement is grounded in the objective of establishing equality between men and women in all social, political, and economic spheres of life.[107] It aims to analyse the unequal distribution of power and privilege incurred by gender roles in society and through exposing it, provide a developmental directive towards increased equality. The integration of feminism within the legal framework is established in feminist legal theory, focusing on recognising the role of the law in governing women and the inherent manifestations of their implied inferiority to men. At its core, feminist legal theory recognises that an individual's gender influences how they are treated as a legal subject. Advocates of feminist legal theory emphasise that being a man, or a woman, has a significant impact on most people's lives.[108] Feminist legal theory is especially valuable in exposing gender biases in the law and establishing ways in which stereotypical legal predispositions can be challenged.[109]

The role of feminism and feminist legal theory has been expanded by the general perspective of post-modernist thought, rejecting dominant narratives

[105] OHCHR *Born Free & Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 67.
[106] 23.
[107] Chamallas *Introduction to Feminist Legal Theory* 1.
[108] 1.
[109] Romero "Methodological Descriptions" in *Feminist and Queer Legal Theory* 197.

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and ideologies.[110] Post-modernism, integrated with feminism and feminist legal theory, allows for the inclusion of an intersectional epistemology offering the potential to transcend the dominant understanding of who a woman is (white, straight, cisgender and middle class as reflected in first wave feminism), which encompasses her oppression, and how gender affects her lived experiences.[111] Post-modern feminist legal theory therefore effectively provides the tools to deconstruct the social identities and legal assumptions that affect the broader grouping of *all* women, irrespective of their race, class, sexual orientation and/or gender identity.

2 4 Queer legal theory

Whereas different feminist theories acknowledge and operate within gendered and sexual categories to overcome their confines, queer theory, as an epistemology, works to challenge the validity of such categories.[112] Queer theorists argue that the binary categories of gender and sexuality are neither natural nor predetermined, but instead social constructions which place limitations on an individual's identity and personal development.[113] "Queer" is a descriptive term and through its rejection of dominant narratives and ideologies, it is inherently post-modern.[114] Morland and Willox argue that "queerness calls at once for a celebration of a diversity of identities but also for a cultural diversity that surpasses the notion of identity".[115] Through these fundamental notions, queer legal theory is useful in recognising the fluidity of identities and illustrates how transgender women can be included under the term "women".

Nonetheless, some queer theorists are suspicious of the role of the law and doubt its value to queer individuals as many experiences the law to "regulate, rather than liberate, them".[116] Nonetheless, as argued in this article, queer legal theory can contribute to an inclusive application of the law which treats all individuals as equal legal subjects, irrespective of their gender identity. This in turn confirms the fundamental principles of international human rights protection, namely: dignity, equality and non-discrimination. Currah suggests that individuals should not be required to comply with heteronormative standards of gender expression to be regarded as protected legal subjects.[117]

Queer legal theory and its deconstruction of the gender binary can aid in dismantling the colonial heritage of heteronormative boundaries within African communities. In turn, this could arguably increase the general acceptance of African transgender women in Africa's many diverse societies and help augment their legal protection. Such a development, however,

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[110] F Valdes "Queering sexual orientation: A call for theory as praxis" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 98.
[111] Chamallas *Introduction to Feminist Legal Theory* 7.
[112] Romero "Methodological descriptions" in *Feminist and Queer Legal Theory* 190.
[113] 193.
[114] SD Walters "From here to queer: Radical feminism, postmodernism, and the lesbian menace" in I Morland & A Willox (eds) *Queer Theory* (2005) 7.
[115] I Morland & A Willox "Introduction" in I Morland & A Willox (eds) *Queer Theory* (2005) 3.
[116] Chamallas *Introduction to Feminist Legal Theory* 225.
[117] Currah "The transgender rights imaginary" in *Feminist and Queer Legal Theory* 255.

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requires people to work autonomously rather than duplicate established forms of activism created in the Global North to affect change.[118] As echoed by Nyanzi, queer legal theory is insightful in asking:

> "What are the implications of legislating non-heteronormative gender identities and sexual practices in society? Apart from statutory laws, what alternative frameworks for managing the national standards of being appropriately gendered and sexualised citizens exist, if such standards should exist at all?"[119]

Higginbotham and Collis-Buthelezi argue that the vulnerable position of African transgender women is attributable to politically motivated stances; often with life-threatening implications.[120] This is taken as far as government officials using queer individuals as scapegoats, arguing that the "moral decay of society" is a result of them destroying African culture in an attempt to distract from incompetence and/or corruption within their own systems.[121] Henceforth, it is crucial to destabilise the legal heteronormativity and hegemony to ensure the legal protection and safety of African transgender women. Applying queer legal theory in an African context has the potential to promote an empowered methodology in which queer individuals are treated equally. For African transgender women specifically, its application, as argued in this article, can help in the production and promotion of knowledge which encourages an understanding that they are both human and women. This, in turn, would warrant the legal protection of their fundamental human rights.

3 A teleological interpretation of the Maputo Protocol to protect African transgender women

3 1 The object and purpose of the Maputo Protocol

A teleological approach to treaty interpretation requires that the terms of a treaty be considered in light of its object and purpose. Thus, this approach does not only encourage that a treaty is interpreted through continuous reference to its object and purpose, but also that it is supplemented and appended through such reference.[122] This article endorses a teleological approach to the interpretation of the Maputo Protocol to enable a consideration of the context within which it was conceived, the matrix of rights and fundamental principles included in the instrument as well as the lived realities of African transgender women.[123]

International human rights protection is founded on the notion that all human rights are indivisible, interdependent, and interrelated.[124] The principles of

[118] Banda *Women, Law and Human Rights* 44.
[119] Nyanzi "Afterword" in *Contested Intimacies* 66.
[120] D Higginbotham & V Collis-Buthelezi "Introduction" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) xvii.
[121] CF Edozien *Lives of Great Men* (2018) 121.
[122] GG Fitzmaurice "The law and procedure of the International Court of Justice: Treaty Interpretation and certain other treaty points" (1951) 28 *British Year Book of International Law* 2.
[123] A Amin *A Teleological Approach to the Interpretation of Socio-economic Rights in the African Charter on Human and People's Rights* LLD dissertation, Stellenbosch University (2017) 31.
[124] R Wallace & O Martin-Ortega *International Law* 7 ed (2013) 244; Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 para 5; Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

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universality, equality and non-discrimination reaffirm this. The principle of universality specifically centres on the conception that there is an "essential and fundamental sameness of humankind".[125] Accordingly, human rights are afforded to all individuals on the basis that they are human. Furthermore, the rights to equality and non-discrimination ensure that all human rights are afforded to all individuals regardless of their demographic and/or cultural background.[126] The principle of dignity, which is an inherent characteristic in all individuals, further affirms this understanding and substantiates the protection of their human rights.

In light of this approach endorsed, it is important to note that the object and purpose of the Maputo Protocol are to ensure that African women fully enjoy all of their human rights.[127] As explained by Muriithi:

> "[The] lack of clarity of human rights vis-à-vis the preservation of traditions, coupled with mass violations against African women, led to the women's movement demanding an African legal framework deriving from the African Charter that would spell out clearly the rights of women in Africa via-à-vis culture and religion and once and for all end the debate on whether African women were entitled to the protections guaranteed within the African Charter and other human rights instruments that African countries had ratified."[128]

It is expressed in the preamble that the Maputo Protocol aims to promote the principle of gender equality as well as to eliminate all forms of discrimination and GBV against women. It is important to bear this in mind when considering the arguments presented below.

3 2 The inclusion of African transgender women under Article 1(k)

As noted in the introduction, Article 1(k) of the Maputo Protocol defines "women", the legal subjects of the Protocol, as persons of the female gender. Furthermore, as has been noted, gender is distinct from sex, as it is a social notion through which one identifies themself.[129] From this point of departure, a person's gender identity is the terminology used to describe their gender. Thus, transgender women, because of their gender identities, are women based on their gender.

Accordingly, because the definition of women in Article 1(k) is established based on gender, transgender women can and should arguably be recognised and protected under the Maputo Protocol. As the Protocol is set on protecting women based on their gender, a trans-exclusionary reading negates its object and purpose, discriminating against transgender women based on a distinction between their gender identity and their sex at birth. Moreover, it contradicts the core principle of non-discrimination which is at the heart of the Protocol.

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[125] A Fagan & H Fridlund "Relative universality, harmful cultural practices and the United Nations' Human Rights Council" (2016) 34 *Nordic Journal of Human Rights* 22.
[126] BG Ramcharan *The Fundamentals of International Human Rights Treaty Law* (2011) 34, 69, 78.
[127] Equality Now *Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa* (2013) 19.
[128] 43.
[129] Sometimes this is aligned to biological birth sex and sometimes not.

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3 3 The right to gender recognition as an aspect of the right to dignity

The notion of dignity is regarded to be a key principle of international human rights law.[130] Derived from the Latin term *dignitas* (which translates into "worthiness"), dignity refers to the recognition of the inherent worth and value of all human beings.[131] The recognition of dignity, as an organising principle of international human rights law, confirms its existence as an inalienable and universal right bestowed to all persons. Within the Maputo Protocol, the right to dignity is set out in Article 3(1) as:

> "Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights."

This article confirms two key principles. Firstly, the equality of the right to dignity, inferring that the intrinsic nature of "inherent dignity" is present in all women, by mere virtue of them being human. This confirms the universality of the right to dignity. Secondly, Article 3 provides for all rights of women to be recognised and protected as a *result* of their dignity. The reference to "recognition" is relevant to the argument that African transgender women are unable to enjoy their right to dignity (and correspondingly all of their other human rights) if their gender identities are not recognised. Furthermore, the failure to recognise these women because of their gender identity is discrimination in and of itself.

The realisation of the right to dignity complements the enjoyment of other fundamental human rights. Vollmer argues that violations of the right to dignity prevent the ability of individuals to live a dignified existence.[132] Following this argument, protecting the right to dignity of African transgender women would arguably aid in protecting all their human rights. Moreover, the phrasing of Article 3(2) is also noteworthy as part of a teleological interpretation. It states that:

> "Every woman shall have the right to respect as a person and to the free development of her personality".

Because an individual's personality is the combination of characteristics and qualities that form their distinctive character, and the personality and identity of individuals are inherently interrelated, it is put forward that the gender identity of an individual is a fundamental aspect of their respective personality. Thus, the protection offered in Article 3 of the Maputo Protocol creates an obligation for state parties to recognise and protect the dignity of African transgender women.

Articles 3(3) and 3(4) emphasise that state parties have a duty to prevent the exploitation and degradation of women as well as to ensure their protection

[130] T Lowenthal "The role of dignity in human rights theory: Constituent or teleological?" (2015) 18 *Trinity College Law Review* 56.
[131] R Steinmann "The core meaning of human dignity" (2016) 19 *PELJ* 4.
[132] DT Vollmer *Queer Families: An Analysis of Non-heteronormative Family Rights under the African Human Rights System* LLD dissertation, Stellenbosch University (2017) 244.

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from sexual and verbal violence.[133] These obligations link dignity, not with an intangible, abstract concept, but rather a tangible and physical sense of being. It focuses on violations of women's bodies, emphasising their right to bodily integrity. The term "exploitation" refers to the treatment of an individual, where someone else benefits from their work and/or gains an unfair advantage from them. Often, exploitation is associated with economic gain through exploitative labour practices including slavery and human trafficking.[134] Other examples of exploitation are forced marriages as well as sexual exploitation. The core feature of exploitation is the coercive nature of the actions. The term "degradation" refers to instances where an individual is undermined or demeaned, making them feel as if they have little or no value. It is an umbrella term incorporating different forms of humiliation, as both degradation and humiliation undermine the self-worth, self-respect, and self-esteem of an individual.[135]

Article 3(4) read alongside the definition of "violence against women" in Article 1(j) obligates state parties to unequivocally ensure the safety of African women. Although Article 3(4) emphasises the prevention of physical and sexual violence, Article 1(j) has a wider protective scope. It defines "violence against women" as:

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

A teleological interpretation of the Maputo Protocol where these articles are read together in light of the object and purpose illustrates that transgender women, when subjected to violence because of their gender identities, can seek redress under the Maputo Protocol. This is noteworthy considering the argument presented below under 4 2, as an indicator of what the SADC GBV Model Law could, and should aspire, to do. Accordingly, this argument together with Article 4(2)(c) challenges the heteronormative, cultural, and religious justifications for violence against African transgender women; in consideration of the fact that as human beings they have inherent dignity, and it is the mandate of the Maputo Protocol to recognise and protect them.[136] The African Commission in their General Comment No 2 set out that:

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[133] "Article 3(3) States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women. Article 3(4) States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence."

[134] OHCHR *Integrating A Gender Perspective into Human Rights Investigations: Guidance and Practice* (2018) 47.

[135] Steinmann (2016) *PER/PELJ* 19.

[136] "Article 4(2)(c) State Parties shall take appropriate and effective measures to: identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence."

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> "The right to dignity enshrines the freedom to make personal decisions without interference from the State or non-State actors. The woman's right to make personal decisions involves taking into account or not the beliefs, traditions, values and cultural or religious practices, and the right to question or ignore them".[137]

Vollmer interprets this statement in the context of queer rights and argues that it presents three key principles. First, because the enjoyment of the right to dignity obligates state parties not to interfere in the personal decisions of women, this includes that of gender identity expression. Second, that beliefs, traditions, values and/or cultural practices cannot be used as justification for the infringement of the right to dignity, as there are clear implications for violations to rights and the defences offered by states. Lastly, since gender identity is an integral part of an individual's personality, Article 3 of the Maputo Protocol can advance the rights of women with non-normative sexual orientations or gender identities, and thus, transgender women.[138]

3 4 A conceptual confusion

Article 1(f) of the Maputo Protocol sets out that "discrimination against women" includes:

> "Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life".

Thus, while "gender" is the distinctive characteristic used to define a woman in Article 1(k), the basis on which discrimination is based in Article 1(f) is "sex". Moreover, Article 2(2), which obliges states to eradicate harmful practices "based on the idea of the inferiority or superiority of either of the sexes", again uses "sex" instead of "gender".[139] So while gender is used to define women in the Protocol and is referenced four times otherwise,[140] sex is referenced twice. This illustrates that at the time of drafting, the terms were regarded as interchangeable, which, as was explained in part 2 2, they are not. The interchangeable (mis)use of the terms "gender" and "sex" within the Maputo Protocol is an example of a conflation of these terms which reveals the need for a post-modern and queer legal approach to regarding the Protocol, otherwise the application will remain (trans-)exclusive and discriminatory.

As discussed in part 2 2 above, "sex" and "gender" are fundamentally distinct concepts. However, their conflation within the Maputo Protocol is not an isolated instance, it is also reflective of a general practice in some of the member states. As an example, relevant to the discussion in this article,

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[137] African Commission General Comment No 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa para 24.

[138] Vollmer *Queer Families* 244.

[139] "Article 2(2) States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

[140] Articles 1(k), 2(1)(c), 8(d), 12(1)(e), 19(a).

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De Vos criticised the then Ugandan Anti Homosexuality Act, 2014[141] and explained how the Act defined:

> "[A] 'homosexual'… [as] a person who engages or attempts to engage in same gender sexual activity and 'homosexuality' as same gender or same-sex sexual acts (section 1). Given the obviously constructed nature of gender (as opposed to sex which is supposedly based on biological characteristics) it is unclear how a judge will be able to decide what the 'gender' of an accused person or their sexual partner is. The conceptual confusion – if one accepts that generally accepted categories of sex and gender are distinct ... suggest[s] an investment in the idea that sex and gender are both biologically determined and thus interchangeable".[142]

This example relates to the threat the conflation of these terms poses to transgender women specifically where homosexuality is still criminalised. As discussed in the introduction, homosexuality and/or indecency between males are criminalised in many state parties to the Maputo Protocol and African transgender women are often persecuted on this basis as they are misidentified as homosexual men. Because such laws use "sex" and "gender" interchangeably, as in the example related to above, the distinction between homosexual men and transgender women is often overlooked and the emphasis is placed on persecuting individuals who were born male and who do not comply with the heteronormative expectation of what a man is. This is representative of a harmful heteronormative culture present in a majority member states which operates as a justification for human rights violations of both homosexual men and transgender women.[143]

The theoretical framework presented in part 2 above, is useful in illustrating how the use of the terms "gender" and "sex" affect the recognition of transgender women as "women" under the Maputo Protocol. The post-modern intersectional feminist legal theory reveals that there is no universal nor essential experience of being a woman and that the presence of other factors affect how women are treated in society and by the law. Moreover, queer legal theory illustrates that markers of identity are socially constructed and fluid.[144] It undermines the heteronormative and binary legal constraints expected of individuals to attain citizenship, recognition as legal subjects and the acknowledgement of their inherent dignity. If read teleologically, upholding the object and purpose of the Maputo Protocol, this would require the narrow reference to discrimination based on sex to extend to that of gender (including gender identity) discrimination.

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[141] On 20 December 2013, the Ugandan Constitutional Court found that there was no quorum in Parliament to enact the Anti-Homosexuality Act 2014 and as it was in contravention with Constitution of the Republic of Uganda 1995 and Rule 23 of the Parliamentary Rules of Procedure. Accordingly, it was made null and void on the technicalities; *Oloka-Onyango v Attorney-General* (2014) UGCC 14 20. In 2019 the Ugandan Sexual Offences Bill was presented before Parliament, which amongst other things criminalised same-sex consensual acts. On 3 May 2021, the Bill was rejected by President Museveni on the grounds that certain acts were already covered in the Ugandan Penal code.

[142] P de Vos "The Limit(s) of the Law: Human rights and the emancipation of sexual minorities on the African continent" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 8.

[143] Oloka-Onyango (2015) *AHJR* 50.

[144] Chamallas *Introduction to Feminist Legal Theory* 218.

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3 5 The work of the African Commission supporting a trans-inclusive reading of the Maputo Protocol

The position of African transgender women in African society is precarious and sparsely documented.[145] However, concerning the (increasing) recognition of gender identity rights in the African human rights system, the work of the African Commission is significant.

As a point of departure, the African Commission, in 2014 at its 55th Ordinary Session in Luanda, Angola, concluded Resolution 275 entitled Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity ("Resolution 275"). This Resolution states that the African Commission is aware and alarmed at the fact that violence, discrimination, and harassment continue to be committed against individuals in many parts of Africa because of their actual or implied sexual orientation or gender identity.[146]

Further, the Commission acknowledged that such violence includes "corrective" rape, assaults, torture, murder, arbitrary arrests, detention, executions, forced disappearances, extortion as well as blackmail. Even though it is not a binding instrument *per se*, Resolution 275 sets out the Commission's interpretation of the legally binding instruments under its mandate, one of them being the Maputo Protocol. Resolution 275 is furthermore noteworthy as an explicit recognition of violations of queer rights within the African regional human rights system. It is useful in light of the preamble of the Maputo Protocol which states that any other related "Resolutions, Declarations, Recommendations, Decisions, Conventions ... aimed at eliminating all forms of discrimination and at promoting equality between women and men" must be considered. Accordingly, reading Resolution 275 together with the Maputo Protocol gives content and context to the rights and provides a basis for the condemnation of the violence committed against transgender women by private actors and state parties alike.

In 2018, the Centre for Human Rights published "Implementation Guidelines" for Resolution 275.[147] While praising the progress of the African Commission, the Centre noted that regardless of Resolution 275, queer Africans continue to be victims of violence and harassment.[148] Within the guidelines, the Centre argued that "the fight to curb violence against persons based on their real or imputed sexual orientation or gender identity

[145] GA Jobson, LB Theron, JK Kaggwa & HJ Kim "Transgender in Africa: Invisible, inaccessible, or ignored?" (2012) 9 *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 161.

[146] Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 55th Ordinary Session from 28 April to 12 May 2014.

[147] University of Pretoria, Centre for Human Rights & AMSHeR Resolution 275: What it means for State and Non-state actors in Africa (2018).

[148] S Khumalo "The Centre for Human Rights Launches Resolution 275 Guidelines at the 63rd Session of the African Commission on Human and Peoples' Rights" (31-10-2018) *University of Pretoria News* <https://www.up.ac.za/en/faculty-of-law/news/post_2730847-the-centre-for-human-rights-launches-resolution-275-guidelines-at-the-63rd-session-of-the-african-commission-on-human-and-peoples- rights online publication> (accessed 05-10-2021).

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is strengthened by two binding treaties that apply at the regional level".[149] Referring to the African Charter on Human and People's Rights ("African Charter")[150] and the Maputo Protocol, they argued that the measures within both documents which grant the protection of "the rights to life, dignity and physical integrity", as well as "the guarantee against cruel, degrading or inhuman treatment ... requires state parties to take specific measures to combat violence against women regardless of their ... gender identity".[151]

Returning to the work of the Commission, in 2017 in a general comment regarding Article 5,[152] the African Commission explicitly included "gender identity" as a protective ground for non-discrimination.[153] They continued to state that:

> "Any person regardless of their gender may be a victim of sexual and gender-based violence. There is wide prevalence of sexual and gender-based violence perpetrated against women and girls. Acts of sexual violence against men and boys, persons with psychosocial disabilities, and lesbian, gay, bisexual, transgender and intersex persons are of equal concern, and must also be adequately and effectively addressed by State Parties."[154]

This inclusive approach to recognising the impact of GBV, the continued emphasis of gender (rather than sex) as well as the intentional mention of transgender persons as of "equal concern" is encouraging to consider in light of the object of, and arguments presented in, this article.

In 2018, the African Commission in a Guideline for the Implementation of Economic, Social and Cultural Rights again explicitly recognised transgender persons as part of the category of vulnerable and disadvantaged groups who "face significant impediments" to the enjoyment of their rights.[155] Later that same year, the Commission formed part of a joint dialogue with the Inter-American Commission on Human Rights and the Office of the United Nations High Commissioner for Human Rights ("OHCHR") on "gender identity, sexual orientation and intersex related issues". In their final report, they noted that such issues have "received limited attention within the African human rights system".[156] The Commission further noted that in considering non-discrimination, there is to be "no limit" on the number of recognised grounds. This implies that even if gender identity is not an explicit ground, it is an implied one and that even though the African Charter does not explicitly list

[149] University of Pretoria, Centre for Human Rights & AMSHeR *Resolution 275: What it means for State and Non-state actors in Africa* (2018) 1.

[150] African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986).

[151] University of Pretoria, Centre for Human Rights & AMSHeR *Resolution 275* 1.

[152] The Right to Redress for Victims of Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment.

[153] African Commission General Comment No. 4 on General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 20.

[154] Para 59; emphasis added.

[155] African Commission *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights* (2011) para 8.

[156] Inter-American Commission on Human Rights, African Commission on Human and People's Rights and OHCHR *Joint thematic dialogue on sexual orientation, gender identity and intersex related issues* (2018) 28.

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a group by its name, protection for them cannot be denied. The same line of argument applies to the Maputo Protocol.

In the joint dialogue, it is noticeable that the Commission, instead of conflating sex and gender reinforces that "sex" includes "sexual orientation" and "sexuality" and that therefore, "[b]y the same token, 'gender' should be interrelated to include 'gender identity'".[157] This, according to the Commission is "particularly important in respect of the [Maputo] Protocol, which defines "women" as "persons of female gender".[158] Not only does this illustrate that there is growing recognition within the African human rights system to recognise and protect transgender persons, but it directly confirms the argument of this article that an inclusive, teleological, interpretation and application of the Maputo Protocol which includes transgender women is not only possible and necessary but legally sound.

4 The Draft SADC GBV Model Law

As the silent pandemic, GBV is "widespread" in the SADC region.[159] As discussed under 3 3, GBV is harmful or violent acts directed against persons as a result of their gender. This includes sexual, physical, mental and or economic harm, which is inflicted on them, either in public or in private.[160] As described by Iranti:

> "Gender-based violence is the umbrella term that described violence that occurs as a result of the unequal power relationships and the normative role expectations with each gender in a specific society".[161]

On the international level, the Convention on the Elimination of Discrimination against Women ("CEDAW")[162] and the work of the CEDAW Committee has defined and contextualised GBV. GBV has historically, and within this context, been approached with an emphasis on the impact of GBV on cisgender women. However, the recent creation of the position of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity by the UN Human Rights Council has broadened the extent of this understanding to include recognition of, amongst others, transgender persons as exceptionally vulnerable to GBV; arguably endorsing a post-modern intersectional feminist approach to GBV.[163]

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[157] 32.

[158] 32.

[159] See Southern African Development Community "Gender based violence" (undated) *SADC* <https://www.sadc.int/issues/gender/gender-based-violence/> (accessed 05-10-2021).

[160] UNHCR "Gender-based violence" (undated) *UNHCR* <https://www.unhcr.org/gender-based-violence.html> (accessed 05-10-2021).

[161] Iranti & Arcus Foundation "Data Collection and Reporting on Violence Perpetrated Against LGBTQI Persons in Botswana, Kenya, Malawi, South Africa and Uganda" (2019) *Arcus Foundation* 9 <https://www.arcusfoundation.org/wp-content/uploads/2020/04/Iranti-Violence-Against-LGBTQI-Persons-in-Botswana-Kenya-Malawi-South-Africa-Uganda.pdf> (accessed 05-10-2021).

[162] (adopted 18 December 1976, entered into force 3 September 1981) 1249 UNTS 13.

[163] HRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity" 38th Session (18 June-6 July 2018).

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As noted by the OHCHR:

> "[T]ransphobic violence has been reported in all regions of the world [and] ranges from aggressive, sustained psychological bullying to physical assault, torture, kidnapping and targeted killings. Sexual violence has also been widely reported, including so-called "corrective" or "punitive" rape".[164]

In general terms, international or regional model laws stipulate best norms and practices which are contained in international instruments, such as the CEDAW and Maputo Protocol. Thus, they aim to act as catalysts for the domestication of such treaties as they contain comparable norms that can be enacted into domestic legislation. The Draft SADC GBV Model Law, as mentioned in the introduction, is currently undergoing several consultative processes. It contains best practices relating to the prevention of GBV across all SADC member states. The main objective of the SADC GBV Model Law is:

> "[T]o serve as a guidance, a yardstick, and as an advocacy tool for legislators and other key stakeholders in the region and provide best practice language which can be easily adopted/adapted by member states. The GBV model legislation will assist member states - in particular policy makers and legislative drafters - to address all the relevant areas in need of legislative reform without interfering with the authority of national legislatures".[165]

The SADC GBV Model Law is closely related to the SADC Protocol on Gender and Development which was revised in 2016 to emphasise the urgent need to address all forms of GBV within the member states as well as the Maputo Protocol. The Draft SADC GBV Model Law defines gender-based violence to include economic and psychological violence as well as stalking and harassment. Clearly modelled on the Maputo Protocol, the SADC GBV Model Law therefore has the potential of influencing GBV legislation across all SADC member states by providing a single piece of legislation, squarely based on pre-existing state obligations, which can be readily domesticated.

Of the 16 SADC member states, which are all bound by the SADC Protocol, all have ratified the CEDAW and only Botswana is yet to ratify the Maputo Protocol. GBV is only explicitly mentioned in the Maputo Protocol once in the preamble. However, "violence against women" is acknowledged several times within the Protocol and as noted under 3 3, is defined in Article 1(j). Applying the teleological method of treaty interpretation and thus the inclusive reading as advocated for within this article confirms that when focusing on how to eradicate GBV, violence against women as noted in the Protocol includes GBV against transgender women.

The SADC Gender Protocol urges member states to enact and enforce legislation that prohibits all forms of GBV. This directly relates to the

[164] OHCHR *Free & equal United Nations for LGBT Equality Fact Sheet: Homophobic and transphobic violence* (2017) 1.

[165] UNFPA "Consultancy Southern African Development Community (SADC) Gender-Based Violence Model Law Drafting" (undated) *UNFPA* <https://www.unfpa.org/jobs/consultancy-southern-african-development-community-sadc-gender-based-violence-model-law> (accessed 05-10-2021). Although this draft law will only be applicable to the 16 countries – it is contended that there will be incentive to further such standards within the entire region.

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realisation of the obligations set out in Articles 3(4), 4(2) and 5(d) of the Maputo Protocol. The Draft SADC Model Law is thus important as it has the potential to strengthen the mandate of human rights protection based on gender (identity) within the SADC region.

5 Conclusion

Within the SADC region, like the rest of the continent, queer individuals continue to face significant threats to their human rights, including their right to dignity, life, safety, and security. For transgender women, the risk of being attacked or murdered is particularly high due to the misogynistic response to the "deviant femininity" these women are often seen to encompass. In this regard, the unlawful arrest and detention of Ms Nathanson was noted in the introduction. Moreover, throughout this article, violations of transgender women's human rights based on the conflation of sexual orientation and gender identity (viewed as gay men and criminalised as homosexual or as engaging in indecent behaviour) and the unacceptance of their gender identities (viewed as non-conforming to normative gender stereotypes) were highlighted.

The research presented in this article illustrated that if sexuality and gender identity continue to be conflated, and homosexuality or indecent behaviour between males remains criminalised the violation of the fundamental human rights of African transgender women will continue alongside the inability (or unwillingness) of domestic justice systems to provide redress. In this regard, the article offered a post-modern intersectional feminist and queer legal reading together with a teleological interpretation of the Maputo Protocol which showed that Article 1(k) can be read to include African transgender women. Article 1(k), read in conjunction with relevant rights in the Maputo Protocol, can offer fundamental protection to African transgender women. Except for Botswana, all SADC countries, including Zimbabwe, have ratified the Maputo Protocol. Therefore, defining State Party obligations towards African transgender women can be of much value when evaluating domestic law especially when it comes to challenging the criminal codes that criminalise homosexuality or indecent behaviour between males and advocating for the legal recognition of transgender identities.

The need for specific laws confronting violence that is based on gender is evident in the Draft SADC Model Law. A further objective of this article was to show how the protection generated through the Maputo Protocol should be utilised in the drafting of the SADC GBV Model Law to provide transgender women equal protection to cisgender women under this model law. In this regard, it is key for the SADC GBV Model Law to include a comprehensive definition of "gender", including reference to the importance of gender identity to fulfil the obligation in the Maputo Protocol to which 15 out of the 16 SADC member states are bound. The Model Law should also provide definitions of "sex", "sexual orientation" and "women" in line with the arguments set out in part 2 above, to create an understanding that if women are considered "women" based on their gender (identities) – as is the case under the Maputo Protocol - then transgender women should be included as a specific group

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requiring protection from GBV. The endorsement of the African Commission of such an inclusion further stresses the need for the SADC Model Law to do the same. If gender identity is once again overtly overlooked as a cause for GBV the SADC GBV Model Law will not honour the core aspect of the Maputo Protocol: that all women have a right to live in dignity free of violence.

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THE NIAMEY GUIDELINES TO COMBAT SEXUAL VIOLENCE AND ITS CONSEQUENCES IN AFRICA AND SEXUAL HARASSMENT: A CASE STUDY OF NIGERIA

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Abstract

This article examines the importance of the provisions of the Niamey Guidelines to Combat Sexual Violence and its Consequences in addressing sexual violence, including sexual harassment in Africa. Using Nigeria as a case study, the article examines the provisions of international and regional human rights instruments in addressing sexual harassment. It discusses the Guidelines' approach to addressing sexual violence, including sexual harassment. The article highlights some of the salient provisions of the Niamey Guidelines on sexual violence, which include the obligation of states to prevent sexual violence, protecting and supporting victims of sexual violence, investigating and prosecuting sexual violence, ensuring reparation to implementing international and regional norms on sexual violence at the national level. The analysis of the Niamey Guidelines vis-à-vis legislation to address sexual harassment in Nigeria is grounded in asking the woman question. This refers to how laws, policies and judicial decisions take account of the lived experiences of women. Thereafter, the article discusses some of the gaps in the approach by the Nigerian government to address sexual harassment and offers recommendations for the way forward.

Keywords: *Niamey Guidelines, sexual harassment, gender-based violence, Africa*

1 Introduction

Sexual harassment is a pervasive problem that is often overlooked and considered an inconsequential private matter. Sexual harassment has very serious consequences for victims, such as loss of means of livelihood, termination of education, emotional trauma, depression, assault, rape, and so forth, depending on the type or degree of the harassment.[1] Conducts

[1] F Bondestam & M Lundqvist "Sexual Harassment in Higher Education – a Systematic Review" (2020) 10 *European Journal of Higher Education* 397.

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constituting sexual harassment such as catcalls, lewd remarks, unwanted and inappropriate touching or groping, demands for sex as conditions for good grades, promotion or favourable working conditions, public display of sexual organs, stalking, sexual bullying and coercion are commonly experienced by victims every day in schools, workplaces, and private and public places.[2] While sexual harassment affects both males and females, it often disproportionately affects the latter.[3] Sexual harassment of women is an act of gender-based violence prohibited under international law. Various international and regional human rights instruments such as the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on Elimination of All Forms of Discrimination against Women ("CEDAW"), the Convention on the Rights of Persons with Disabilities ("CRPD") and the African Charter on Human and Peoples' Rights ("African Charter") recognise the rights to life, dignity, liberty, health, freedom from torture, inhuman and degrading treatment, and non-discrimination. These rights are relevant in protecting against incidents of sexual violence in general and sexual harassment in particular.

Sexual harassment is widespread in all nations of the world. The #MeToo movement in the wake of the Hollywood scandal in 2017 was a wake-up call for women globally to draw attention to this ignoble vice. This precipitated actions such as surveys to assess the level of the problem as well as advocacy and legislative and policy measures to address it. Sexual harassment has been identified in several international and regional instruments, including the African Commission on Human and Peoples' Rights ("ACHPR") Guidelines on Combating Sexual Violence and its Consequences in Africa (the "Niamey Guidelines" or "Guidelines"),[4] as a major form of sexual violence or gender-based violence ("GBV"). As with other forms of GBV, women are more vulnerable than men to sexual harassment. According to a survey conducted in 2018, 81% of women globally have experienced sexual harassment.[5] Africa as a region is not left out in this scourge. Indeed, Africa accounts for one of the largest percentages of cases of sexual violence including sexual harassment occurring worldwide.[6]

Kiki Mordi, an undercover journalist who conducted an investigation to expose the prevalence of sexual harassment at Nigerian and Ghanaian

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2 R Latcheva "Sexual Harassment in the European Union: A Pervasive But Still Hidden Form of Gender-Based Violence" (2017) 32 *Journal of Interpersonal Violence* 1821.

3 1821.

4 ACHPR Guidelines to Combat Sexual Violence and its Consequences in Africa (2017).

5 R Chatterjee "A New Survey Finds 81 Percent of Women have Experience Sexual Harassment" (2018-02-21) *NPR* <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> (accessed 26-01-2022).

6 The report indicated that the lifetime prevalence rates of sexual violence were higher across Africa than in other regions – more than half of the 19 countries across Africa with data reported prevalence of at least 20%. Across all the other regions only one country reported prevalence over 20 percent. See United Nations "The World's Women Report" (2015) *UNStats* 144 <https://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_chapter6_t.pdf> (accessed 26-01-2022). See also WHO *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013).

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Universities, stated that the problem was far greater than expected.[7] According to United Nations ("UN") Women Advisor, Rosalina Nhachote, domestic violence and sexual harassment are two of the major factors that deprive women of access to the formal labour market; dealing with sexual harassment in the workplace thus remains a big challenge.[8] The most recent gender barometer for the Southern African Development Community reveals "a setback of at least 5 years on issues of safeguarding women's rights".[9] Studies equally show that sexual harassment is highly prevalent in Nigeria, especially in higher institutions of learning and in workplaces.[10] In a study conducted to evaluate patterns of sexual harassment in higher institutions in Anambra State, Nigeria,[11] 312 female workers between the ages of 23 and 37 from three higher institutions were surveyed.[12] The survey revealed a high prevalence of sexual harassment of female workers in the selected institutions and put it at an average figure of 69.4%. Job insecurity was identified as a major consequence of sexual harassment.[13]

The adoption of the Niamey Guidelines by the African Commission in 2017 is both a necessary and timely response to combat issues of sexual violence, including sexual harassment in Africa. The Guidelines are the first comprehensive attempts at the regional level, to address all forms of sexual violence, including sexual harassment. Against this backdrop, this article examines the importance of the provisions of the Guidelines in addressing sexual violence, including sexual harassment in Africa. Using Nigeria as a case study, the article examines the provisions of international and regional human rights instruments in addressing sexual violence. It then discusses the Guidelines' approach to addressing sexual violence, including sexual harassment. The analysis of the Niamey Guidelines *vis-à-vis* legislation to address sexual harassment in Nigeria is grounded in "asking the woman question". This refers to how laws, policies and judicial decisions take account of the lived experiences of women. Thereafter, the article discusses some of the gaps in the approach by the Nigerian government and offers recommendations for the way forward.

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7 E Vaughn "How Undercover Journalists Exposed West Africa's 'Sex for Grades' Scandal" (2019-10-25) *NPR* <https://www.wbur.org/npr/771427782/how-undercover-journalists-exposed-west-africas-sex-for-grades-scandal> (accessed 26-01-2022).

8 N de Silva "The Challenge of Gender Equality in Africa" (2021-03-09) *Africanews* <https://www.africanews.com/2021/03/09/the-challenge-of-gender-equality-in-africa//> (accessed 26-01-2022).

9 De Silva "The Challenge of Gender Equality in Africa" (2021-03-09) *Africanews*.

10 OE Okondu, A Afolabi, PC Ikonta & UR Iloma "Prevalence of Sexual Harassment in a Faith-Based Institution of Higher Learning in South-Western Nigeria" (2020) *Global Journal of Health Science* 1; PA Ejembi, AD Aina-Pelemo, E Owo & IT Aina "The Trajectory of Nigerian Law Regarding Sexual Harassment in The Workplace" (2020) 4 *AJLHR* 1, 4.

11 EI Anierobi, CE Etodike, VN Nwogbo, NU Okeke & MN Nwikpo "Evaluating Sexual Harassment against Female Workers in Higher Institutions in Anambra State, Nigeria" (2021) 11 *International Journal of Academic Research in Business and Social Sciences* 265-278.

12 266.

13 266.

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2 International norms and standards on sexual harassment

While there are no specific human rights instruments addressing sexual harassment under international law, the provisions of various human rights instruments are useful in addressing sexual harassment. It must be noted that women's rights organisations and feminist scholars played a crucial role in drawing the attention of the international community to the incidence of violence against women, including sexual harassment. At the end of the Second World War, the UN, in a bid to prevent the recurrence of the grotesque violation of human rights during the war, adopted the Universal Declaration of Human Rights ("UDHR") in 1948. The UDHR emphasises respect for the dignity of all human beings. Article 2 prohibits all forms of discrimination on various grounds including sex. The UDHR further underscores that all persons are born free and equal in dignity and rights.[14] To this end, human dignity must be affirmed in places of work, without limiting it to the ability to receive remuneration for work. This implicitly highlights the need to accord a person in the workplace a dignified existence free from violence and harassment.[15] While the UDHR is not binding on states, it has been argued that it has attained the status of customary law and remains influential in the drafting of national constitutions worldwide.[16]

Furthermore, provisions of other international human rights instruments can be applied directly or indirectly to address sexual harassment. For instance, the ICCPR guarantees rights as life, liberty, dignity and non-discrimination, which are all related to sexual harassment. Similarly, the International Covenant on Economic, Social and Cultural Rights[17] ("ICESCR") guarantees the rights to work, family equality and an adequate standard of living. These rights are crucial in ensuring equality for women and other marginalised groups in the workplace as well as addressing discriminatory practices, including sexual harassment.

The adoption, of the CEDAW in 1979, was a milestone in the recognition of women's rights internationally. Although there is no specific reference to violence or sexual harassment in the Convention, subsequent interpretations have addressed both. For instance, considering emerging norms and standards such as General Recommendations 19 and 35, the CEDAW Committee has reiterated the inclusion of sexual harassment as a form of GBV.[18] Moreover, the Committee has continued to urge states to take adequate measures to deal

[14] Article 1 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[15] Article 23(3).

[16] H Hannum "The Status of Universal Declaration on Human Rights in National and International Law" (1996) 25 *Ga J Intl & Comp L* 287; see also, SG Barnabas "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law" (2017) 6 *International Human Rights Law Review* 242-261.

[17] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3. The fourth preambular paragraph recognises that human rights derive from the inherent dignity of the human person.

[18] General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19 UN Doc CEDAW/C/GC/35.

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with sexual harassment through policy and legislative reforms.[19] In some of its concluding recommendations to states, the Committee has expressed concerns on the incidence of sexual harassment and called on states to adopt measures to address it.[20] For instance, in its concluding observations to Serbia, the Committee expresses concerns about the lack of political will by the government to address sexual harassment in the workplace. It further calls on the government to adopt an appropriate legal framework to address sexual harassment. In the same vein, the Committee has expressed concern regarding the efforts of the government of Poland to address sexual harassment in the workplace.[21]

Over the years, the CEDAW Committee has included, in the guidelines for state reporting, the need to address negative stereotypes of women. This is a welcome development as it will go a long way in ensuring that states take decisive steps to address all forms of negative stereotyping, which can exacerbate gender inequality and the low status of women. This is, in particular, important in combating sexual harassment in the workplace. Experience has shown that sexual harassment of women is fueled by negative stereotypes that portray women as wanting advances from men and viewing women as "sex objects". By this pragmatic approach, the CEDAW Committee is asking the woman question to challenge structural processes and socio-cultural practices that often perpetuate discrimination against women.

Cook and Cussack have identified three main ways in which a law, policy or practice can discriminate against women based on gender stereotypes.[22] These are if the law, policy or practice leads to a difference in treatment; if the law, policy or practice impairs or nullifies a woman from enjoying her human rights or fundamental freedoms; and if the application, enforcement or perpetuation of a gender stereotype in law, policy or practice is unjustifiable.[23] Sexual harassment not only constitutes discrimination against women, but may also impair them from enjoying other rights.

The CEDAW Committee had the opportunity to address gender stereotypes in the context of sexual harassment in *S v Philippines*.[24] However, the Committee missed an opportunity to reaffirm its commitments to eliminate the negative gender stereotypes that have plagued women. In that case, M.S alleged that Mr G assaulted her on various occasions between May 1999 to November 1999. All the alleged assaults took place at social events arranged by the corporation or at parties hosted by fellow employees of the corporation. The most serious alleged assault took place at a party hosted by a fellow employee in November 1999. The alleged assaults took place in view of other attendees of the party and involved Mr G. The matter was dismissed at the

[19] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No 19: Violence against women, 1992.

[20] See Concluding Observations to Serbia, the CEDAW Committee 72nd Session, 14 March 2019.

[21] See CEDAW Committee Concluding Observations to Poland adopted during the 1249th and 1250th meetings, on 22 October 2014 (see CEDAW/C/SR.1249 and 1250).

[22] RJ Cook & S Cusack *Gender Stereotyping: Transnational Legal Perspective* (2010) 226.

[23] 226.

[24] Communication no. 30/2011: Committee on the Elimination of Discrimination against Women: Decision adopted by the Committee at its 58th session (30 June–18 July 2014) UN Doc CEDAW/C/58/D/30/2011.

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High Court for want of evidence; the Court of Appeal subsequently overturned the decision of the High Court and upheld the claims of M.S. Crucial to the decision of the Supreme Court of Philippines in overturning the decision of the Court of Appeal was its conclusion that M.S's account of the events did not conform with "common human experience" because the alleged assaults occurred in crowded venues and there were no other witnesses to the alleged events. M.S did not slap or walk away from Mr G after he assaulted her on the sofa and instead danced with him and failed to "raise hell" after he groped her breasts and buttocks, and M.S failed to raise the assaults in her resignation letter.

The majority of the Committee gave a short judgment and dismissed the communication on the basis that it was inadmissible under Article 4(2)(c) of the Optional Protocol for not being "sufficiently substantiated".[25] The majority relied on the State's argument that the Supreme Court ruling was based upon the fact that the author's complaint lacked substance and credibility. The majority stated that it was the role of national courts to evaluate the facts and evidence in a particular case unless it could be established that this evaluation was biased or based on gender harmful stereotypes.[26] However, committee member, Patricia Schulz, dissented. Ms Schulz found that the communication was "sufficiently substantiated" and that there was evidence of gender stereotyping in the Supreme Court's judgment. In particular, Ms Schultz stated that to suggest that all women would react to an assault in the same way, was a gender stereotype. She stated that not all women would react to an assault by slapping the assailant and "raising hell", particularly if the assailant is a superior and the assault occurred in the presence of colleagues.[27] Further, not all women would choose to refer to an assault in their resignation letter. One important lesson to learn from this decision is that prospective litigants on sexual harassment should carefully build their case in such a way as not to leave "cracks in the wall".

Moreover, the Committee on the Rights of the Child, in its General Comment 30 on violence against children, has condemned all forms of sexual violence, including harassment of children and adolescents, as a gross violation of various human rights. The Committee on Economic, Social and Cultural Rights in General Comment 22 has addressed sexual violence including sexual harassment as a violation of women's right to sexual and reproductive health. It enjoins "States to ensure employment with maternity protection and parental leave for workers, including vulnerable workers such as migrant workers or women with disability, *as well as protection from sexual harassment at the workplace*".[28] The Committee further notes that a

[25] Communication no. 30/2011: Committee on the Elimination of Discrimination against Women: Decision adopted by the Committee at its 58th session (30 June–18 July 2014) UN Doc CEDAW/C/58/D/30/2011.

[26] Communication no. 30/2011: Committee on the Elimination of Discrimination against Women: Decision adopted by the Committee at its 58th session (30 June–18 July 2014) UN Doc CEDAW/C/58/D/30/2011.

[27] Communication no. 30/2011: Committee on the Elimination of Discrimination against Women: Decision adopted by the Committee at its 58th session (30 June–18 July 2014) UN Doc CEDAW/C/58/D/30/2011.

[28] Committee on Economic, Social and Cultural Rights (CESCR) General Comment 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (Emphasis added).

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violation of the obligation to protect exists where a state fails to prevent the incidence of violence including sexual harassment.[29]

The UN Special Rapporteur on violence against women has played an important role in raising awareness about the incidence of sexual violence, including sexual harassment, against women worldwide. In some of her reports and country visits, the Special Rapporteur has expressed concerns about violence against women, including sexual harassment, as a threat to the enjoyment of women's fundamental rights and freedoms. For instance, in her report on combating violence against women journalists, she expressed deep concerns about "sexual harassment and other forms of GBV, including the rampant sexism and discriminatory practices that pervade the newsroom".[30] She has called on states to take concrete and adequate measures to address this serious challenge.[31]

Besides these binding instruments, the international community has established further standards on this issue. For instance, in 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women ("DEVAW").[32] It defines violence against women to include "sexual harassment and intimidation at work, in educational institutions or elsewhere".[33] It urges states to strive towards combating sexual harassment and other acts of violence against women by preventing and investigating such acts.[34] The 1993 Vienna Declaration and Programme of Action defines GBV to include all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, as incompatible with the dignity and worth of the human person and to be eliminated.[35]

In 1994, it was agreed at the International Conference on Population and Development that states should "take full measures to eliminate all forms of exploitation, abuse, harassment and violence against women, adolescents and girls".[36] At the Fourth World Conference on Women in Beijing 1995, the international community noted that "sexual harassment is a form of discrimination that limits girls' access to education; the fear or threat of violence such as sexual harassment is an obstacle to the achievement of equality".[37] It called on states to enact and enforce laws against gender discrimination in the workplace, as well as calling on governments, trade unions, and community organisations to develop programmes and procedures

[29] CESCR General Comment 22 para 59.

[30] See the Report of the Special Rapporteur on violence against women, its causes and consequences on Combating violence against women journalists presented during the 44th Session of the Human Rights Council held from 15 June–3 July 2020 UN Doc A/HRC/44/52.

[31] Combating violence against women journalists – Report of the Special Rapporteur on violence against women, its causes and consequences UN Doc A/HRC/44/52.

[32] Declaration on the Elimination of Violence against Women (adopted 20 December 1993) UN Doc A/RES/48/104.

[33] Article 2.

[34] Article 2.

[35] Vienna Declaration and Programme of Action (adopted 12 July 1993) UN Doc A/CONF.157/23).

[36] Programme of Action of the International Conference on Population and Development UN Doc. A/CONF 171/13 (1994).

[37] Para 7.8

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to eliminate sexual harassment in educational institutions, workplaces, and elsewhere.[38]

The International Labour Organization (ILO) Convention 190 is a landmark achievement and the first-ever global treaty on violence and harassment in the workplace. It followed years of campaigning by trade unions, civil society and women's organisations.[39] The discussion towards the adoption of this Convention began in 2015 and was due to the pervasive nature of sexual harassment in the workplace. It was adopted in June 2019 during the International Conference of the International Labour Organisation in Geneva. About 187 government, employer and employee representatives make up the General Conference of the ILO. The ILO is the only tripartite UN agency with governments, employers, and workers' representatives. Some of the important provisions of the Convention include the broad definition of what constitutes sexual harassment in Article 1, the definition of where sexual harassment may take place.[40] More importantly, it calls for a gender-sensitive approach to addressing sexual harassment. In essence, the ILO Convention 190 is asking the woman question when it urges states to adopt a gender-sensitive approach to sexual harassment.

It should be noted that feminist scholars and commentators have consistently argued for a gender-sensitive approach to the challenge of sexual harassment. They have proposed that laws and policies to address sexual violence, including sexual harassment, must put women at the centre. In other words, they argue that such laws and policies must reflect the lived experiences of women.[41] This implies that such laws and policies must ask the woman question. One of the ways the woman question can be asked is to challenge inaction or silence in addressing sexual harassment in the workplace. When feminists question the failure to decisively adopt gender-sensitive policies and processes to address sexual harassment, they are asking the woman question. Joyner observes that asking the woman question means "examining how the law fails to reflect the experiences and values that seem more typical of women than of men".[42] The method similarly recognises the fact that, historically, women have been and are still a disadvantaged group that requires special attention. Bartlett opines that it is imperative to challenge existing structural inequality and highlight the historically disadvantaged position of women with a view to correcting this by asking the woman question.[43] The woman question interrogates the

[38] Beijing Declaration and the Platform for Action, Fourth World Conference on Women, China, September 4–15 1995, UN Doc AlCONF.I77/20 para 78.

[39] The International Labour Organization (ILO) Convention (190) and Recommendation (260) on ending violence and harassment against women and men in the world of work adopted on 21 June 2019 in Geneva at the International Labour Conference.

[40] Article 3. These include work-related trips, travel, training and social events.

[41] See for instance, N Fraser *Unruly Practices: Power, Discourse and Gender in contemporary Social Theory* (1989); J Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990); SM Okin *Justice, Gender and the Family* (1989).

[42] C Joyner *United Nations and International Law* (1997) 183.

[43] KT *Bartlett "*Feminist Legal Methods*"* (1989) 103 *Harvard Law Review* 829-888.

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various forms of inequalities that women have been subjected to. It demands justification for women's different roles and subjugation in society.[44]

3 Normative framework on sexual harassment under the African human rights system

The various human rights provisions in the African Charter, the Protocol to the African Charter on the Rights of Women[45] ("Maputo Protocol") and the African Charter on the Rights and Welfare of the Child[46] are important in addressing sexual harassment. Under the African Charter, articles 2, 3, 4 (on the right to life), 5 (on dignity) and 15 (on the right to work) are relevant in addressing sexual harassment. Articles 2 and 3 deal with equality before the law and non-discrimination respectively. Explaining the relevance of articles 2 and 3 in *Purohit and Moore v The Gambia*, the Commission observed as follows:

> "Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter." [47]

This is a strong statement from the Commission that can have far-reaching implications for vulnerable and marginalised groups that may encounter any form of discrimination in their daily lives.

The Maputo Protocol contains some radical and progressive provisions to address all forms of violence against women, including sexual harassment. It contains a broad definition of violence in article 1 to cover various issues including sexual harassment:

> "Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war ..." [48]

Article 4 provides that "States Parties shall take appropriate and effective measures to:

> "a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public."

The Maputo Protocol further urges states to take holistic action towards preventing and punishing acts of violence against women. It equally enjoins

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[44] For a detailed discussion on this see E Durojaye & O Oluduro "The African Commission on Human and Peoples' Rights and the Woman Question" (2016) 24 *Feminist Legal Studies* 315.

[45] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

[46] Article 5 of the African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990).

[47] *Purohit and Moore v The Gambia,* Communication No 241/2001, Sixteenth Activity report 2002-2003, Annex VII.

[48] Article 1 of the Maputo Protocol.

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states to take necessary steps to rehabilitate victims of violence. While the provision does not specifically mention sexual harassment, it is argued that a combined reading of articles 1 and 4 requires states to take measures to address sexual harassment against women in the workplace. More importantly, Article 12(c) of the Maputo Protocol requires states to:

> "Protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices."

It further enjoins states to ensure that women who have experienced sexual harassment are provided with counselling and are rehabilitated. This is a progressive approach to sexual harassment that seems to take into cognisance women's lived experiences. Studies have documented a high incidence of sexual violence, including assault and harassment, experienced by girls in schools across some countries in southern Africa.[49] This not only poses a threat to attendance at school but may also result in psychological trauma for the girls. Thus, in this laudable provision on sexual harassment, the Protocol is clearly asking the woman question. The Protocol takes a gender-sensitive approach by recognising that women and girls are susceptible to sexual harassment in all institutions of learning and need not only be protected but also have access to counselling and treatment where necessary.

While the African Commission and the African Court are yet to interpret the provision of Article 12(c), a Zambian High Court has found that sexual assault and rape of a 13-year-old schoolgirl by a male teacher amounts to a breach of duty on the part of the teacher and is inconsistent with the fiduciary relationship between learners and educators.[50] The Court noted that school teachers are in a position of moral superiority, and a young schoolgirl's "consent" is fictitious in light of the ethics compelling a teacher to not engage in sexual relations with schoolgirls. It awarded damages against the teacher and further held that the Ministry of Education and Attorney-General are both complicit in this case and should be vicariously liable. Although this case did not refer to the Maputo Protocol, nonetheless, it serves as a good example of reflecting the lived experiences of girls and women in sexual harassment cases. By rejecting the argument of the teacher about the consensual nature of the relationship, given the age of the girl and rather highlighting the power dynamics at work, the Court focused on the woman question. It should be noted that Nigeria has ratified most of the international and regional human rights instruments discussed above. Hence, the country is expected to implement the provisions of these instruments. To this extent, the Nigerian government must ensure that efforts at addressing sexual harassment in the country are consistent with asking the woman question.

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[49] See for instance, Paper 5: Women and Law in Southern Africa Trust-Zambia, Cornell Law School. Avon Global Center for Women and Justice, and Cornell Law School. International Human Rights Clinic "They are Destroying our Futures: Sexual Violence Against Girls in Zambia's Schools" (2012) *Avon Global Center for Women and Justice and Dorothea S. Clarke Program in Feminist Jurisprudence* <http://scholarship.law.cornell.edu/avon_clarke/5> (accessed 15-02-2022); see also D Smith & V du Plessis "The Sexual Harassment in The Education Sector" (2011) 14 *PELJ* 172-217.

[50] *Mashita Katakwe v Hakasenke* High Court of Zambia (2006) 2006/HP/0327.

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4 The Niamey Guidelines to combat sexual violence and its consequences

As already noted, in 2017, the African Commission adopted the Niamey Guidelines as a way of responding to the pervasive challenge of sexual violence in Africa. The Guidelines were a product of activism and collaboration by civil society groups, especially women's rights organisations and the Special Rapporteur on the Rights of Women in Africa (SRRWA). Emphasising the goal of the Guidelines, the SRRWA notes that "[t]he goal of these *Guidelines* is to guide and support Member States of the African Union in effectively implementing their commitments and obligations to combat sexual violence and its consequences".[51] The Guidelines serve as an important document with laudable provisions that would seem to ask the woman question. Though not binding, the Niamey Guidelines contain provisions that if effectively implemented will go a long way in minimising the incidence of sexual violence, including sexual harassment. The Niamey Guidelines deal with sexual violence in all ramifications.

The Guidelines are divided into six parts, ranging from the definition of sexual violence, the obligation of states to prevent sexual violence, the duty to protect and support victims of sexual violence, investigating and prosecuting sexual violence, ensuring reparation to implementing international and regional norms on sexual violence at the national level. The document adopts a holistic definition of sexual violence, which encompasses sexual harassment. In broadly defining sexual violence, the Guidelines note that "[s]exual violence means any non-consensual sexual act, a threat or attempt to perform such an act, or compelling someone else to perform such an act on a third person".[52] It identifies sexual violence to include sexual harassment, rape, sexual assault, forced marriage, forced pregnancy, anal or virginity tests, forced sterilisation, forced prostitution, forced nudity and trafficking.[53] The Guidelines recognise that certain forms of sexual violence may amount to an international crime and could constitute torture cruel, inhuman and degrading treatment.[54]

In addition to the traditional obligations of states to respect, protect and fulfil women's rights in the context of sexual violence, including sexual harassment, the Guidelines impose further obligations on states, such as the duty not to do harm, the due diligence principle, the duty to protect women from sexual violence, the duty to ensure access to justice for women who have experienced sexual violence, and ensuring the principle of non-discrimination in all efforts to combat sexual violence, including sexual harassment.[55] Similar to the Maputo Protocol, the Guidelines require states to prevent sexual violence, prosecute perpetrators of sexual violence and rehabilitate victims of sexual violence. These principles and obligations of states are important and require

[51] See L Asuagbor (Special Rapporteur on the Rights of Women in Africa) "Foreword to the Guidelines on combating sexual violence and its consequences in Africa" 2017 (the "Guidelines").
[52] See part 1, para 3.1 of the Guidelines.
[53] See part 1, para 3.1.
[54] See part 1, para 3.1.
[55] See part 1B.

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that legislative frameworks at the national level combat sexual harassment in line with the principles. This is commendable given that the Guidelines are meant to be implemented at the national level. Such legislative frameworks must incorporate norms and standards contained in international and regional human rights instruments on sexual violence.[56] Moreover, such laws and policies must reflect the lived experiences of women. In order words, they must ask the woman question. States are expected to enact specific laws to combat sexual violence, including sexual harassment.[57]

It remains to be seen whether states will be willing to implement the Guidelines at the national level. If the experience with binding instruments such as the Maputo Protocol is anything to go by, then much more effort will be required to ensure that the Guidelines are effectively implemented at the national level. A study conducted to assess the level of implementation of the African Charter and the Maputo Protocol at the national level has shown mixed results. While some states have, to a large extent, implemented the provisions of the Protocol, others still lag behind.[58] This calls for more activism on the part of civil society groups and stronger oversight functions from national human rights institutions.

In addition, the Guidelines urge states to adopt and implement national action plans to ensure that their provisions are translated into action at the national level.[59] This is an important requirement that should galvanise states to take concrete measures towards ensuring that the provisions of the Guidelines do not become paper tigers. More importantly, states are required to establish national gender institutions or national human rights institutions that will ensure that the laudable provisions of the Guidelines are implemented at the national level.[60] Given the importance of data to combating the incidence of sexual violence, the Guidelines urge states to strengthen data collection in a disaggregated manner that will inform evidence-based policies and programmes in response to sexual violence, including sexual harassment.[61] Bearing in mind the challenges with creating awareness with the Guidelines, states are enjoined to adopt appropriate measures that will ensure their dissemination.[62]

5 Legislative framework on sexual harassment in Nigeria

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "Nigerian Constitution") contains several important provisions that can be applied to address sexual harassment. Notably, chapter IV of the Nigerian

[56] Part 6A.
[57] Part 6A.
[58] See VO Ayeni *The Impact of the African Charter and Maputo Protocol in Selected Countries in Africa* (2016).
[59] Part 6B of the Guidelines.
[60] Part 6C.
[61] Part 6D.
[62] Part 6E.

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Constitution guarantees fundamental rights such as life,[63] dignity,[64] liberty[65] and privacy.[66] Section 42 of the Nigerian Constitution prohibits discrimination on various grounds including sex, ethnicity, religion or political affiliation. As noted above, GBV, including sexual harassment, is inconsistent with the principle of non-discrimination. Commenting on the importance of this provision to addressing gender inequality, the Nigerian Court of Appeal noted, "[a]ny form of societal discrimination on grounds of sex, apart from being unconstitutional, is an antithesis to a society built on the tenets of democracy, which we have freely chosen as a people".[67] This statement provides a bulwark to victims of GBV, including sexual harassment.

There is no specific legislation dealing with sexual harassment in Nigeria. However, the provisions of the Criminal Law of Lagos State[68] deals with this issue. Section 262 defines and criminalises sexual harassment as an offence punishable with three years' imprisonment. It remains the only law that specifically defines sexual harassment in Nigeria and imposes penalties for it. Regrettably, this law is only applicable in Lagos State and does not extend to the rest of the country. The law equally has no provision for civil remedies. However, the Violence Against Persons Prohibition ("VAPP") Act, 2015[69] contains provisions that define and criminalise certain conduct that typically characterises sexual harassment, including the use of intimidation, force or coercion to compel victims to carry out or tolerate sexual acts.[70] For instance, section 3 of the VAPP Act provides that "a person who coerces another to engage in any act to the detriment of that other person's physical or psychological well-being commits an offence and is liable on conviction to a term of 3 years imprisonment". Section 5(1) of the VAPP Act further provides that,

> "[a] person who compels another, by force or threat, to engage in any conduct or act, sexual or otherwise, to the detriment of the victim's physical or psychological wellbeing commits an offensive conduct and is liable on conviction to a term of imprisonment not exceeding two years or to a fine not exceeding N500,000.00 or both."

Section 18 of the VAPP Act criminalises intimidation and prescribes a punishment of a maximum of one year's imprisonment and/or a fine not exceeding N200,000, or both.

The combined reading of these sections would seem to criminalise some elements of sexual harassment. It should be noted that the VAPP Act in section 46 defines sexual harassment as:

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63 Section 33 of the Nigerian Constitution.
64 Section 34.
65 Section 35.
66 Section 37.
67 *Mojekwu v Mojekwu* (1997) 7 NWLR (part 512) 283 (CA), 305.
68 Criminal Law of Lagos State C17 (2011).
69 The VAPP Act also suffers the same limitation as the Criminal Law of Lagos State as it is only applicable in the FCT. However, the law has been adopted in 22 states of the Federation.
70 For a detailed analysis of the Act, see C Onyemelukwe "Legislating on Violence Against Women: A Critical Analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015" (2016) 5 *DePaul Journal of Women, Gender and the Law* <https://via.library.depaul.edu/jwgl/vol5/iss2/3> (accessed 26-01-2022); see also, N Chibueze, I Iyioha & E Durojaye "Violence Against Prohibition Act, the Maputo Protocol and Women's Rights in Nigeria" (2018) 39 *Statute Law Review* 337-347.

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> "Unwanted conduct of a sexual nature or other conduct based on sex or gender which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment and this may include physical, verbal or non-verbal conduct."

Furthermore, the definition of Sexual Intimidation by the Act directly fits into the purview of sexual harassment. The Act defines sexual intimidation as:

> "Any action or circumstances which amount to demand or actual demand for sexual intercourse with either a male or a female under any guise, as a condition for passing examination, securing employment, business patronage, obtaining any favour in any form, as defined in this Act or any other enactment."[71]

It further extends sexual intimidation to include:

> "(c) acts of deprivation, withholding, replacing or short-changing of entitlements, privileges, rights, benefits, examination or test marks or scores, and any other form of disposition capable of coercing any person to submit to sexual intercourse for the purpose of receiving reprieve thereto; or
>
> (d) any other action or inaction construed as sexual intimidation or harassment under any other enactment in force in Nigeria."[72]

However, the VAPP Act does not classify the offences defined and punishable under sections 3, 5 and 18 thereof as sexual harassment, sexual intimidation or any of the other relevant conduct defined under section 46. There is therefore no apparent link between the defined key terms and the offences created in the Act. This creates a gap wherein an act is defined but not directly criminalised. A more effective approach would have been to criminalise and prescribe punishment for each of these acts, as seen in the case of section 262 of the Criminal Law of Lagos State.

Ejembi et al identify section 9 of the Employees Compensation Act, 2010 as another relevant law, which provides for the award of compensation to an employee who suffers mental stress due to a sudden and unexpected traumatic event that an employee experiences at work.[73] This provision is a long stretch as it is coined in very general terms, and it does not apply to students who are victims of sexual harassment. The writers also refer to the Nigerian National Industrial Court, which is empowered under section 254(1)(g) of the Nigerian Constitution to entertain cases of disputes arising from discrimination or sexual harassment in the workplace.[74]

However, in July of 2020, the Nigerian Senate passed the Bill to Prohibit and Redress Sexual Harassment of Students in Tertiary Educational Institutions.[75] The Bill imposes a fiduciary duty of care on an educator not to exploit his or her relationship with his student for personal gain, sexual pleasure, or immoral satisfaction, or in any way that violates the sanctity of the fiduciary relationship existing between the student and the educator.[76] Clause 4 of the Bill criminalises the commission of several forms of conduct as constituting

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71 See s 46 of the VAPP Act.

72 Section 46.

73 Ejembi et al (2020) *AJLHR* 4.

74 See the case of *Ejieke Maduka v Microsoft Nigeria Limited* (2014) NLLR (Pt 125) 67 NIC cited in Ejembi et al (2020) *AJLHR* 2.

75 Sexual Harassment in Tertiary Education Bill (2020) <https://elect-her.org/wp-content/uploads/2020/07/Sexual-Harassment-Bill-2020.pdf> (accessed 07-06-2021).

76 See cls 2 and 3 of the Sexual Harassment Bill.

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sexual harassment when committed by an educator against a student. These include sex or demand for sex; creating a hostile or offensive environment by requesting for sex or making sexual advances; directing, inducing or aiding another person to commit any act of sexual harassment; grabbing, hugging, kissing, rubbing or stroking or touching or pinching the breasts or hair or lips or hips or buttocks or any other sensual part of the body of a student; displaying or sharing of nude or pornographic videos, images or sex objects to a student; whistling, winking, shouting or making sexual comments about a student's physique; and stalking.

Offences under clause 4 (1, 2 and 3) are punishable by a minimum of 5 and a maximum of 14 years' imprisonment, while offences under clauses 4 (4, 5 and 6) are punishable by a minimum of 2 and maximum of 5 years' imprisonment, respectively. The Bill further stipulates in clause 6 thereof that the consent of a student cannot be raised as a defence to the commission of any of the offences created under clause 4. This is a very important provision that aligns with a gender-sensitive approach to sexual harassment. It recognises the power dynamics that often characterise the incidence of sexual harassment between a female student and a male lecturer. This coincides with the feminist position that laws and policies on sexual violence, including sexual harassment, must address power imbalances and resonate with women's lived experiences.[77] Clause 7 further states that the prosecution need not prove the intention of an accused person or the circumstance for the commission, where such person is charged with the offence of sexual harassment.

Clause 13 provides for the right of the student to institute a civil proceeding against the perpetrator of sexual harassment notwithstanding any criminal cases filed against him or her. Clause 16 of the Bill mandates the head of every higher educational institution in Nigeria to establish an Independent Sexual Harassment Prohibition Committee to hear and investigate cases of alleged sexual harassment. According to the Bill, criminal or civil proceedings can be instituted against a perpetrator of sexual harassment.[78] Furthermore, there is no time limitation to bring an action for sexual harassment under the Bill.[79] This is a positive development as one of the main concerns with the criminal law approach to sexual harassment is that it does not allow the victims to claim damages directly from the perpetrators of such acts.

Nevertheless, while this Bill has been successfully passed by the Senate (Upper House) it is yet to be passed by the House of Representatives (Lower House). The Bill was introduced to the National Assembly and passed by the Nigerian Senate already in 2016 but was rejected by the House of Representatives.

[77] See for instance, C Makinnon *Sexual Harassment of Working Women* (1979).
[78] See cls 8 and 13 of the Sexual Harassment Bill.
[79] Clause 25 of the Sexual Harassment Bill.

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6 Assessing the consistency of the legislative framework on sexual harassment in Nigeria with the Niamey Guidelines

An examination of the legal provisions discussed above reveals that the current laws and measures against sexual harassment by Nigeria meet the primary responsibility of states to provide for suitable domestic legislation to effectively combat sexual violence as prescribed by the Niamey Guidelines.[80] However, as noted above, Part 1(B) of the Guidelines outlines certain general principles and obligations which states must fulfil to protect victims from sexual violence adequately, including sexual harassment. These include the non-discrimination principle, the do no harm principle, the due diligence principle, obligations to prevent and provide protection against sexual violence and its consequences, the obligation to guarantee access to justice and investigate and prosecute the perpetrators of sexual violence as well as provide effective remedies for victims.

With regard to the non-discrimination principle,[81] the VAPP Act is not expressly discriminatory as it does not limit its application to any class of persons on any of the identified grounds for discrimination. However, while the VAPP Act adopts gender-neutral language, it fails to expressly recognise the fact that women are more susceptible to violence, especially sexual violence, in Nigeria.[82] As noted earlier, section 42 of the Nigerian Constitution read together with articles 2 and 18 of the African Charter (Ratification and Enforcement Act), prohibits discrimination against persons in Nigeria on the grounds of sex, race, religion, ethnic group, place of origin, political opinion or any other opinion, national or social origin, fortune, birth or other status.[83]

Regarding the "do no harm" principle,[84] which requires states to guarantee the well-being and security of the victims and witnesses of sexual violence, section 28 of the VAPP Act provides that "an application for a protection order may be made before the High Court following a complaint of violence by the complainant". Such protective order if granted is effective throughout the whole country and no time limitation shall apply to a victim seeking the order. However, the expression "following a complaint of violence" implies that a person can only seek a protection order after the occurrence of the violent act. Hence, the threat of its commission would not suffice to entitle a person to the order, and mere witnesses to the crime cannot seek protection either. It is noteworthy that certain acts of sexual harassment stop at the threshold of threats. Since sexual harassment was not directly criminalised as an act of violence under the Act, victims of sexual harassment might be unable to seek protection under this provision. Conversely, clause 23 of the Anti-Sexual Harassment Bill obligates the administrative head of an institution to ensure adequate protection from further victimisation to a student on account of

[80] Preamble to the Niamey Guidelines 9.
[81] 17.
[82] See Onyemelukwe (2016) *DJWGL* <https://via.library.depaul.edu/jwgl/vol5/iss2/3>.
[83] Ejembi et al (2020) *AJLHR* 5. These provisions are however generally applicable and is not limited to cases of sexual violence.
[84] Niamey Guidelines 18.

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making a complaint of sexual harassment under the Bill. Clause 24 thereof makes any educator or person within an institution who victimises a student for making a sexual harassment complaint liable for the same criminal sanctions, disciplinary punishment, or damages as the educator against whom the original allegation of sexual harassment was made.

The due diligence principle requires states to adopt necessary legislative or regulatory measures to prevent and investigate acts of sexual violence committed by state and non-state actors, prosecute and punish perpetrators, and provide remedies to victims.[85] No provision for the protection of vulnerable persons from the risk of perpetration of sexual violence by states and non-state actors is contained in the VAPP Act. There have been several allegations of sexual violence by the police and military against women and girls in internally displaced persons' camps in North-East Nigeria.[86] However, reports indicate that most perpetrators enjoy impunity for these offences.[87] The African Commission has held in the *Zimbabwe Human Rights NGO Forum v Zimbabwe* that failure by the state to prevent or address acts of violence perpetrated by individuals or third parties will amount to the breach of duty to protect.[88] In explaining the basis for this, the Commission notes:

> "Thus, an act by a private individual and therefore not directly imputable to a state can generate responsibility of the state, not because of the act itself, but because of lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparations."[89]

Given that most acts of sexual harassment take place in private spheres, this decision becomes important in ensuring that states are held accountable for failure to address them. The government cannot give an excuse that the act of sexual harassment occurs in a private firm or organisation. It should be noted that the Economic Community of West African States ("ECOWAS") Court in a case involving the sexual assault of four women by security agents of the Nigerian government held that the action constituted a breach of obligations under the African Charter and the Maputo Protocol to protect the right to dignity and to uphold the right to be free from torture inhuman and degrading treatment.[90] Similarly, in *Mary Sunday v Nigeria* ("*Mary Sunday*") the ECOWAS Court held that the failure of the Nigerian Police Force to investigate a complaint of domestic violence made by the applicant violated her right to access to justice and to be heard guaranteed in Article 7 of the African Charter.[91] This case provides a strong basis for arguing that the Nigerian government is obligated under international law to protect women from all forms of sexual assault, including sexual harassment. It can be argued that the ECOWAS Court was asking the woman question in the *Dorothy*

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[85] L Hasselbacher "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection" (2010) 8 *Nw J Int'l Hum Rts* 190.

[86] Amnesty International "Submission to the United Nations Committee on the Elimination of Discrimination Against Women" 67th Session (2017) 8-9.

[87] Onyemelukwe (2016) *DJWGL* <https://via.library.depaul.edu/jwgl/vol5/iss2/3>.

[88] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005), see also *Egyptian Initiatives for Personal Rights v Egypt* (2011) AHRLR 90 (ACPHR 2011).

[89] Para 143.

[90] *Dorothy Njemanze v Nigeria* ECOWAS Court of Justice (12-10-2017) ECW/CCJ/JUD/08/17.

[91] *Mary Sunday v Federal Republic of Nigeria* (ECW/CCJ/APP/26/15) [2018] ECOWASCJ 11 (17 May 2018).

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Njemanze case when it found the Nigerian government responsible for failing to protect the four women from sexual abuse by security agents.

On the obligation to prevent sexual violence and its consequences, especially through the eradication of the root causes of sexual violence, the Federal Government of Nigeria has adopted the National Gender Policy.[92] This policy aims to establish legal equality for women and men and eliminate all obstacles to the social, economic and political empowerment of women as well as incorporate a gender perspective into all aspects of the National Planning Policy.[93] Notwithstanding this policy, gender inequalities and GBV remain prevalent in Nigeria. The adoption and implementation of policies that specifically address these root causes of sexual violence would be more impactful in curbing the trend. Furthermore, the Nigerian government would still be required to adopt a national action plan to implement the provisions of the Guidelines, especially as regards sexual harassment. The Guidelines make it clear that the adoption of a national action plan is crucial to ensuring the effective implementation of their lofty provisions at the national level.

In fulfilment of its obligation to provide protection against sexual violence and its consequences, the Nigerian government, in collaboration with international development partners and civil society organisations, has taken considerable steps to provide the requisite social, psycho-social, security and medical care to victims of sexual violence through the establishment of Sexual Assault Referral Centres,[94] provision of shelters, counselling and necessary medical care to GBV victims/survivors. However, the focus of these services has been more on victims of rape, physical or sexual assault and domestic violence. Rarely do victims of sexual harassment approach or access care from these facilities. It is recommended that institutions, including schools and workplaces, which are flashpoints for the occurrence of sexual harassment, should put in place measures to protect victims through the provision of these services. This will not only be in line with the Guidelines but also go a long way in ensuring adequate protection and safeguards for victims of sexual violence, including sexual harassment.

To ensure access to justice for victims of sexual violence, all the extant laws identified above provide access to justice for victims of sexual harassment through human rights provision and the criminalisation of the act. Although specific provisions and measures to ensure trial without undue delay, impartiality, independence and effectively in a manner that guarantees identification and conviction of perpetrators of sexual violence are not contained in applicable laws like the VAPP Act, they are provided for in the Nigerian Constitution and the Administration of Criminal Justice Act, 2015. Nonetheless, as exemplified by the decision in *Mary Sunday*, access to justice remains a significant challenge for victims of GBV, including sexual

[92] National Gender Policy (2006) <https://nigerianwomentrustfund.org/wp-content/uploads/National-Gender-PolicySituation-Analysis.pdf> (accessed 26-01-2022).

[93] The Policy was reviewed in 2011 but was not published. Another review of the policy is currently ongoing.

[94] United States Agency for International Development "Strengthening the response to Gender-Based Violence in Nigeria" (20-03-2020) *USAID* <https://pdf/usaid.gov/pdf_docs/PA00X239.pdf> (accessed 12-03-2022).

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harassment in Nigeria.[95] A National Gender-Based Violence Dashboard of Nigeria indicates that of the total of 4 185 SGBV cases reported in 6 spotlight states of the federation between 2020 and 2021, there are only 767 active cases, 214 closed cases and 11 convicted cases.[96] This is a clear indication that the government will need to do more to ensure that perpetrators of sexual violence, including sexual harassment, in the country are brought to book. Both the Guidelines and the Maputo Protocol require states to ensure that acts of violence against women are properly sanctioned. Usually, cases of sexual violence against women, including sexual harassment are rarely prosecuted in Nigerian courts due to a low level of reporting or investigation. This may constitute an act of discrimination. One example of a case dealing with sexual harassment is that of *Federal Republic of Nigeria v Richard Akindele*[97] ("*Akindele*"). In *Akindele*, a postgraduate student of the Obafemi Awolowo University alleged that one of her professors demanded sex in exchange for marks. The professor was charged with abuse of office. Initially, the accused had pleaded not guilty, however, this was subsequently changed to a guilty plea. He was therefore convicted and sentenced to imprisonment for 2 years. This is one of the few cases dealing with sexual harassment by a Nigerian court. While the conviction is a welcome development, the fact that the sentence was light, and the court failed to engage in a feminist analysis on the issue, leaves much to be desired. It can be argued that the court failed to ask the woman question in *Akindele.* The court could have made a stronger statement on the obligations of the Nigerian government to address sexual harassment in public and private spheres as envisaged by the Niamey Guidelines.

Although the Nigerian National Human Rights Commission exists to provide quasi-judicial remedies for victims of human rights violations, the institution will need to redouble its efforts in dealing with cases of sexual violence, including sexual harassment. The Commission can be more proactive by, for example, launching investigations into the prevalence of sexual harassment in Nigerian educational institutions and providing concrete recommendations. This will ensure that perpetrators of such acts are held accountable, and that appropriate relief is provided to victims. As recommended by the Guidelines, the time has come for the Nigerian government to establish a National Gender Human Rights Institution that will engage with issues of sexual violence, including sexual harassment. This will ensure improved attention to these issues. In other countries such as Kenya[98] and South Africa,[99] National Gender Human Rights Institutions exist in addition to the traditional national human rights bodies.

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[95] United Nations Nigeria "Gender-Based Violence in Nigeria during the COVID-19 Crisis: The Shadow Pandemic" 4 May 2020 <https://nigeria.un.org> (accessed 26-01-2022).

[96] National Gender Based Violence Dashboard <https://reportgbv.ng/#/> (accessed 26-01-2022).

[97] *FRN vs Prof. Richard I. Akindele (Former Lecturer of Obafemi Awolowo University)* <https://corruptioncases.ng/cases/frn-vs-prof-richard-i-akindele-former> (accessed 26-01-2022).

[98] This is known as the National Gender and Equality Commission established by the National Gender and Equality Commission Act 15 of 2011.

[99] This is known as the Commission for Gender Equality created under section 187 of the Constitution of the Republic of South Africa, 1996.

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The difficulty in enacting laws or successfully passing bills that protect women from sexual harassment is a classic example of how the Nigerian government fails to ask the woman questions by enacting laws that reflect the values and experiences that seem more typical of women than of men. As earlier noted, women statistically constitute a significantly large percentage of the victims of sexual violence in Nigeria and worldwide. Hence the imperative need to enact laws that specifically target this challenge. The VAPP Act which is currently the most comprehensive national law that protects women from violence went through an arduous 12-year period in the National Assembly before its enactment[100]. Major concessions including changing its name from Violence against Women Act to VAPP Act and watering down some of its important provisions before the Nigerian male-dominated Legislature could pass it into law.[101] These issues resulted in a situation where acts of sexual violence including sexual harassment were defined but not criminalised in the Act. Similarly, the Anti-Sexual Harassment in Tertiary Institution Bill was, as mentioned earlier, passed by the Nigerian Senate in 2016 but failed to make it through the second chamber (House of Representatives). The bill was re-introduced to the National Assembly by the Deputy Senate President, Ovie Omo-Agege, in 2019 and successfully passed by the Senate in July 2020,[102] while the House of Representatives has to date failed to pass it. It therefore appears to be suffering the same fate, as the ninth Assembly would be rounding off by 2023.

Furthermore, in December 2021, the attempt by Senator Biodun Olujimi to reintroduce the Gender and Equal Opportunities Bill to the Senate was met with stiff resistance by some Senators who claimed that the Bill was against the Islamic religion and culture in the North.[103] This bill would have *inter alia* protected women from sexual harassment and discrimination in the workplace. Enactment of this law by Nigeria would amount to the fulfilment of some of its obligations under the Niamey Guidelines and international/regional instruments on women's rights. This is the third frustrated attempt to pass the Bill since its first introduction in March 2016.[104] Thus, the Nigerian government has failed to ask the woman question by its nonchalance and inaction towards the enactment or implementation of laws that protect women from sexual violence including sexual harassment.

Moreover, as discussed, societal prejudice and bureaucracy in the Nigerian criminal justice system often discourage victims from reporting let alone pursuing cases of sexual harassment in court. An example was the case of Senator Elisha Abbo where despite overwhelming evidence of sexual

[100] Onyemelukwe (2016) *DJWGL* 9.
[101] 9.
[102] H Umoru "Whistling, winking now offences as Senate Passes Sexual Harassment Bill" (08-07-2020) *Vanguard* <https://www.vanguardngr.com/2020/07/whistling-winking-now-offences-as-senate-passes-sexual-harassment-bill/> (accessed 26-01-2022).
[103] QE Iroanusi "Again gender equality bill suffers setback at Senate" (15-12-2021) *Premium Times* <https://www.premiumtimesng.com/news/headlines/500980-again-gender-equality-bill-suffers-setback-at-senate.html> (accessed 26-01-2022).
[104] Iroanusi "Again gender equality bill suffers setback at Senate" (15-12-2021) *Premium Times*.

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harassment[105], the Court had to strike out the case for want of diligent prosecution by the police.[106] This is further proof of the failure of the Nigerian government to ask the woman question in guaranteeing access to justice for victims of sexual harassment.

7 Conclusion and recommendations

This article discussed the incidence of sexual harassment in Nigeria and the applicable international and regional norms on this issue. More specifically, it examined the provisions of the Niamey Guideline adopted by the African Commission in 2017. It argued that the Guidelines broadly define sexual violence to include sexual harassment and places obligations on states to take concrete measures to address sexual harassment. This was followed by a discussion of the legislative framework in Nigeria to address sexual harassment and a consideration of whether this framework is consistent with the provisions of the Guidelines.

While to some extent the legislative framework in Nigeria is in line with the Guidelines, gaps still exist that require urgent response from the Nigerian government. The current legislative framework at the national level is defective and ambiguous, making it difficult to hold perpetrators of sexual harassment accountable. Therefore, there is a need for the speedy enactment of the Bill on Sexual Harassment in Tertiary Educational Institutions in the country. Moreover, the government should require schools and workplaces to adopt a policy on sexual harassment as well as establish counselling and support units for victims of sexual harassment.

In addition, the government must strengthen its justice system to facilitate access to justice for victims of sexual harassment. This will include removing barriers to courts as well as providing the needed support physically and psychologically to enable victims to seek redress without fear or intimidation. In other words, the justice system must be victim-centred as well as gender-sensitive. The establishment of a national gender equality institution is essential to address issues bordering on sexual violence, including sexual harassment. This institution would complement the work of the Nigerian National Human Rights Institution.

Also, it will be necessary for the Nigerian government to adopt a national action plan to implement the Guidelines at the national level. Currently, it cannot be ascertained if such a plan exists. Further, there is a need to create awareness about the incidence and consequences of sexual harassment as well as the obligations under international and regional laws, including the Guidelines. In this regard, the Nigerian government would need to work with civil society groups to disseminate the Guidelines among policymakers and

[105] A video had emerged of the Senator slapping a female attendant at an adult toy shop and ordering his police orderly to arrest her. Following public outrage at his actions, he publicly apologised to Nigerians and the woman.

[106] QE Iroanusi "Assault: Court dismisses suit against Senator, Elisha Abbo" (01-08-2020) *Premium Times* <https://www.premiumtimesng.com/news/headlines/406149-assault-court-dismisses-suit-against-senator-elisha-abbo.html> (accessed 26-01-2022).

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relevant institutions. This will ensure familiarity with the provisions of the Guidelines and pave way for its incorporation into policies and programmes by stakeholders.

Reliable and accurate data is key to addressing the incidence of sexual harassment. Therefore, the Nigerian government would need to redouble its efforts in conducting research that will generate reliable data to enable it to develop plans and programmes in response to sexual harassment. This must be complemented with continued efforts to assess and monitor existing programmes and services for addressing sexual violence, including sexual harassment. It is noteworthy that sexual harassment is not included in the types of sexual violence identified on the dashboard.[107] Given its prevalence, there is a critical need to include it to give room for reporting on its occurrence.

[107] See *Dorothy Njemanze v Nigeria* ECOWAS Court of Justice (12-10-2017) ECW/CCJ/JUD/08/17.

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THE LEGAL IMPUNITY FOR GENDER-BASED VIOLENCE AGAINST INTERSEX, TRANSGENDER, AND GENDER DIVERSE PERSONS IN KENYA: A LEGAL RECOGNITION ISSUE FOR THE AFRICAN HUMAN RIGHTS SYSTEM

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Abstract

In 2019, a judge of the Supreme Court of Kenya issued a public apology to an intersex person for a decision the court handed down in 2010. The judge regretted the court's failure to appreciate the identity and human rights needs of intersex persons in that case. R.M. had petitioned the High Court for redress due to the sexual, psychological, and emotional abuse he had suffered while detained at the state correctional facilities. This case highlighted the various forms of violence that intersex, transgender, and gender diverse persons ("ITGDPs") experience on account of their gender identity. Studies reveal that gender-based violence against ITGDPs in Kenya is intricately conjoined with a lack of socio-cultural and legal recognition of their gender identities. The exclusion engenders pervasive violence by state actors and private individuals. Despite the growing use of public interest litigation ("PIL") as a mechanism for pursuing the goals of legal recognition and social, economic, and political emancipation of ITGDPs in Kenya, there is scant improvement in policy and practice. The same lacuna obtains in the African human rights mechanisms. The apology, the research findings and the unyielding PIL create the appropriate occasion for a critical examination of the effects of the assumption on synonymy and binarism of gender and sex espoused by the national and the African human rights system, on sexual and gender-based violence ("GBV") against ITGDPs in Kenya. This article analyses the nexus and how a lack of legal recognition of ITGDP gender identities and expression aggravates sexual and GBV against the group against the backdrop of the African human rights system.

Keywords: *gender-based violence, intersex, legal recognition transgender*

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1 Introduction

Kenya's Constitution has been recognised as one of the most progressive globally. This is mainly due to its transformative agenda that aims at promoting human rights, social justice, equity, inclusiveness, equality, non-discrimination and the protection of marginalised groups.[1] Despite this progressive stance, intersex, transgender and gender diverse persons ("ITGDP") do not enjoy all the fundamental rights guaranteed therein.[2] The question is: why would a country with such a transformative constitution exclude and outlaw a certain minority group? In the words of Shivji, "constitutions do not make revolutions, revolutions make constitutions".[3] There is a need for a revolution to influence the inclusion and recognition of ITGDPs to eliminate GBV in Kenya.

Prevailing socio-cultural attitudes and norms of most societies, including in Africa, consider sex and gender to always be "synonymous, uncomplicated and in-sync".[4] This view is anchored on the presumption that sex and gender are categorised along binary lines, and human beings are biologically male or female. Accordingly, those who are labelled as male are assumed to have a corresponding masculine gender and therefore identify and express as men, while females are assumed to have a corresponding feminine gender, and therefore identify and express as women. It is also assumed that the sex of a person and the corresponding gender are fixed at birth based on the genitalia.

However, evidence from biomedicine and sociology demonstrates that a person's sex is a complicated phenomenon that cannot be determined by simply looking at their genitalia.[5] Sex is located along a continuum or spectrum and the biological sex assigned at birth does not invariably predict individuals' inner gender identity.[6] Further, the existence and lived experiences of ITGDPs pose a direct challenge to the assumptions of sex and gender binarism and congruence.[7] This article seeks to explore the concepts of sex, gender, gender identity, gender expression and how they relate to ITGDPs. It explains the correlation between the erroneous assumption on synonymy and binarism of gender and sex and the consequent wide-reaching social-legal exclusion of ITGDPs. The research employs an extensive analysis of GBV against ITGDPs in Kenya and the intricate interrelations of different factors and actors such as the police, public administrators, religious leaders and media.

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1 Article 10(1)(b) of the Kenyan Constitution.

2 CE Finerty "Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws" (2012) 45 *Cornell International Law Journal* 431-432.

3 F Kabutu "The Constitution of Kenya 2010: Panacea or nostrum" (2020) *Strathmore Law School* <https://law.strathmore.edu/the-constitution-of-kenya-2010-panacea-or-Nostrum/> (accessed 25-01-2022).

4 American Psychological Association "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People" (2015) 70 *American Psychologist* 832-834.

5 B Vanderhorst "Whither lies the self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex" (2015) 9 *Harvard Law Review* 241-243.

6 JS Hyde, RS Bigler, D Joel, CC Tate, SM van Anders "The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary" (2008) *American Psychologist* 171.

7 A Mbugua "Gender Dynamics: A Transsexual Overview" in S Tamale (ed) *African Sexualities, A Reader* (2011).

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Drawing upon judicial pronouncements from numerous cases on ITGDPs and other minority and marginalised groups in Kenya, we posit that the pervasive violence against ITGDPs is significantly aggravated by the social, cultural, and legal non-recognition that beleaguer their gender identity. The article concludes with proposals to make the text and institutions of the African human rights mechanisms an effective and forceful guardian of the human rights of ITGDP Africans.

2 Conceptual analysis: Sex, gender, gender identity, gender expression, intersex, transgender, gender diverse

In many jurisdictions, the terms gender and sex are generally used interchangeably in all spheres of life including legislation. Nonetheless, the two terms differ in meaning and context. Gender refers to the socially construed characteristics of boys, girls, men and women while sex refers to their biological and physiological differences.[8] In essence, gender entails the societal expectations assigned to males and females. For instance, the notion that women should do more housework and men should never show weakness is a gender stereotype while biological traits like having a vagina, ovaries, penis, testosterone, and testes represent sex.

An intersex person is a person with sex characteristics that do not fit the typical binary notion of male or female bodies.[9] The ambiguity may manifest through the person's genitals, gonads or chromosomes at birth or during puberty. Intersexuality variations include "the congenital development of ambiguous genitalia, disjunction between the internal and external sex anatomy, incomplete development of the sex anatomy and chromosomal anomalies or disorders of gonadal development".[10]

A transgender person was defined succinctly in *Bellinger v Bellinger*.[11] This case was decided in England in 2003 when the position of the law was that a person's gender was fixed at birth and could not be changed.[12] The House of Lords defined a transgender person as a person who is born with the anatomy of a person of one sex but with the unshakeable belief that they are persons of the opposite sex. Transgender persons have "physical characteristics that are congruent, but their sexual belief is incongruent".[13] For instance, a transgender man identifies and expresses as a man although assigned female at birth and *vice versa*. Transgender persons experience mental and psychological distress

[8] The World Health Organization "Gender and Health" (undated) *WHO* <https://www.who.int/health-topics/gender#tab=tab_1 > (accessed 25-01-2022).

[9] The Taskforce on Legal, Policy, Institutional and Administrative Reforms regarding Intersex Persons in Kenya "Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya" (2018) *KNCHR* 44-46 <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf> (accessed 25-01-2022).

[10] Kenya National Commission on Human Rights "Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya" (2013-2022) *Kenya National Commission on Human Rights* <https://www.knchr.org/Our-Work/Special-Interest-Groups/Intersex-Persons-in-Kenya/Taskforce-on-Policy-Legal-Institutional-and-Administrative-Reforms-regarding-Intersex-persons> (accessed 25-01-2022).

[11] (2003) UKHL 21.

[12] This was pursuant to the decision of Ormrod J in *Corbett v Corbett* [1970] 2 All ER 33, 47.

[13] See *R v Kenya National Examinations Council ex parte Audrey Mbugua Ithibu* (2014) eKLR.

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from the dissonance between the sex that they were assigned at birth and their brain sex.[14] This distress is known as gender dysphoria and may begin at childhood, after puberty or much later into adulthood.[15]

Gender diverse persons express an identity that does not fall squarely in either the female or male gender.[16] They identify "between or beyond the male or female genders". Gender identity has been defined as "a person's deeply felt internal and individual experience of gender",[17] while gender expression is how a person publicly expresses their gender through behaviour and outward appearance such as dressing, hair, body language, voice and preferred pronouns.[18]

The unique issues affecting ITGDPs have been largely absent from the spotlight of the LGBTIQ movement. This is mainly attributed to the inorganic combination of two groups with significantly different issues and experiences into one movement. The ideology behind the formulation of the LGBTIQ movement was premised on the collective identity theory which stipulates that individuals are connected because of similar life experiences and characteristics.[19] This did not take into account the fact that the LGB community and the ITGDP community undergo remarkably distinct life experiences.[20] The former's experiences revolve around their sexual orientation while the latter's revolve around gender identity. Consequently, both issues are often merged in literature and advocacy forums. In Kenya for instance, there is no conclusive literature that focuses solely on the plight of ITGDPs in the country. Even progressive states such as South Africa continue to conflate these issues.[21] The continued use of this umbrella term (LGBTIQ) has led to the dilution of gender identity and expression issues in the larger inclusion discourse.

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[14] In *Re Kevin (Validity of marriage of transsexual)* [2001] FamCA 1074 para 273, the court explained that brain sex determines whether a person thinks of themselves as either female or male. It is the constant strong need in the brain to perceive oneself as a woman or a man.

[15] J Turban "What is Gender Dysphoria?" (2020) *American Psychiatric Association* <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (accessed 26-02-2022).

[16] S Hanssen "Beyond Male or Female: Using Non-binary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law" (2017) 96 *Oregon Law Review* 283-287.

[17] F Pega & JF Veale "The Case for the World Health Organization's Commission on Social Determinants of Health to Address Gender Identity" (2015) 105 *Am J Public Health* 3.

[18] World Health Organization "FAQ on Health and Sexual Diversity: An Introduction to Key Concepts" GER <https://www.who.int/gender-equity-rights/news/20170227-health-and-sexual-diversity-faq.pdf> (accessed 26-02-2022).

[19] N Jazayeri *Transgender Exclusion within the LGBTQ Movement: An Introductory Analysis* LLB thesis Florida (2014) 6-7.

[20] 7.

[21] Gender Dynamix, Iranti-org & Legal Resources Centre "Recognition of Civil and Political Rights: A continued struggle for Transgender and Intersex Persons in South Africa: An Alternative Report to the United Nations Human Rights Committee" (2016) 4 <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23065_E.pdf> (accessed 25-01-2022).

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3 Situational analysis of gender-based violence against ITGDPs in Kenya

A 2019 study on violence in nine African countries concluded that ITGDPs are more likely to experience gender-based violence than the general population.[22] The research sampled 887 ITGDPs and found that 56% had experienced some form of violence during their lifetime. In 2018 alone, 29% had experienced GBV with 25% having encountered physical violence and 19% sexual violence.[23] Notably, transgender women were the most affected with 73% having encountered violence in their lifetime and 45% in 2018 alone.[24] In Kenya, the study found that 61.3% of ITGDPs experience GBV in their lifetime with 53% encountering physical violence and 44% sexual violence.[25]

Studies establish that the violence is perpetrated by police officers and other law enforcement agents and private individuals alike.[26] The police often refuse to take victims' statements, investigate, or arrest the perpetrators of GBV against ITGDPs. Instead, they victim-shame ITGDPs and blame them for the violence.[27]A 2015 Human Rights Watch report investigated the prevalence of GBV against ITGDPs in Kenyan coastal communities and found that between 2008 and 2015, there were at least six attacks on ITGDPs or health workers serving these communities. The police did not arrest any of the perpetrators.[28] This inaction by the police legitimises and exacerbates these violent attacks.

A 2012-2013 baseline survey administered by the East African Sexual Health and Rights Initiative ("UHAI-EASHRI") found that 46% of the respondents had faced police harassment at some point in their life.[29] They reported having been subjected to physical, sexual and verbal violence upon arrest. For instance, transgender women are forced to strip and are incarcerated with male inmates where they suffer further violence.[30]

The situation is no different for victims of GBV who end up being arrested for personation, instead of accessing justice when they report to the police. The police choose to focus on the discrepancy between the ITGDPs' identity documents and their gender expression rather than their complaint. For instance, when Bettina, a transgender woman, reported an attack on her kiosk,

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22 A Müller, K Daskilewicz, Mc L Kabwe, A M Chalmers, C Morroni, N Muparamoto, A S Muula, V Odira, M Zimba, & The Southern and Eastern African Research Collective for Health "Experience of and Factors Associated with Violence against Sexual and Gender Minorities in Nine African Countries: A Cross-Sectional Study" (2021) 21 *BMC Public Health* 1-9.

23 4.

24 4.

25 6.

26 East African Sexual Health and Rights Initiative "Why Must I Cry? Sadness and Laughter of the LBGTI Community in East Africa" (2013) *UHAI EASHRI* 20.

27 20.

28 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 19 <https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast> (accessed 02-02-2022)

29 EASHRI "Why Must I Cry? (2013) 20.

30 The East African Sexual Health and Rights Initiative "Lived Realities, Imagined Futures: Baseline Study on LGBTI Organizing in Kenya" (2011) *UHAI EASHRI* 25.

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the police refused to give her a case number and focused on questioning her on whether she was male or female.[31]

Some of the violent attacks against ITGDPs are fuelled by extremist religious leaders. A study by UHAI-EASHRI found that religious leaders are the most vocal opponents of the inclusion and acceptance of ITGDPs in society.[32] A 2018 research by Kenya Human Rights Commission ("KHRC") and Columbia University found that 78.1% of religious leaders believe it is morally wrong to identify as a transgender woman and 77.1% found it morally wrong to identify as a transgender.[33] These religious attitudes often culminate in violence. The KHRC study found that 37.4% of religious leaders agreed that violence can be justified to preserve social values. A further, 27.4% opined that violence against transgender persons is permissible to preserve social values.[34]

A 2018 intersex taskforce report documented that most intersex children have been accused of engaging in homosexuality and been expelled from school.[35] Similarly, a National AIDS and STIs Control Programme ("NASCOP") and Jinsiangu report found that transgender persons are often referred to as homosexual or gay.[36] This misidentification often places ITGDPs at a higher risk of violence. The Human Rights Watch report detailed that in February 2015, some photos and videos of men engaging in same-sex conduct circulated on social media. This increased the attacks on ITGDPs prompting them to flee or go into hiding because people believe that they are homosexuals.[37]

The media also plays a huge role in exacerbating GBV against ITGDPs. FM radio stations constantly encourage hate speech and exhibit ignorance on issues affecting ITGDPs.[38] The media covers negative public sentiments as they are and does not make any attempts to objectively change negative and discriminatory perceptions of ITGDPs.[39] The media also covers GBV cases perpetrated against ITGDPs in an undignified manner. This was the situation in *A.N.N v Attorney General*[40] (*"A.N.N")* where the media ran a clip

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31 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 36.

32 EASHRI "Lived Realities: (2011) 21.

33 DK Mbote, TGM Sandfort, E Waweru & A Zapfel "Kenyan Religious Leaders' Views on Same-Sex Sexuality and Gender Non-conformity: Religious Freedom versus Constitutional Rights" (2018) 55 *J Sex Res* 1-9.

34 10.

35 Taskforce on Intersex Persons in Kenya (2018) "Report of the Taskforce" *KNCHR* 177.

36 USAID, PEPFAR, JINSIANGU, LINKAGES, LVCT Health, University of Manitoba & NASCOP "The Nexus of Gender and HIV among Transgender People in Kenya" (2016) *FHI 360* 2. <https://www.fhi360.org/sites/default/files/media/documents/resource-linkages-kenya-tg-gender-analysis-2016.pdf> (accessed 03-02-2022).

37 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 24.

38 EASHRI "Lived Realities" (2011) 21.

39 The East African Sexual Health and Rights Initiative "A People Condemned: The Human Rights Status of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in East Africa" (2009-2010) *UHAI EASHRI* 55.

40 (2013) eKLR.

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of the transgender woman being stripped by police during prime-time news reporting.

Cultural beliefs further aggravate GBV against ITGDPs. This is due to the internalised gender norms and expectations which reject identities outside the binary classification.[41] Generally, many societies view women as lesser beings than men, thus, trans women are often seen to have degraded themselves and given up the privilege of being men hence the heightened violence.[42] Intersex children also suffer sexual violence and genital mutilation due to detrimental religious and customary beliefs and practices.[43]

GBV against ITGDPs transcend their person to their property, families and businesses. For instance, a transgender woman reported to Human Rights Watch how her kiosk was attacked by a mob because of her gender identity.[44] In February 2010, a crowd of 200 people attacked transgender women who served as peer educators at Kenya Medical Research Institute ("KEMRI"), a government institution.[45] These attacks deny ITGDPs opportunities for engaging in lawful means of earning livelihood hence many resort to sex work which further exposes them to more violence including; rape, arbitrary arrests, police harassment and abuse from clients.[46]

ITGDPs in conflict with the law endure extreme humiliation at the hands of police. In *A.N.* the petitioner, a transgender woman, had been arrested and charged with assault. She was dressed as a woman at the time of the arrest. While being held at the police station, male and female police officers undressed her in the full glare of the media to ascertain her gender. The police touched her all over her body, pulled her hair, beat her, teased her, and threatened her with guns.[47] The High Court found the police liable for violating her right to human dignity.[48]

Incarceration is a hotspot for the perpetration of GBV against ITGDPs. The Prisons Act only provides for the separation of female and male convicts.[49] Although the Persons Deprived of Liberty Act[50] defines an intersex person, it does not lay down a mechanism for their incarceration. This creates a situation where the prison officers place ITGDPs in the wrong cells thereby inviting

41 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 4.
42 USAID et al (2016) "Nexus of Gender and HIV" *FHR* 4.
43 Taskforce Intersex Persons in Kenya (2018) "Report of the Taskforce" *KNCHR* 182.
44 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 26.
45 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 28.
46 See R George, J Rivett, F Samuels & E Dwyer "Intersecting Exclusions: Displacement and Gender-based Violence among People with Diverse Sexualities and Gender Identities in Kenya" (June 2021) *Literature Review* 34 <https://cdn.odi.org/media/documents/GESI_Samuels_et_al_SGBV_prevention_Web_8bJqQFX.pdf> (accessed 02-03-2022). See also The East African Sexual Health and Rights Initiative "Defiant: Landscape Survey on Violence against LBQ Women, Trans People & Female Sex Workers in Burundi, Kenya, Tanzania and Uganda" (2018) *UHAI EASHRI* 49 <https://uhai-eashri.org/wp-content/uploads/2019/12/DEVFIANT-FULL-REPORT-1-1.pdf> (accessed 02-03-2022).
47 *A.N.N v Attorney General* (2013) EKLR para 16.
48 Para 57.
49 Section 36 of the Prisons Act, CAP 149 of the Laws of Kenya.
50 Persons Deprived of Liberty Act 23 of 2014 of the Laws of Kenya.

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violations. In *R.M v Attorney General*,[51] ("*R.M.*") an intersex person was tried, convicted and sentenced. He was committed to a Maximum Prison for male convicts where he was made to share cells, bedding, and sanitary facilities with the male inmates because of the male name and gender expression. This exposed R.M. to mockery, ridicule, and sexual abuse from the inmates. The prison guards also treated him in a degrading and humiliating way. Officers asked him to spread his legs and expose his private parts in front of all other inmates. The Court ruled that the petitioner's incarceration in a male prison was not unlawful under the Prisons Act. However, the Court condemned the strip searches conducted by the prison wardens as cruel, inhuman and degrading treatment and a violation of R.M.s right to human dignity.

3 1 ITGDPs and GBV-related laws in Kenya

Article 29(c) of the Constitution of Kenya, 2010 ("Kenyan Constitution") protects all persons from any form of violence from either public or private sources. The provision provides for the right not to be subjected to physical or psychological torture. Article 29(f) protects every person from being treated or punished in a cruel, inhuman or degrading manner.

The Sexual Offences Act 3 of 2006 is the main legislative framework that protects individuals from sexual gender-based violence. Section 3(1) defines rape as "the act of causing penetration with one's genital organs without the consent of the other person". Section 2 defines genital organs to include "the whole or part of male or female genital organs and includes the anus". The definition of rape is not gender-neutral and does not consider the realities of intersex persons with sexual violence. The definition only recognises penile penetration of the female genitalia or the anus.[52] An inclusive definition of sexual offences would improve the protection of ITGDPs from sexual violence.

ITGDPs experience other forms of sexual violence including; oral rape, genital violence, amputation of the testes or penis, genital mutilation, forced sexual activity with other people, corpses or animals, forced witnessing of sexual violence, insertion of objects or liquids into the urethra, forced sterilisation, sexual humiliation such as forced nudity, forced masturbation of self or others, and the non-consensual touching of their genitals.[53] Although some of these violations are covered by the Act, the majority are not mentioned.

The main form of violence that is perpetrated against intersex persons is intersex genital mutilation. Intersex children are subjected to non-consensual, medically unnecessary, irreversible, and cosmetic hormonal and surgical interventions to modify their ambiguous genitalia to fit the typical gender binary.[54] There is no medical evidence on the benefits of these surgeries;

[51] (2010) eKLR.

[52] E McDonald "Gender Neutrality and the Definition of Rape: Challenging the Law's Response to Sexual Violence and Non-Normative Bodies" (2019) 45 *University of Western Australia Law Review* 166-183.

[53] Women's Refugee Commission *Addressing Sexual Violence against Men, Boys, and LGBTIQ+ Persons in Humanitarian Settings* (2021) *Reliefweb* 2 <https://reliefweb.int/sites/reliefweb.int/files/resources/Addressing-Sexual-Violence-against-Men-Boys-LGBTIQ-Persons-Guidance-Note-022021.pdf> (accessed 02-03-2022).

[54] Human Rights Watch "The Issue Is Violence" (2015) *HRW* 26.

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instead, they are justified by societal and cultural prejudices that require one to be either male or female.[55] Sadly, the only law that prohibits genital mutilation in Kenya is the Prohibition of Female Genital Mutilation Act which recognise cisgender girls and women only.[56] Yet, the taskforce research on intersex in Kenya found that out of 112 intersex persons interviewed, 29% had undergone this surgery, 30% were happy with the outcomes while 24% were dissatisfied about the surgery yet they had to live with the consequences for a the rest of their lives.[57]

Section 3(a) of the Protection against Domestic Violence Act 2 of 2015,[58] describes domestic violence to include largely violations that occur in marriage. However, the Constitution only recognises marriages between a cis-gender man and woman.[59] As such, domestic violence within a marriage involving members of the ITGDP community is likely to fall outside of the protection of the Constitution and this Act. Nevertheless, the Act defines a domestic relationship to include relationships between persons living in the same household or having a close personal relationship, thus creating a possibility of protection for individual ITGDPs against domestic violence.[60] The Penal Code[61] creates some GBV-related criminal offences which apply to everyone despite their gender identity.

4 Lack of legal recognition: An aggravator of GBV and SGBV against ITGDPs in Kenya?

4 1 Understanding the right to legal recognition

The Oxford dictionary defines recognition as "the acknowledgement of the existence, validity, or legality of something". Therefore, legal recognition is the acknowledgement of the existence of a person in law. The United Nations Working Group on enforced disappearance defines the right to legal recognition as, "the capacity of each human being to be the holder of rights and obligations under the law".[62] That is, the "right to have rights".[63] Bell J in *Lifestyle Communications Ltd (No 3)* ("*Anti-Discrimination*")[64] explained that legal recognition means that all people enjoy all the rights under the law.

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55 Human Rights Watch "The Issue Is Violence" (2015) *HRW* 26.

56 Section 2 defines female genital mutilation as the "partial or total removal of the clitoris or prepuce, excision of the clitoris and labia majora or the narrowing of the vaginal orifice".

57 Taskforce Intersex Persons in Kenya (2018) "Report of the Taskforce" *KNCHR* 170.

58 Protection Against Domestic Violence Act 2 of 2015 of the Laws of Kenya. Its objective is to protect victims of domestic violence.

59 Article 45 (2) of the Kenyan Constitution, 2010; s 3(1) of the Marriage Act 2014 of the Laws of Kenya.

60 Section 4 of the Protection Against Domestic Violence Act 2 of 2015 of the Laws of Kenya.

61 CAP 63 of the Laws of Kenya. Section 202 criminalises manslaughter, section 203 criminalises murder, section 234 criminalises actions that causes grievous harm, section 250 criminalises common assault, and section 251 assault that causes actual bodily harm.

62 UNGA "Report of the Working Group on Enforced or Involuntary Disappearances" 43 (2 March 2012) UN Doc A/HRC/19/58/Rev1.

63 43.

64 (2009) VCAT Ref No. A98 of 1869 <https://jade.io/article/114166> (accessed 15-08-2021).

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Without legal recognition, a person cannot enforce their rights, commence, defend or participate in legal proceedings.[65]

The United Nations ("UN") Human Rights Council affirms that the right to legal recognition is connected to the right to civil registration and documentation as a prerequisite to the enjoyment of other rights:

> "Birth registration, and more especially a birth certificate, is a life-long passport for the recognition of rights, which may be necessary to, *inter alia*, vote, marry or secure formal employment. In some countries, it may be needed to obtain a driver's license, to open a bank account, to have access to social security or a pension, to obtain insurance or a line of credit, and, significantly, to be able to register one's own children. It is also vitally important for securing inheritance and property rights, particularly for women and within families."[66]

R.M., discussed above, chronicles the scenario described by the UN Human Rights Council in a dramatic sense.[67] R.M., an intersex person, could not obtain a birth certificate when he was born as the law did not have a category for his sex. Consequently, he could not obtain a national identity card ("NID"). He dropped out of school at the lower primary level due to social stigmatisation and exclusion. As a young adult, he attempted to marry but the marriage could not be recognised culturally and legally. Frustrated, he sought employment in the city but with almost non-existent education he could only secure low-level employment. He eventually broke the law and was convicted. The prison authorities placed him in the male cells where he was violated by inmates and prison officers which led to his taking legal action.

4 2 Legal recognition and culture

The relationship between the law and culture is two-pronged. First, culture influences the nature and scope of the law. For instance, some communities in Kenya consider intersex children a curse hence, they are disowned or at times killed.[68] The patriarchal Kenyan society and lawmakers hold cis-heteronormative constructions of gender that generally regard ITGDPs as "cursed, deviant or devil worshippers" which hinders legal recognition.[69] Moreover, African lawmakers have vocally expressed their opinions on the un-African nature of the ITGDP community.[70] These African cultural values have influenced the ITGDP-excluding laws in Kenya.

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[65] *Zohra Madoui and Menouar Madoui v Algeria* (28 October 2008) Communication No. 1495/2006 <http://www.worldcourts.com/hrc/eng/decisions/2008.10.28_Madoui_v_Algeria.htm> (accessed 02-03-2022).

[66] Human Rights Council "Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law" (17 June 2014) UN Doc A/HRC/27/22.

[67] *R.M v Attorney General* (2010) eKLR.

[68] KG Nelson "Intersex is Counted in Kenya's Census: but is this a Victory?" (10-02-2022) *Global Post* <https://theworld.org/stories/2019-09-10/intersex-counted-kenyas-census-victory> (accessed 10-03-2022). J Chigiti *Intersex Persons and the Law in Kenya* (2021).

[69] Minority Women in Action, AFRA-Kenya, Kenya Campus Lasses Association and the National Gay and Lesbian Human Rights Commission *List of Issues Relating to the Violence and Discrimination against Lesbian, Bisexual, Transgender, Intersex and Queer Women in Kenya* (Submitted for the consideration of the 8th periodic report by Republic of Kenya for the 68th Session of the Committee on the Elimination of all forms of discrimination Against Women) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_26370_E.pdf> (accessed 6-8-2021).

[70] T Walton "Sexual Minorities and the Right to Culture in African States" (2018) 50 *Journal of International Law and Politics* 1325 <https://nyujilp.org/wp-content/uploads/2018/10/NYI404.pdf> (accessed 6-8-2021).

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On the other hand, the law indirectly changes and fuels certain moral attitudes in society.[71] The lack of legal recognition means that the law does not acknowledge ITGDPs. This in turn heightens the notion in the society that ITGDPs are social outcasts, immoral people whose existence is out of the bounds of the law and therefore do not deserve humane treatment. For example, 2018 research study conducted in Kenya found that 27.4% of religious leaders agreed that violence against ITGDPs is justified to preserve cultural values; 35.5% of these respondents held the belief that the Kenyan Constitution does not apply to transgender persons.[72]

R.M. is a proper illustration of how cultural prejudices permeate the highest justice systems expected to protect the ITGDPs from the same biases. Called to recognise intersex persons as different from the male and female sex categories provided by the law, the court stated:

> "Issues of sexuality are issues which cannot be divorced from the socio-cultural attitudes and norms of a particular society. To include intersex in the category of "other status" would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time."[73]

However, recently the court expressed a different opinion in *Baby A (Suing through the Mother E A) v Attorney General*[74] ("*Baby A*") where it pronounced that "intersexuals ought not to be discriminated against in any way including in the issuance of registration documents such as a birth certificate". This case birthed the taskforce on intersex persons in Kenya,[75] and the inclusion of intersex persons in the 2019 national census which reported their total count as 1,524.[76] This number has been decried as a grave undercount and the inaccuracy is attributed to the existing widespread stigmatisation of intersex persons and lack of awareness by the census enumerators.[77]

4 3 Kenyan law on legal recognition

4 3 1 The process of non-recognition of ITGDPs in Kenya: An explainer

The Births and Deaths Registration Act[78] makes provision for the notification and registration of births and deaths. Section 10 obligates the person

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[71] K Bilz & Janice Nadler "Law, Moral Attitudes, and Behavioral Change" in E Zamir & D Teichman (eds) *The Oxford Handbook of Behavioral Economics and the Law* (2014) 241.

[72] Mbote et al (2018) *J Sex Res* 1-10.

[73] *R.M v Attorney General* (2010) eKLR para 133.

[74] (2014) eKLR.

[75] *Baby A (Suing through the Mother E A) v Attorney General* (2014) eKLR. It is during a meeting of the taskforce that Justice Lenaola issued an apology for the court's failing to appreciate the identity and unique challenges faced by intersex persons in R.M's case. The taskforce report recommended; the amendment of the existing legal recognition laws to include an intersex marker and the establishment of agencies to effectuate the amended laws.

[76] G Kajilwa "2019 Census Reveals Kenya has 1,524 Intersex People" (2020) *The Standard* <https://www.standardmedia.co.ke/entertainment/local-news/2001348112/2019-census-reveals-kenya-has-1524-intersexpeople#:~:text=There%20are%201%2C524%20intersex%20persons,of%20intersex%20people%20with%20245.> (accessed 18-02-2022).

[77] Kenya National Commission on Human Rights estimates there are 1.4 million intersex people in Kenya. See also N Bhalla "Kenya Census Results a Big Win for Intersex People" (04-11-2019) *Reuters* <https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9> (accessed 17-01-2022).

[78] Births and Deaths Registration Act CAP 149 of the Laws of Kenya.

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registering the birth of a child to furnish the registrar with some mandatory particulars which include sex in the alternate options of male or female.[79] This sex assignment considers the child's genitalia as a representation of both their sex and gender identity.

When an intersex child is born, this process simply stalls as the law is oblivious of sex besides the male and female classification. Often the doctors record a question mark (?) on the notification form in the place of the sex marker as was the case in *Baby A*.[80] This complicates the process of obtaining a birth certificate for the intersex child. All other social, economic and civil processes, including enrolling in school rely on the birth certificate and thus this child is excluded. To avoid the registration dilemma and socio-cultural exclusion, sometimes parents opt for corrective surgery to fix the child within the sex binary of male/female.[81] In other circumstances, parents choose the most dominant sex from the intersex child's genitalia and physiological features. This was deemed as an acceptable practice by the judges in *R.M.*[82]

The particulars in the birth certificate inform all other documents that are issued to that child to adulthood and in death. At 18 years of age, the Registration of Persons Act[83] clothes the person with legal capacity through an NID. The particulars of sex are required to issue an NID.[84] For transgender and gender diverse persons whose gender identity and expression become more pronounced at puberty and young adulthood, the challenges start with the inability to obtain an NID with sex/gender marker that match their gender identity and expression, different to the particulars contained in the birth certificate.

The Kenya Citizenship and Immigration Act[85] under section 24 entitles every Kenyan citizen to apply for and be issued with a passport to facilitate their international travel. Particulars of sex in the alternate of male or female, together with copies of the birth certificate and NID are required for this application for inclusion in the passport.[86] Like the passport**,** all other identification documents such as the National Hospital Insurance Fund card, driver's licence, primary, secondary and college certificates adopt the same particulars of sex/gender as the birth certificate and NID.

A consequence of these laws is that intersex persons cannot acquire documents without either undergoing surgery or identifying as male or female.[87] Thus, transgender and gender diverse persons have documents that do not conform to their appearance (gender expression), hence the legal

[79] Schedule 1.
[80] *Baby A (Suing through the Mother E A) v Attorney General* (2014) eKLR.
[81] Taskforce on Intersex Persons in Kenya (2018) "Report of the Taskforce" *KNCHR* 173.
[82] *R.M v Attorney General* (2010) eKLR. However, in Baby "A" the court stated "[t]he fact that the Births and Deaths Registration Act and the Constitution do not define the term 'sex' does not mean that we should hide behind the traditional definition as we know it."
[83] The Registration of Persons Act CAP 107 of the Laws of Kenya.
[84] Section 5 and 6(1).
[85] The Kenya Citizenship and Immigration Act 12 of 2011.
[86] Section 27(1), the First schedule of the Kenya Citizenship and Immigration Regulations 2012, Rule 13.
[87] For instance, R.M's parents chose to label him a male while Baby "A" could not obtain a birth certificate. Sometimes intersex children labelled one sex at birth grow to identify and express themselves with the opposite gender thus encounter the same challenges as TGNCs.

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identity crisis.[88] For example, Monica Mary, a transgender woman, can have an identity card that reads Joseph Andrew with a "male" gender marker. This discrepancy in identification documents exposes them to stigma and discrimination whenever they are required to show their official documents to verify their identity.[89]

Although Kenyan law allows a change of name via deed poll, there is no legal provision for change of the sex marker which is also considered as the gender marker.[90] The inability to change the gender marker on a document even after changing one's name creates a socio-legal complexity that makes ITGDPs unable to enjoy their basic human rights such as the use of education certificates for economic empowerment. In *Republic v Kenya National Examinations Council Ex-parte Audrey Mbugua Ithibu*,[91] a transgender woman who, after successfully obtaining her Kenya Certificate of Secondary Education, could not use the certificate to secure employment due to the male gender marker, petitioned the court to allow the change from a male to a female marker to correspond with her new female name.[92] The court did not approve the change but in an innovative and progressive move allowed the removal of the gender marker where the law does not expressly require its inclusion. However, this approach is not applicable for identification documents like the birth certificate, NID, and passport where the law expressly requires the inclusion of a gender/ sex marker.[93]

4 3 2 The constitutional perspective: Are ITGDP people "every person"?

Article 12(1)(b) of the Constitution provides that "every citizen is entitled to a Kenyan passport and any other document of registration or identification issued by the state to citizens". The term "every person" was interpreted to encompass gender and sexual minorities by the court in *EG v Non-Governmental Organizations Co-ordination Board*[94] ("*EG*"). Article 27(1) affirms the equality of all people before the law while Article 27(4) prohibits discrimination on the basis of certain grounds including sex. Gender is not mentioned in the grounds. However, the court in *EG* held that the use of the word "including", immediately preceding the list of the grounds indicate the listed grounds are not exhaustive.[95] Similarly, in *Republic v Non-Governmental Organizations Co-ordination Board ex-parte Transgender Education and*

88 USAID et al (2016) "Nexus of Gender and HIV" *FHI* 2.

89 A Müller "Legal Gender Recognition: An Analysis of Law and Policy in the Context of International Best Practice." (2020) *Southern Africa Litigation Centre* 6 <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Botswana-Gender-Marker-Report.pdf> (accessed 10-01-2022).

90 Rule 9 of the Registration of Persons Rules.

91 (2014) eKLR.

92 In Kenya, and many other African states, names are often gendered female or male.

93 The Births and Deaths Registration Act, the Registration of Persons Act and The Kenya Citizenship and Immigration Act.

94 (2015) eKLR.

95 *EG v Non-Governmental Organizations Co-ordination Board* (2015) eKLR. The court stated that "to allow discrimination based on sexual orientation would be counter the constitutional principles of, human dignity, equity, social justice, inclusiveness, equality, human rights, and non-discrimination" provided under Article 10. In *Baby A*, the court expounded Article 27(4) to include intersexuals.

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Advocacy[96] the court held that discriminating against transgender persons based on their gender or sex is a violation of Article 27(4) of the Constitution.

Article 28 affirms the inviolable inherent dignity of all persons and the right to have that dignity respected and protected. In *A.N.N*, the court in a bold and progressive judgment held that:

> "If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination dignity and freedom ..." [97]

Although the Kenyan Constitution employs an inclusive language and the courts have progressively interpreted it to embrace the ITGDPs, the statutes preclude ITGDPs from legally affirming their gender identity. Even the process of changing one's name which is legally provided for is especially difficult for the ITGDPs due to discriminatory practices by the registrars of persons. For instance, in *MM v National Registration Bureau*,[98] four transgender persons had successfully changed their names and applied to have their new names reflected on their NIDs. The registrar of persons refused to effect the changes because their old photos on NIDs did not resemble their immediate appearances.[99]

4 4 Lack of legal recognition and criminalisation of ITGDPs in Kenya: A catalyst for GBV and SGBV

According to section 14(1) of the Registration of Person's Act, it is an offence to register oneself, to give false information during such registration and or to possess a NID with false entry, alteration or erasure. Section 382 of the Penal Code[100] provides for the offence of personation while sections 313 and 320 criminalise "obtaining registration by false pretences with intent to defraud" and "obtaining registration by false pretences" respectively.[101]

Due to ignorance on gender identity and expression matters, many parents refuse to allow their ITGDP youths the use of their NIDs to register for their own NIDs, a requirement under the Registration of Person's Act. This forces them to use other people's documents to obtain identity cards. Equally, ITGDPs are often arrested and charged with these offences because their gender identities and expression contrast with sex/gender particulars on identification documents, thus exposing them to harassment, extortion and

[96] [2014] eKLR.
[97] *A.N.N v Attorney General* (2013) eKLR. ANN, the police had publicly undressed a transgender woman.
[98] Judicial Review No 419 of 2015.
[99] The refusal to effect the changes was an administrative decision which had no legal basis. Accordingly, a consent judgement was entered, and MM and others were issued with NIDs reflecting new names and photos.
[100] The Penal Code CAP 63 of the Laws of Kenya.
[101] In *R v SCK,* Eldoret Criminal Case 480 of 2020, SCK, a transgender woman has been charged with obtaining registration by false pretences, the case has been ongoing since February 2020 and SCK is living without an NID, greatly affecting her life and athletic career as NID is a basic requirement for all social, economic and political engagements in Kenya.

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violence from the police.[102] *R v SCK*[103] succinctly illustrates the correlation between lack of legal recognition and the consequent criminalisation of ITGDPs and GBV.[104]

Transgender women are often misidentified as men who have sex with men by the police thus they are often arrested for engaging in same-sex conduct between males, which is criminalised.[105] Moreover, criminalisation of "living on the earnings of prostitution", and conducts such as "loitering with intent to commit an offence" which targets sex workers, greatly expose ITGDPs to police harassment.[106]

5 African regional and international frameworks and perspectives on the legal recognition of ITGDPs and GBV

The Universal Declaration on Human Rights[107] provides for the right to recognition for everyone, everywhere as a person before the law. The Inter-American Court of Human Rights expounded the normative context of this provision in *Sawhoyamaxa Indigenous Community v Paraguay* explaining that:

> "The right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such person can enforce such rights. The breach of such recognition implies the absolute denial of the possibility of being a holder of such rights and of assuming obligations and renders individuals vulnerable to the non-observance of the same by the State or by individuals."[108]

The Court reiterated the state's duty to provide all means for the enjoyment of this right, especially to vulnerable persons, excluded or discriminated against. More importantly, the court held that the failure by Paraguay to issue identification documents to some members of the Sawhoyamaxa community was a violation of their right to legal recognition as persons before the law.

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[102] Human Dignity Trust "The Criminalization of Transgender People and Its Impacts*"* (2019) *Human Dignity Trust* 27 <https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf> (accessed 10-01-2022).

[103] Eldoret Criminal Case 1980 of 2019.

[104] The case concerned a transgender woman athlete who was charged with personation. She was detained in the male section at the remand prison after being subjected to intrusive body search which included stripping, touching of her body parts and probing of her orifices by the prison officers. The court ordered unspecified tests to ascertain her gender, which were used to further subject her to humiliating and dehumanising intrusive physical examination which involved pulling and measuring of her genital parts, radiological examination and the extraction of blood samples. The law enforcement officers released her medical reports to the media and the public without her consent. Yet, she was found innocent and acquitted of personation charges.

[105] Sections 162 and 165 of the Penal Code. See NASCOP "Module 6: Prevention and Response to Violence, Stigma, Discrimination against the Transgender People" (2021) on misidentification of transgender women.

[106] Section 154 of the Penal Code. See also: Human Rights Watch "The Issue Is Violence" (2015) *HRW* 32-33.

[107] Article 6 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) ("UDHR"). See also Article 16 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171.

[108] *Inter-American Court of Human Rights, Case of the Sawhoyamaxa Indigenous Community v Paraguay* Merits. Judgment of March 29, 2006. Series C No. 146, 187-193, https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf> (accessed 05-08-2021).

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In *Anzualdo Castro v Peru*,[109] the same court referred to this right as the right to "juridical personality" and acknowledged that the denial of this right places people in a vulnerable position where they are vulnerable to harm by the state or individuals.

The Convention on the Rights of a Child obligates state parties to register every child immediately after birth.[110] The Committee on the Rights of the Child emphasises that the registration of a child's birth is essential to their personal identity and their enjoyment of other human rights entitlements.[111] The Yogyakarta Principles[112] establish the state obligation on the application of international human rights law in relation to ITGDPs. Principle 3 requires states to put in measures to:

> "Legally recognize each person's self-defined gender identity and to ensure that efficient, fair and non-discriminatory procedures exist whereby all state-issued identity papers which indicate a person's gender/sex including birth certificates, passports, electoral records and other documents reflect the person's profound self-defined gender identity, and changes to ITGDPs identity documents are recognized in all contexts where the identification or disaggregation of persons by gender is required by law or policy".[113]

5 1 African human rights mechanisms on legal recognition

The African Union ("AU") has three principal mechanisms for protecting human rights, the African Court on Human and Peoples' Rights[114] ("African Court"), the African Commission on Human and People's Rights[115] ("African Commission") and the African Committee of Experts on the Right and Welfare of the Child[116] ("Expert Committee"). The African Charter on Human and

[109] Inter-American Court of Human Rights, *Anzualdo Castro v Peru* Merits. Judgment of September 22, 2009. Series C No. 202 https://www.corteidh.or.cr/docs/casos/articulos/seriec_202_ing.pdf> (accessed 05-08-2021).

[110] Article 7(1) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[111] Committee on the Rights of the Child "General Comment No 7: Implementing Child Rights in Early Childhood" in "Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies" 25 (20 September 2006) CRC/C/GC/7/Rev.1.

[112] International Commission of Jurists "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" (March 2007).

[113] See *Christine Goodwin v United Kingdom* Application No. 28957/95 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60596%22]}> (accessed 22.06.2021). In this case, the European Court of Human Rights held that United Kingdom's failure to legally recognise Goodwin as a transgender woman was a violation of her right to privacy.

[114] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5 establishes the African Court.

> "It has jurisdiction to hear and give advisory opinions on any matters that relate to the interpretation of the Banjul Charter, the Protocol or any other human rights treaty ratified by the State Parties. Only State parties, African inter-governmental organizations, individuals, and NGOs have the locus standi to bring a suit before the court. An individual can only lodge a complaint at the court if the respondent state has recognized the court's competence to receive such a complaint."

[115] Article 30 of the African Charter establishes the African Commission. Article 30 proscribes that its mandate is "to promote and protect human rights in Africa".

[116] The African Committee of Experts on the Rights and Welfare of the Child draws its mandate from articles 32-46 of the African Charter on the Rights and Welfare of the Child ("ACRWC").

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People's Rights[117] ("African Charter"), is the principal treaty. Several specific instruments complement the African Charter.

Article 2 of the African Charter promotes the right to non-discrimination on several grounds, including sex and other status. Gender and gender identity are not listed as grounds against which discrimination is prohibited. However, the African Court in the *Matter of African Commission on Human and People's Rights v The Republic of Kenya*[118] interpreted the phrase "any other status" to include "those cases of discrimination, which could not have been foreseen during the adoption of the Charter".

The Commission in *Open Society Justice Initiative v Côte d'Ivoir*e[119] explained the importance of the right to be recognised by third parties, natural persons, or institutions, without which the "legal status remains only an unproductive attribute which cannot bear any of its potential fruits, especially a series of fundamental rights and obligations".[120] Nonetheless, the Commission is yet to issue a general comment on the normative content of this right in relation to ITGDPs.

Article 6(2) of the ACRWC provides for "the right of every child to be registered after birth".[121] General Comment No 2 to Article 6 of the ACRWC obligates states to ensure "no child's birth should go unregistered".[122] However, the prohibited grounds of discrimination focus on the parents rather than the child. General Comment 2 identifies and explains the plight of vulnerable children including those born to, imprisoned mothers, indigenous parents, refugees, internally displaced persons, asylum seekers, and parents with a disability. There is no mention of intersex or any other of the ITGD children yet their sex/gender and or gender identity bar them from registration in most African countries and thus they fall outside of the reach of the government's protective actions.[123] Furthermore, General Comment 2 lacks guidance on the details of the registration and only provides for the omission of details that may be prejudicial to the child or lead to stigmatisation or discrimination.[124]

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[117] African Charter on Human and People's Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217.

[118] Application No. 006/2012, 138 <https://africanlii.org/afu/judgment/african-court/2017/28> (accessed 06-08-2021).

[119] Communication 318/06 <https://www.achpr.org/sessions/descions?id=228> (accessed 06-08-2021). This case concerned the discrimination and exclusion of the Dioula ethnic group by the government of Côte d'Ivoire through denial of passports, birth certificates and national identity cards.

[120] Article 5 of the African Charter provides for the right to legal recognition.

[121] The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entry into force 29

[122] The African Committee of Experts on the Rights and Welfare of the Child "General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality" (16 April 2014) ACERWC/GC/02.

[123] International Commission of Jurists "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" para 43. This was the case in *Baby A* and *R.M.* discussed above. Further, only South Africa and Uganda allow intersex persons to alter the name and sex in their birth certificates. The Ugandan law only applies to minors who have undergone sex reassignment surgery.

[124] International Commission of Jurists "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" para 82. An in-depth discussion and guidance on inclusion of details such as sex and gender in the children's registration documents would be desirable.

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Article 1 of the Protocol to the African Charter on Human and People's Rights of Women in Africa[125] ("Maputo Protocol") define women as "persons of the female gender, including girls", while Article III(1) affirms every woman's right to recognition and protection of her human and legal rights.[126] According to Rudman and Snyman, a teleological approach to treaty interpretation of the term "female gender" includes transgender women because a person's gender is not determined by their sex but by their gender identity.[127] Nonetheless, neither the African Court nor the Commission has had an opportunity to pronounce on the issue of gender identity and legal recognition of ITGDPs.

The issues of sexual orientation and gender identity have generally received hostility and opposition from these institutions.[128] For instance, it took seven years for the African Commission to grant observer status to the Coalition of African Lesbians ("CAL") a non-governmental organisation. However, in what has been criticised as interference with the independence of the Commission,[129] the African Union Executive Council issued a directive to the African Commission to revoke CAL's observer status on the grounds that CAL's organisational objectives were against "fundamental African values, identity and good traditions".[130] The African Court dismissed a request to give an advisory opinion on the AU's directive on this issue.[131] Although significant efforts have been employed by civil society and academic institutions, there has been no substantive progress on the issue of legal recognition of ITGDPs by the African human rights systems.

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[125] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

[126] Article 1 Maputo Protocol defines violence against women to include "physical, sexual, psychological and economic harm".

[127] A Rudman & TC Snyman "Protecting Transgender women within the African Human Rights System Through an Inclusive Reading of the Maputo Protocol and Proposed GBV Model Law" (2022) 30 *Stell LR* forthcoming.

[128] K Esom "Human Rights, Sexual Orientation and Gender Identity in Africa: Challenging the Single Story" (2016) *State of Civil Society Report* <https://www.civicus.org/documents/reports-andpublications/SOCS/2016/Human%20rights,%20sexual%20orientation%20and%20gender%20identity%20in%20Africa-%20challenging%20the%20single%20story.pdf> (accessed 02-03-2022).

[129] S Nabaneh "2020 In Review: Focus on the African Commission on Human & People's Rights" *Coalition for the Independence of the African Commission* (accessed 02-03-2022). <https://achprindependence.org/2020-in-review-a-focus-on-the-african-commission-on-human-and-peoples-rights/> (accessed 02-03-2022).

[130] During its 33rd Ordinary session in Nouakchott, Mauritania, AU Executive Council declared under paragraph 5 of Decision EX. CL/Dec.1008-1030(XXXIII) of the AU Executive Council (Decision 1015) that the African Commission only had "independence of a functional nature, and not independence from the same organs that created the body". See S Nabaneh "Maintaining the Independence of the African Commission on Human and Peoples Rights: A Commentary on the Rules of Procedure, 2020" (24-08-2020) *Coalition for the Independence of the African* <https://achprindependence.org/wp\content/uploads/2020/08/CIAC_RoP_Nabaneh_Rules-of-Procedure.pdf> (accessed 02-03-2022).

[131] Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians No. 002/2015 (ACHPR) (28 September 2017) <https://www.african-court.org/en/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf> (accessed 02-03-2022).

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5 2 The case of South Africa

South Africa is relatively progressive when it comes to the legal recognition of ITGDPs. The Alteration of Sex Description and Sex Status Act[132] allows intersex and transgender persons to change their sex description in the birth register. Previously, section 7(b) of the Births, Marriage and Deaths Registration[133] regulated such change and restricted it to only intersex and transgender persons who had undergone gender reassignment surgery. The current law eliminated this condition and opened the process to even those who have only undergone hormonal treatment.[134] Section 7 (b) was withdrawn following the High Court judgment in *W v W* where the court held that a person's sex could not be medically changed and that section 7 (b) could not assist the plaintiff, a post-operative transgender woman, to prove that her sex had changed.[135] This led to the introduction of section 33(3) of the Births and Deaths Registration Act, 1992 to include anyone during a gender change.

The Alteration of Sex Description and Sex Status Act is a progressive stride towards the recognition of ITGDPs in South Africa. In 2013, the then Minister of Home Affairs, Naledi Pandor, revealed that 95 transgender persons had changed their sex description in the birth register since the enactment.[136] Both Kenya and South Africa have transformative constitutions designed to protect human rights and promote equality. In fact, the Kenyan Constitution has borrowed greatly from South Africa's Constitution.[137] Unfortunately, on the legal recognition of ITGDPs, Kenya, as argued throughout this article, lags behind.

5 3 International perspectives on gender-based violence against ITGDPs

Key international human rights instruments obligate states to protect all people against violence including GBV and SGBV.[138] The Committee against Torture through its General Comment No 2 reiterates state parties' obligation to protect ITGDPs from torture and ill-treatment.[139] Principles 4 and 5 of the Yogyakarta principles require states to cease state-sponsored attacks on the lives of ITGDPs, to vigorously investigate and prosecute individual or group perpetrators of such attacks, and to ensure the gender identity of a victim is

[132] Section 2(1) of the Alteration of Sex Description and Sex Status Act 49 of 2003.
[133] Births, Marriages and Deaths Registration Act 81 of 1963.
[134] RS Nielsen *A Third Gender in South Africa: Does the Legal Non-Recognition of a Third Gender Violate Non-Binary Transgender Person's Constitutional Rights to Dignity and Equality?* LLM Thesis University of Cape Town (2020) 32.
[135] *W v W* 1976 2 SA 308 (WLD).
[136] Gender Dynamix & Legal Resources Centre "Alteration of Sex Description and Sex Status Act, No. 49 of 2003" (2019) *Briefing Paper* <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> (accessed 26-01-2022*)*.
[137] D Ally "A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa" (2016) 2 *Athens Journal of Law* 137-141.
[138] Article 3 UDHR affirms the right to life and security of persons, Article 5 UDHR and Article 7 CCPR protects ITGDPs from torture and other cruel, inhuman, or degrading treatment.
[139] UN Committee Against Torture (CAT) General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008 UN Doc CAT/C/GC/2.

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not used to justify, excuse, or mitigate violence. Principle 10 calls on states to take measures to protect ITGDPs from torture, cruel, inhuman or degrading treatment, provide medical and psychological support to victims of such treatment and conduct awareness among the police and other state actors who are likely to perpetuate or prevent such acts.

The United Nations General Assembly recognises that lack of legal recognition exposes ITGDPs to violence and discrimination and urges states to develop measures that permit ITGDPs to change their gender in state-issued documents.[140] Likewise, the UN has called on member states and other stakeholders to ensure "legal recognition of the gender identity of transgender people without abusive requirements" as an effective measure of curbing violence against this group.[141]

5 4 African human rights mechanisms on gender-based violence against ITGDPs

The African Charter prohibits "exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment", [142] while Article 4 of the Maputo Protocol protects the right to security of a person and obligates states to prohibit, prevent, eradicate and punish all forms of violence against women. The African Commission in *Curtis Doebbler v Sudan*[143] explained the normative content of this right to "encompass the widest possible array of physical and mental abuses".

General Comment No 4 of the African Commission on the Right to redress for victims of torture calls on states to effectively address acts of sexual violence against transgender and intersex persons.[144] Specifically, states are required to undertake several measures to combat GBV including; identifying the causes and consequences of GBV and implementing measures to prevent and eradicate such causes.[145] Furthermore, the African Commission's Resolution 275 calls on states to end acts of violence against ITGDPs including; corrective rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings, executions, forced disappearances, extortion, and blackmail, by enacting and effectively applying appropriate laws, and establishing judicial

[140] UNGA "Report of the United Nations High Commissioner for Human Rights: Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity" (17 November 2011) GE 11-17075 para 73.

[141] Joint UN statement on ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people <https://www.ohchr.org/en/issues/discrimination/pages/jointlgbtistatement.aspx> (accessed 08-07-2021).

[142] Article 5 of the African Charter.

[143] Communication 236/00: Curtis Francis Doebbler/Sudan. Summary of Facts <https://www.achpr.org/public/Document/file/English/achpr33_236_00_eng.pdf> (accessed 07-08-2021).

[144] General Comment No 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 59 <https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf> (accessed 12-01-2022).

[145] Para 61.

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procedures responsive to the needs of the victims.[146] Similarly, the Committee for Prevention of Torture in Africa has called upon African states to take actions to stop and punish perpetrators of violence based on imputed or actual sexual orientation or gender identity.[147]

5 5 Are the African human rights mechanisms effective in protecting ITGDPs from GBV?

While it is clear that the African Charter and its complementary instruments prohibit discrimination and violent actions against all people including ITGDPs, it is clear that ITGDPs are not offered sufficient "normative" protection due to the socio-legal non-recognition of their gender identities.[148] Further, the African Charter's limitation provisions which obligate individuals and states "to preserve and strengthen positive African cultural values, collective security, morality and common interest" are a threat to the ITGDPs' quest to be legally recognised.[149] In this regard, it is interesting to note that although the Commission, on its interpretation of the Charter, has consistently demonstrated the positive and progressive intention to bar states from using clawback clauses to limit the enjoyment of human rights, by drawing inspiration from international law, it unfortunately approves limitations on grounds of morality and "African cultural values". This was pronounced in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* indicating that:

> "The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'."[150]

The importance attached to the issue of preservation of positive African cultural values and morality within the AU systems can be construed from granting and then revoking the observer status of CAL.[151] To make matters worse, the African Charter does not define what constitutes "positive African cultural values" and "morality" thus African states have an opportunity to use this ambiguity to violate the rights of ITGDPs and other minorities who are considered social outcasts.

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[146] The African Commission on Human and Peoples' Rights "275 Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation of Gender Identity" (2014) ACPHR/Res.275(LV).

[147] ACHPR "Statement on the Occasion of the International Day in Support of Victims of Torture" (26-6-2014) <https://reliefweb.int/report/world/statement-occasion-international-day-support-victims-torture-26-june-2014> (accessed 02-03-2022).

[148] Like Kenya, the African human rights systems employ the problematic assumptions of synonymy and binarism of gender and sex thus excluding ITGDPs.

[149] Articles 27(2) and 29(7) of the African Charter; African cultures consider intersex and transgender persons immoral and a curse. See EASHRI "Why Must I Cry" (2013) 20.

[150] Communication Nos 140/94, 141/94 and 145/95 <https://www.achpr.org/public/Document/file/English/achpr26_140.94_141.94_145.95_eng.pdf> (accessed 19-08-2021). See also GJ Naldi "Limitation of Rights under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights" (2001) 17 *S Afr J on Hum Rts* 109.

[151] See S Nabaneh (2021) "2020 in Review" *Coalition for the Independence of the African Commission* .

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Further, as Ssenyonjo rightly observes, the mandate of the African Court to ensure the protection of human rights hardly materialises as individuals and non-governmental organisations with observer status cannot directly submit cases to the court unless their states have made a declaration acknowledging the jurisdiction of the court in that regard.[152] So far, only 12 states have deposited such a declaration of which four have subsequently withdrawn their declarations leaving eight active declarations.[153] In addition, lack of mechanisms to enforce and monitor states compliance with the decisions of the African Court and the African Commission and complicit inaction by the AU's political organs, including the Assembly of Heads of State, seriously undermine the ability of the African Court and African Commission to fulfil their mandates.[154]

With regard to the creation of awareness and the value of advocacy before the African Commission, Murray argues that the secrecy and poor mechanisms for information sharing have deprived the African Commission of valuable contributions of the local and international community necessary to "pressurise governments to respect its decisions".[155]

6 Conclusion

Kenya's history on the recognition, promotion and respect for ITGDP's rights is no different from the history of other African states. It is largely underscored by the mystical and customary beliefs that consider and treat ITGDPs as taboo and a bad omen. The social and legal structures are anchored on erroneous presumptions of synonymy and binarism of sex and gender which exclude and incite violence against ITGDPs. On a positive note, though, in the last two decades, the Kenyan Courts have progressively affirmed the rights of ITGDPs in an attempt to rid the society of exclusionist tendencies that treat ITGDPs as objects instead of subjects.

The pronouncements of the African Commission and other human rights mechanisms discussed in this article demonstrate a willingness to recognise the existence and human rights needs of ITGDPs, in an otherwise highly prejudiced society. However, the need to expressly recognise ITGDPs in African human rights instruments is of paramount urgency and should not be left to the mercy of individual benevolent judges and expert opinions that lack reliable enforcement mechanisms.

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[152] M Ssenyonjo "Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights 1987-2018" (2018) 7 *IHRL Review* 1-35.

[153] See African Court on Human and Peoples' Rights <https://www.african-court.org/wpafc/declarations/> and <https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country- to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> (accessed 11-03-2022). States with an active declaration: Burkina Faso, The Gambia, Ghana, Malawi, Mali, Tunisia, Niger and Guinea Bissau.

[154] F Viljoen & L Louw "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101 *American Journal of International Law* 32. For instance, in 2013 Libya failed to comply with the court's orders prompting the court to call upon the African Union's Assembly of Heads of State to take action. The assembly did not take any action.

[155] R Murray "African Charter Progress & Problems 1989-2000" (2001) 17 *African Human Rights Law Journal* 17.

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In light of the findings in this article there is a need for a general comment by the African Commission to expound on the normative content of Article 5 of the African Charter on the right to recognition of a person's legal status with specific reference to ITGDPs. The comment should explain the correlation between legal recognition and SGBV against ITGDPs.

The Expert Committee should also urgently pass a general comment on article 6(2) of the ACRWC with specific grounds upon which a child must not be denied registration at birth. These grounds should include having ambiguous genitalia. Moreover, such a general comment should refer to intersex and TGDP youths as vulnerable children who are likely to be denied registration at birth or adulthood.

The judicial organs of the AU, the African Commission and the African Court, must make more effort to explain the nature and scope of the problematic criteria for limiting rights under the Charter, that is, "positive African cultural values" and "morality" in relation to ITGDPs. Furthermore, the AU Assembly of Heads of State should consider amending Article 34(6) of the African Court Protocol to allow direct access to victims of human rights violations.

Finally, the African Commission and the AU Commission should grant observer status to any NGOs that advocate for the rights of ITGDPs to enhance advocacy and public visibility of the community that applies for such status.

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ROLE OF THE POLICE IN ACCESS TO JUSTICE FOR SEXUAL AND GENDER-BASED VIOLENCE PERPETRATED AGAINST DIVERSE WOMEN IN ZIMBABWE

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Abstract

Bound by the 2013 Constitution of Zimbabwe ("Zimbabwean Constitution"), as informed by regional human rights law, Zimbabwean police should facilitate access to justice for everyone. This article interrogates the lived realities of diverse women in terms of how the police in Zimbabwe respond when they report cases of sexual and gender-based violence ("SGBV"). Using qualitative data this article also interrogates institutional practices questioning the alignment of laws and actions to the Zimbabwean Constitution. The findings show that the reluctance of the police to efficiently and appropriately engage with SGBV cases reported by diverse women is encouraged by the homophobic context in which these take place. The ability of the police to provide justice to diverse women who experience SGBV can be strengthened by repealing the laws that criminalise same-sex relations and sodomy and by implementing regional human rights law as interpreted through Resolution 275 of the African Commission on Human and People's Rights.

Keywords: *sexual and gender-based violence, LGBTI rights, homophobia, transgender rights, Zimbabwean police, Resolution 275 of the African Commission on Human and People's Rights*

1 Introduction

In Zimbabwe, sodomy[1] is criminalised and same-sex marriage illegal. The latter is prohibited under Chapter 2 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013 (the "Zimbabwean Constitution"), paradoxically setting out to protect fundamental human rights and freedoms of all

[1] Section 73 of the Criminal Law (Codification and Reform) Act Cap 9:23.

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Zimbabweans.[2] Sodomy and same-sex marriage are often related and conflated with other non-heteronormative identities, such as trans-identities, leaving many Zimbabweans, including police officers, to presume such identities to be illegal and the behaviour of transgender or gender diverse persons to be outlawed.[3] As a result of the conflation, and the anti-homosexuality sentiment prevailing within Zimbabwe's political[4] and religious[5] spheres, it is difficult for lesbian, gay, bisexual, transgender and intersex ("LGBTI")[6] persons to find protection under the law.[7] Moreover, Zimbabwean politicians often fuel the homophobia that prevails among the public.[8]

Zimbabwean police operate, as further argued in this article, within a homophobic context, as is briefly discussed in part 2 below, and hence LGBTI persons are often mistreated by the police. As one example, Ms Nathanson, a transgender woman, was arrested by six anti-riot police officers after a complaint was made that she was using a women's toilet. Ms Nathanson was detained for 48 hours during which she was forced to undergo repeated anatomical examinations to "determine" her sex.[9]

As argued in this article, the Zimbabwean Constitution, as informed by regional human rights law, provides a suitable framework to analyse the rights of LGBTI persons and the obligations of the police, as an organ of the state, to uphold such rights. Under the non-discrimination clause, both "sex" and "gender" are listed as prohibited grounds.[10] The Zimbabwean Constitution recognises basic human rights, such as the right of everyone to personal liberty, ensuring that no one is arbitrarily arrested.[11] The inherent human dignity of every person is recognised, guaranteeing that it be "respected and protected".[12] The Constitution recognises every Zimbabwean's right to privacy[13] and freedom of association.[14] In addition, the Constitution emphasises that all individuals are equal before the law, hence everyone should enjoy equal protection as well as other benefits of the law.[15]

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2 Section 78(3).

3 E Mandipa "The Suppression of Sexual Minority Rights: a case study of Zimbabwe" in S Namwase & A Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) 151 151-152.

4 N Muparamoto "LGBT Individuals and the Struggle Against Robert Mugabe's Extirpation in Zimbabwe" (2020) 2 *Africa Review* 1-16.

5 K Kaoma *Christianity, Globalization and Protective Homophobia: Democratic Contestation of Sexuality in sub-Saharan Africa* (2018) 22-24

6 Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI).

7 Mandipa "The Suppression" in *Protecting the Human Rights of Sexual Minorities* 151-152

8 S Tamale "Confronting the politics of nonconforming sexualities in Africa" (2013) 56 *ASR* 39 31-45; Mandipa "The suppression" in *Protecting the Human Rights of Sexual Minorities* 151-156

9 *Nathanson v Mteliso* (HB 176 of 2019, HC 1873 of 2014) [2019] ZWBHC 135 (14 November 2019) <https://zimlii.org/zw/judgment/bulawayo-high-court/2019/135>; T Ndoro "Mugabe Turning in His Grave as Zimbabwean Court Rules in Favour of LGBT Awards $400 000 in Landmark Case" (18-11-2019) *iHarare News* <https://iharare.com/zimbabwean-court-rules-in-favour-of-lgbt/> (accessed 08-10-2021).

10 Section 56(3) of the Zimbabwean Constitution.

11 Section 49.

12 Section 51.

13 Section 56(3).

14 Section 59.

15 Section 56(1).

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The police must protect the rights of all individuals in adherence to the prevailing laws. The role of the police is to receive reports of any violations of the law, investigate, compile evidence, apprehend perpetrators and transmit cases together with the evidence gathered to courts of law for adjudication.[16] As such, the police is an institution that should be accountable to all citizens for it to be able to execute its mandate with fairness. However, as was evident in Ms Nathanson's case, and through the further statements collected within the ambit of this research, the police in Zimbabwe have a history of being partisan and failing to protect all of its citizens.[17] As an example, in the past, the police has raided safe spaces that are used by LGBTI persons, arresting some of them, and following others to their homes, outing them to their families and friends.[18] This arguably placed these individuals at a heightened risk of being excommunicated or abused by their families. Blackmail of LGBTI persons is also common as the existing laws provide room for such behavour to occur.[19] Phillips points out that these laws have been used by the police and public prosecutors to intimidate and extort funds from those accused of homosexuality.[20]

The objective of this article is to interrogate the experiences of diverse women – as broadly defined in this article (as discussed in part 2 below) – when they seek assistance from the Zimbabwean police to access justice for sexual and gender-based violence ("SGBV"). In this regard, this article importantly combines a legal perspective with individual case studies to be able to infuse the legal analysis with the lived realities of the most vulnerable individuals that the law is set to protect. This analysis takes place against the backdrop of the international legal obligations that rest on Zimbabwe. To this end, the article analyses data collected through interviews with lesbian, transgender and intersex persons against sexual orientation, gender identity and expression ("SOGIE") reading of the domestic and international legal framework.

The article is structured as follows: Part 2 briefly sets out the context within which the Zimbabwean police operates. Part 3 outlines the terminology and definitions relevant in the Zimbabwean context. It also defines what constitutes SGBV. Part 4 presents the relevant provisions of regional human rights law

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16 Open Society Justice Initiative "Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agencies" (2021) *Open Society Foundation* 1 <https://www.justiceinitiative.org/publications/who-polices-the-police-the-role-of-independent-agencies-in-criminal-investigations> (accessed 12-01-2022).

17 See also Zimbabwe Human Rights NGO Forum "Who guards the guards? – Violations by law enforcement agencies in Zimbabwe, 2000 to 2006" (20-12-2006) *HRforumzim* <https://reliefweb.int/report/zimbabwe/who-guards-guards-violations-law-enforcement-agencies-zimbabwe-2000-2006> (accessed 02-03-2022); Sokwanele. "'I can arrest you': The Zimbabwe Republic Police and Youth rights" (16-07-2012) *Sokwanele* <https://reliefweb.int/report/zimbabwe/%E2%80%9Ci-can-arrest-you%E2%80%9D-zimbabwe-republic-police-and-your-rights> (accessed 02-03-2022); K Chitiyo "The Case for Security Sector Reform in Zimbabwe" (2009) *Royal United Services Institute (RUSI) – Occasional Paper* <https://static.rusi.org/assets/Zimbabwe_SSR_Report.pdf> (accessed 12-01-2022).

18 Muparamoto (2020) *Africa Review* 1-16.

19 O Phillips "Blackmail in Zimbabwe: Troubling Narratives of Sexuality and Human Rights" (2009) 13 *IJHR* 345 345-351.

20 352.

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and the interpretations of these by the African Commission of Human and Peoples' Rights ("African Commission") in Resolution 275.[21] Part 5 offers a brief methodological note explaining how the data of this study was collected, collated, and analysed. Part 6 presents the lived realities of diverse women in three categories namely, legal environment and suitability of policing; the response of the police to SGBV cases reported by diverse women; and the opportunities for the police to provide justice for diverse women as survivors of SGBV. The final part, Part 7, presents the conclusions and recommendations.

2 A brief background to the political and religious context in Zimbabwe

Many Zimbabweans view LGBTI persons as adopting behaviours that are "unAfrican".[22] This homophobic and misogynistic idea was made popular by the statements by late former President Robert Mugabe at the 1995 book fair[23] where GALZ – an association of LGBTI persons (formerly Gays and Lesbians of Zimbabwe) was barred from exhibiting its materials by government order. At this event, he used his opening speech to denounce LGBTI persons as immoral perverts.[24] Most recently, opposition leader, Nelson Chamisa, offered his support to the late former President Robert Mugabe's anti-homosexuality stance in an interview on Zimbabwe's national broadcaster.[25] President Emmerson Dambudzo Mnangagwa has also pointed out that homosexuality is illegal in Zimbabwe, and that he will not canvas for the rights of LGBTI persons.[26] These sentiments expressed by the political elite in Zimbabwe arguably encourage homophobic practices by the broader public, including the police, having a spillover effect on diverse women.[27]

Since the 1990s, religious leaders in Zimbabwe have also influenced public perception on homosexuality. In 1995, Zimbabwe Assemblies of God, Africa ("ZAOGA") issued a press release, and thousands of its members marched in Harare, in support of the then President Robert Mugabe's anti-homosexuality sentiments.[28] The Anglican Church's province of central Africa excommunicated former Archbishop Nolbert Kunonga in 2007 because he tried to withdraw the church's Diocese of Harare after he made allegations that the province of central Africa supported homosexuality.[29] In 2014, the

[21] Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014 ("Resolution 275").

[22] N Hoad *African Intimacies: Race, Homosexuality and Globalisation* (2007) 105.

[23] The Zimbabwe international book fair is an annual event which was started in 1983 and is held in Harare. The 1995 book fair was themed "human rights and justice".

[24] Muparamoto (2020) *Africa Review* 2.

[25] 2.

[26] R Quest & M Sheena "President Mnangagwa: Zimbabwe is Open for Business. Davos: Switzerland" (22-01-2018) *CNN* <https://edition.cnn.com/2018/01/24/africa/zimbabwe-president-emmerson-mnangagwa-davos-intl/index.html> (accessed 02-09-2021).

[27] One example is the case of a gay teacher who was publicly threatened and forced to resign in 2018. Muparamoto (2020) *Africa Review* 2.

[28] D Maxwell "'Catch the Cockerel Before Dawn': Pentecostalism and Politics in Post-Colonial Zimbabwe" (2000) 70 *Africa* 249 263.

[29] N Muparamoto *Understanding Defiant Identities: An Ethnography of Gays and Lesbians in Harare, Zimbabwe* DPhil Thesis, Rhodes University (2018) 12.

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popular Pentecostal prophet, Emmanuel Makandiwa, labelled homosexuals as mentally ill.[30] Such statements and actions, targeted at LGBTI persons, arguably legalise, in the eyes of their followers, the promotion of homophobia. Together, the sentiments communicated by religious and political leaders create fertile ground for the police to operate with impunity in victimising LGBTI persons and denying them access to justice.

3 Terminology and definitions relevant in the Zimbabwean context

3 1 Lesbians, bisexual women, transgender women, and intersex people (diverse women)

LGBTI persons are persons whose SOGIE fall outside heteronormativity.[31] Such sexual orientations include lesbian and gay persons, individuals who are sexually and emotionally attracted to people of the same sex; and bisexuals who are individuals that are sexually and emotionally attracted to people of all sexes.[32] Such gender identities and expressions include transgender individuals whose gender identity does not align with the sex they were assigned at birth; and intersex individuals, born with ambiguous genitalia or internal reproductive organs or chromosomes that make it difficult to place them in neither of the binary male nor female categories.[33]

This article focuses on non-heteronormative and/ or gender diverse persons who live their lives as women either by choice or because of societal norms – referred to in this research as diverse women. This includes, but is not restricted to, lesbians, bisexual women, women who were assigned the male sex at birth although they self-identify as female – transgender women, intersex persons assigned the female sex at birth, with or without self-identification, intersex persons assigned the male sex at birth but identifying as women and gender diverse individuals who may at times identify as women.

Following the above, the definition of diverse women applied in this article is expanded to include all women – based on real or imputed sexual orientation and/or gender identity.[34] As discussed further in part 4 below, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[35] defines women as "persons of female gender".[36] Applying the trans-inclusive reading of the Maputo Protocol as put forward by Snyman and Rudman includes all individuals that self-identify or are identified with the

[30] 12.
[31] World Health Organization *A Technical Brief: HIV and Young Transgender People* (2015) 3.
[32] E Green & EN Peterson *Gender and Sexuality Terminology* (2015) 7.
[33] 7.
[34] In accordance with the definition set out in Resolution 275 of the African Commission on Human and Peoples' Rights.
[35] (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66 6 ("Maputo Protocol").
[36] Article 1(k).

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female gender, including transgender women and intersex persons assigned the male or female sex – identifying as women.[37]

3 2 Sexual and gender-based violence

SGBV takes the form of economic, physical, emotional, sexual violence as well as harmful traditional practices.[38] This definition of SGBV is originally based on the Declaration on the Elimination of all forms of Violence Against Women ("DEVAW"), particularly Articles 1 and 2.[39] The prohibition of SGBV under international law departs from an understanding that violence against women is a form of discrimination. The Committee on the Elimination of Discrimination against Women ("CEDAW Committee") established this more than 25 years ago.[40] In this regard General Recommendation No 19 establishes that "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[41] This definition significantly includes sexual violence and violence in the form of harmful practices based on culture, tradition, and religion.

For the purpose of this Article 1(1) of the Maputo Protocol defines violence as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war". As argued by Rudman, the "Maputo Protocol does not distinguish between SGBV committed in private or in public; it prohibits all acts of violence, sexual or non-sexual, everywhere, at all times".[42] Therefore, as is further suggested by Rudman the rights in the Maputo Protocol referring specifically to violence against women "comprehensively locate violence within the contexts of dignity, integrity, security, cultural/traditional practices, refugee status, widowhood, age and disability". However, as is further highlighted in the interviews referenced in part 4 below, diverse women are particularly vulnerable to SGBV because there is little specific protection availed to them.[43]

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[37] T Snyman & A Rudman "Protecting Transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and proposed GBV model law" (2022) 30 *Stell LR* forthcoming).

[38] United Nations High Commission for Refugees (UNHCR) *Handbook for the Protection of Internally Displaced Persons* (2010) 194-195.

[39] Article 27(1) of the Convention on the Elimination of all Forms of Discrimination Against Women (adopted on 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[40] UN Committee on the Elimination of Discrimination Against Women (CEDAW) General recommendation No 19: Violence against women, 1992 UN Doc A/47/38 para 1. As reconfirmed in UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No 35 on Gender-Based Violence against Women, updating General Recommendation No 19, 2017 UN Doc CEDAW/C/GC/35.

[41] Paras 11-12.

[42] A Rudman "A Feminist Reading of the Emerging Jurisprudence of the African and ECOWAS Courts Evaluating their Responsiveness to Victims of Sexual and Gender-Based Violence" (2020) 31 *Stell LR* 424, 429.

[43] S Tamale "Exploring the contours of African sexualities" (2014) 14 *AHRLJ* 150 158.

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Although this research focuses on diverse women, it is important, as a point of departure, to acknowledge that SGBV against cisgender[44] Zimbabwean women is widespread.[45] Zimbabwe National Statistics Agency ("ZimStats") has confirmed that this crime is underreported. Nevertheless, statistics show that 42.5% of Zimbabwean cisgender women, 15 years and older, reported having experienced physical or sexual violence.[46] In addition, a report by the United Nation's Office for the Coordination of Humanitarian Affairs ("UNOCHA") from 2021 noted a 175% increase in the reports of SGBV that were made to MUSASA[47] during the height of COVID-19 – between April and December 2020 – as compared to the same period in the previous year.[48] There is also evidence that cisgender women in Zimbabwe fall victim to violence and abuse at the hands of the police.[49] Zengenene and Susanti provide evidence that women are often subjected to physical, sexual and emotional forms of violence by the police.[50] The police in Zimbabwe have also been reported to have physically assaulted women who were deemed to violate COVID-19 restrictions.[51] Thus, added to the homophobic and transphobic position of the Zimbabwean police, as discussed in this research, is also the deeply patriarchal nature of Zimbabwean society.

4 The regional legal framework

4 1 The African Charter on Human and People's Rights

The African Charter on Human and People's Rights[52] was established for the protection of all Africans from discrimination, and to ensure the enjoyment of their human rights including the rights to dignity, life, and physical integrity. The African Charter is binding on Zimbabwe as the Zimbabwe parliament ratified it on 5 September 2008.[53] Articles 2 and 4 of the African Charter,

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[44] Cisgender refers to a person whose gender identity conforms to their assigned sex at birth.

[45] R Martin & V Ahlenback "Sexual and Gender-Based Violence in Zimbabwe: Women Human Rights Defenders' Experiences and Legal Challenges: Evidence synthesis" (10-11-2020) *International Commission of Jurists* <https://www.icj.org/wp-content/uploads/2021/03/Zimbabwe-SGBV-WHRD-Publications-Reports-Thematic-reports-2021-ENG.pdf> (accessed 10-02-2022).

[46] Zimbabwe National Statistics Agency Zimbabwe Multiple Indicator Cluster Survey 2019 (2019) Harare, Zimbabwe.

[47] MUSASA is a non-governmental organisation that was set up in 1988 to deal with issues of violence against women and girls. It provides relief to survivors of SGBV. MUSASA operates from four regional offices in Harare, Bulawayo, Gweru and Masvingo.

[48] OCHA "Zimbabwe Situation Report" (19-02-2021) *UNOCHA* <https://reports.unocha.org/en/country/zimbabwe/> (accessed 10-02-2022).

[49] R Martin & V Ahlenback "Stopping Abuse and Female Exploitation (SAFE) Zimbabwe Technical Assistance Facility" (10-11-2020) *SDDirect* <https://www.sddirect.org.uk/news/2020/12/covid-19-and-gender-based-violence-in-zimbabwe-how-is-the-pandemic-increasing-the-risk-of-violence-against-women-and-girls/> (accessed 10-02-2022).

[50] M Zengenene & E Susanti "Violence against Women and Girls in Harare, Zimbabwe" (2019) 20 *Journal of International Women's Studies* 83-93.

[51] Martin & Ahlenback "Sexual and Gender-Based Violence in Zimbabwe: Women Human Rights Defenders' Experiences and Legal Challenges: Evidence synthesis" (10-11-2020) *International Commission of Jurists*.

[52] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 ("African Charter").

[53] Veritas "Protocol to the African Charter on Women's Rights – Women's Watch 1/2019" (11-04-2019) *Kubatana* <https://kubatana.net/2019/04/11/protocol-to-the-african-charter-on-womens-rights-womens-watch-1-2019/> (accessed 04-06-2021).

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reaffirm the inalienable nature of all the rights and freedoms for all, including LGBTI persons. Particularly, Article 4 specifies that rights to life and personal integrity are non-derogable and must always be upheld with regard to all persons. However, since the 1990s, Zimbabwean parliamentarians have made every effort to silence any voice raised in favour of decriminalising sodomy and same-sex marriage.[54] A key example is the actions of Professor Jonathan Moyo. As a long-standing parliamentarian, he actively lobbied for the exclusion of sexual orientation as a ground for discrimination in the Zimbabwean Constitution.[55]

Article 3(1) and (2) of the African Charter importantly emphasises that "every individual shall be equal before the law" and that "every individual shall be entitled to equal protection of the law". This places a responsibility on the police, as well as the courts, to guarantee that every individual has access to justice for any violation that is committed against them, including diverse women.

4 2 The Maputo Protocol

As briefly mentioned, in parts 3 1 and 3 2 above, the Maputo Protocol provides a definition of women that embraces diverse sexual orientations and gender identities under Article 1(k); and provides a detailed definition of SGBV under Article 1(j). The Maputo Protocol was endorsed by African heads of state and government to tackle discrimination against women as emphasised under Article 2.[56] Against this backdrop, Articles 1(j), (k) and 8(d) are of specific interest to this study. Building on the right to equality before the law in Article 3 of the African Charter, Article 8 of the Maputo Protocol specifically stipulates that "women and men are equal before the law and shall have the right to equal protection and benefit of the law". Article 8(d) specifies that states parties must take all appropriate measures to "ensure that that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights". This is essential for diverse women as they, as mentioned in the introduction, are often subjected to police brutality and unlawful detention. If Zimbabwe's legal obligations under international law are considered in conjunction with the Constitution which, as introduced in part 1, includes a person's gender and sex as prohibited grounds for unfair discrimination, this establishes that the Zimbabwean police must protect *all* women, including diverse women, from discrimination and SGBV.

[54] M Epprecht "The Constitution Making Process and Sexual Minority Rights in Zimbabwe" (2012) S*olidarity Peace Trust* <http://www.solidaritypeacetrust.org/1226/the-constitution-process-and-sexual-minority-rights-in-zimbabwe/> (accessed on 21-09-2021).

[55] Epprecht "The Constitution Making Process and Sexual Minority Rights in Zimbabwe" (2012) S*olidarity Peace Trust*.

[56] Veritas "Protocol to the African Charter on Women's Rights – Women's Watch 1/2019" (11-04-2019) *Kubatana*.

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4 3 The African Commission Resolution 275

The mandate of the African Commission is to promote and protect the human rights of all Africans as well as interpret the African Charter. Within this mandate, the African Commission has repeatedly referred to SOGIE as prohibited grounds for discrimination.[57] The most important contribution of the African Commission in this regard is its interpretations of the African Charter and other regional human rights law instrument in Resolution 275. Of particular concern to this article, the African Commission pointed out that it was deeply disturbed by:

> "[T]he failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity".[58]

This statement laments the failures of law enforcement agents, including the police, in their duty to protect diverse women from SGBV. Resolution 275 condemns the persecution of diverse women, including arbitrary arrests and urges law enforcement agents to protect them as well as the organisations that represent them. This interpretation of the state obligations under the African Charter and the Maputo Protocol is an important contribution to the development of regional human rights law and should therefore inform the application of these treaties within member states such as Zimbabwe. Resolution 275 informs how the Zimbabwean police ought to execute their duties. This article, as introduced in part 1, utilises Resolution 275, read together with the African Charter and the Maputo Protocol, as the standard against which the constitutional protection must be measured, instructing the police on how it must handle all matters of SGBV that are reported to them by diverse women.

5 Methodology

The data represented in this article was collected from seventeen diverse women through in-depth interviews and focus group discussions.[59] The in-depth interviews were conducted with four lesbian women (two femme, one versatile and one butch), one bisexual woman, five transgender women, two intersex persons who self-identified as gender diverse and one heterosexual woman (key informant). The respondents whose quotations were extracted

[57] See African Commission Guidelines on the Implementation of Economic, Social and Cultural Rights [2010]; "Pathologization – Being Lesbian, Gay, Bisexual and/or Trans is not an Illness" For International Day against Homophobia, Transphobia and Biphobia [2016]; General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) [2017]; Guidelines on combating sexual violence and its consequences in Africa [2017] and Joint thematic dialogue on sexual orientation, Inter-American Commission the African Commission and United Nations human rights mechanisms [2018].

[58] Resolution 275.

[59] The data for this study was collected as part of the PhD studies of the first author. M Shoko *Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People's Access to Sexual Health in Zimbabwe* PhD dissertation, University of KwaZulu-Natal (2022). Ethical clearance for the study was provided by UKZN Humanities & Social Sciences Research Ethics Committee on 26 June 2019 (Protocol reference number: HSS/0838/018D).

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from the focus group discussions for the purpose of this analysis, were one femme lesbian and three transgender women. As a result, the findings from this research, though they may resonate with findings from other studies, are not generalisable because of the small sample. As mentioned in part 3 1 above, the respondents either self-identify as women or are viewed as women by members of society. The data from all seventeen respondents was collected at GALZ-run safe spaces in Harare, Bulawayo, Mutare, Gweru and Masvingo. The interviews and focus group discussions were conducted in two local languages, Shona, and Ndebele, and then translated to English during the transcription process.

During the interviews and focus group discussions, the role of the police in protecting the rights of LGBTI individuals was a recurring theme. Hence all quotations on the role of the police that were shared by these diverse women were utilised in this article. The pronouns used, such as she, he, or them, are the pronouns the respondents chose to use.

6 The lived realities of diverse women in Zimbabwe

6 1 Legal environment and the suitability of policing

As discussed in parts 1 and 2 above, the role of the police is influenced by the legal environment in which they operate. The legal environment includes the culture within the judiciary and the legislature that generally views homosexuality as immoral, thus perpetuating and sometimes superimposing the adherence to sodomy laws that were established during the colonial period.[60] Respondents generally felt that Zimbabwe's laws influence the way that people, including the police, view diverse women as shown in the following quotation:

> "Because same-sex sexual relationships are illegal, no matter how much training is offered to them [the police], they will still take advantage [of diverse women]." Paida, versatile lesbian, Masvingo.

The statement by Paida shows that the existence of the Criminal Law Act that criminalises sodomy[61], as well as the criminalisation of same-sex marriage within the Constitution[62] makes it possible for police officers to harass diverse women.

However, while Paida felt that the legal environment allows the police to treat diverse women unfairly, one individual was confident that even with the existing legal environment, it is possible to get some protection from abuse.

> "Even if you tell a police officer that that one is gay, I would not be arrested. But the thing that gets one arrested is when you are found having sexual intercourse with another man, then you get arrested for sodomy. And also, if someone insults you and also calls you gay, *Ngochani* or *chichi-man*, then you have the right to go to the police and report that person, and he/she could get arrested." Farai, transgender woman, Harare FGD.

[60] M Epprecht *Hungochani: The History of a Dissident Sexuality in Southern Africa* 2 ed (2013).
[61] Section 73 of the Criminal Law (Codification and Reform) Act, Cap 9:23.
[62] Section 78(3) of the Zimbabwean Constitution.

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The confidence that was shown by Farai was quickly challenged by the other participants who were in the same focus group discussion with her. They felt that only a few police officers would be comfortable to stand up for LGBTI rights because of the prevailing homophobia within Zimbabwean society, including among some police officers. In addition, the other respondents highlighted that most people in Zimbabwe do not see any difference between identifying as a homosexual and the actual act of sodomy. Hence, the diverse women that were interviewed expressed that they generally fear the police and would not want to present themselves at police stations even when they were wronged.

The raiding of safe spaces used by diverse women by the police in Zimbabwe was a major concern to the respondents. Some respondents felt that there was always a risk that the police could raid their safe spaces because they did not have any protection from the law. One respondent from Mutare expressed concern about the way that some members of the police force treat diverse women as individuals without any rights. Themby stated,

> "Even if we are attacked (by the police) here at this Drop-In-Centre right now, they will just say 'right, everyone is under arrest'. Because we have no rights currently, there is no place where our rights are protected. We just hope that they [parliamentarians] sit down and then pass a viable law that protects us." Themby, transgender woman, Mutare FGD.

Themby's concerns highlight a view that was shared by many LGBTI individuals who were interviewed, that their rights are elusive and that they are exposed to harassment from the police. These statements also bring out the impunity with which the police in Zimbabwe are deemed to operate, allowing homophobic elements among the police to thrive. Themby aptly pointed out that the legislature has a responsibility to pass laws to protect the rights of diverse women. However, her statement is unfortunately pinned more on hope than on reality because, as indicated in part 2 above, political and religious homophobia prevails. As a result, the lack of responses by the legislature, to the position of diverse women serves to embolden those members of the police and the judiciary who are homophobic, to harass and abuse diverse women.

MaDube who experienced a raid when she was at one of GALZ's drop-in-centres[63] in Harare, explained the experience at the hands of the police as follows:

> "We got arrested here at GALZ in 2012 and the issue came out in the press. The issue came out in the press saying 42 homosexuals arrested. So when the police were making a follow-up that is when they went home [and outed me to my family]." MaDube, transgender woman, Harare.

The raid that is narrated by MaDube was also documented by Muparamoto, who provided details of how the raid occurred.[64] The impunity displayed by the police during the raid that was referred to by MaDube and Muparamoto shows the disregard of diverse women's right to be protected from arbitrary arrest. In addition, the raid on GALZ provided evidence that the police did

[63] A drop-in-centre is a place that was established by GALZ to provide for walk-in LGBTI clients who need treatment, counselling, legal aid and other services.

[64] N Muparamoto *Understanding Defiant Identities: An Ethnography of Gays and Lesbians in Harare, Zimbabwe* DPhil dissertation, Rhodes (2018) 242-247.

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not see the importance of allowing GALZ, a legally registered LGBTI NGO in Zimbabwe, to work without facing stigma and reprisals. The further steps taken by the police to follow some individuals to their homes and to inform their family members about their sexual orientation and/or gender identity also infringed on their right to privacy and effectively put them in harm's way. When their identities became known to their families, some families subsequently threw them out of their homes or began to abuse them in different ways.[65]

The statements provided by the respondents show that the Zimbabwean legal environment castigates same-sex sexual relations and conflates sexual orientation with gender identity and expression, hence effectively criminalising many aspects of the lives of diverse women. This furthermore makes it difficult for people who sympathise with diverse women to support and promote their rights.

6 2 Response of the police to SGBV cases reported by diverse women

Some respondents indicated that they had not reported cases of SGBV to the police. A key factor that contributed to this was the legal environment, as discussed in part 2 above, and the unwillingness of the police to respond to matters related to diverse women. In addition, cases of SGBV were not reported because the diverse women interviewed were not sure that they would have a chance of getting a fair hearing if their cases reached the courts. This was based on the perceived culture of prejudice and homophobia within the judiciary. Welly, an individual who was born intersex narrates his experience of SGBV:

> "Three guys who knew that I am Intersex attacked and badly injured me last year [2018] demanding money, saying that 'if you do not give us money, we will take you to the police' .... . When we arrived at the station [the police] asked me, 'so what do you say about these things that you are a homosexual?' I explained to them that I am Intersex and I described my genital organs …. . [Some of the officers wanted to] undress me so that they see if I am really an intersex person, but one of them then said, 'Oh no that is not legal'". Welly, intersex, Masvingo.

Thus, the handling of this case by the police clearly undermined Welly's access to justice and additionally exposed him to secondary abuse. The police officer who stopped the other officers from undressing Welly might have understood the implication of the laws on Welly's situation. However, although preventing further abuse the officer did not enable Welly to obtain justice for the violence that he had faced at the hands of the initial perpetrators as well as from the other police officers. This is again related to the legal environment, discussed in part 2 above, that vindicates SGBV against diverse women. Welly's experiences suggest that there is little accountability among the police when it comes to SGBV that affects diverse women.

Furthermore, the reputation of the police is such that diverse women are often not prepared to report their cases. One of the respondents explained the

[65] 227.

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abuse that she encountered and why she did not have a desire to report it to the police:

> "I used to work at a fast-food outlet, and my supervisor was demanding that I should have sex with him. He knew that I am lesbian, and one day he tried to force me into sex while I was changing into the work uniform. I was traumatised but I managed to push him away and I ran out of the workplace. I never went back there again, and I could not even report the matter to the police because Aaagghh, I think that would have caused me more problems because of my Butch identity and all." Sphiwe, butch lesbian, Mutare.

Sphiwe was doubtful that the police would assist her to get justice because of their reputation. She had heard that the police would rather accept a bribe from a perpetrator of SGBV than facilitate the process of accessing justice in the courts for matters reported by a diverse woman. This is especially so because she felt that her Butch identity made it easier for people to recognise that she is a lesbian woman, an identity that made her subject to discrimination. As a result, she felt that the moment the police saw her, they would have treated her with prejudice. Sphiwe's experience is further supported by evidence that police in Zimbabwe have previously abused diverse women.[66] Thus, in her opinion, not reporting the attempted rape by her supervisor was a logical solution to avoid secondary abuse at the hands of the police.

6 3 Opportunities for the police to provide justice to diverse women survivors of sexual and gender-based violence

As discussed in parts 5 1 and 5 2 above, diverse women suffer significant levels of SGBV at the hands of community members, intimate partners, and the police. If appropriately applied, the Constitution, incorporating the provisions of the African Charter and the Maputo Protocol, provides diverse women with an avenue for accessing justice for the SGBV that they continue to face. However, as is clear from the information provided by the respondents, the police in Zimbabwe are not appropriately trained and sensitised to offer protection to diverse women. As evidenced in this study, the SGBV encountered by diverse women in Zimbabwe often goes unreported because of fear that the police will not act, and/or they may end up victimising the survivor.

One respondent showed that the end of former president Mugabe's rule brought in some opportunities for the protection of the rights of LGBTI individuals in Zimbabwe:

> "So you find that others are warming up to us. We attended a certain workshop recently at Chevron hotel. They came, the members of ZRP (Zimbabwe Republic Police), Lawyers for Human Rights, and those from the courts also. Before this president (President Mnangagwa), government did not allow this, and once you see the police you would jump through the window." Carol, femme lesbian, Masvingo.

The involvement of the police, lawyers, and court officials in an engagement meeting with LGBTI persons shows that there is an opportunity for them to start working towards providing justice for diverse women. There are various

[66] Muparamoto *Understanding Defiant Identities* 242-247; Phillips (2009) *IJHR* 345-351.

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ways in which the police can provide justice for SGBV perpetrated against diverse women. Respondents expressed that the police should execute their job without discrimination and prejudice to be able to provide justice. The police's failure to do so violates Article 3(2) of the African Charter, which gives every person the right to equal protection of the law; this is further reiterated in Resolution 275. It also violates Article 8(d) of the Maputo Protocol as the Zimbabwean police is far from equipped to effectively interpret and enforce gender equality rights of diverse women protected under the Maputo Protocol.

Regardless of the existing laws that criminalise same-sex marriage and sodomy, and the impact of the conflation of identities discussed in this article, the police in Zimbabwe have an opportunity to provide impartial policing for all to end homophobic violence and discrimination. This would go a long way to ending corrective rape, assault, arbitrary arrest, and blackmail, all of which were mentioned by respondents in this study and all of which are violations of the Constitution and regional human rights law.

The Zimbabwean Constitution obliges the police to protect diverse women from SGBV. As stated earlier, the Constitution includes gender, as a prohibited ground for unfair discrimination.[67] This means that transgender and intersex individuals must be protected from unfair discrimination based on their preferred gender identity. Unfortunately, this is not the dominant interpretation of the non-discrimination clause in the Constitution and the police have a tendency, as confirmed in the interviews, to conflate non-heteronormative sexual orientations and gender identities under the banner of homosexuality. Therefore, in the situations narrated by the respondents, the police also perpetrate the violence in addition to denying the victims access to justice.

In 2014, the Supreme Court of India ruled that the right to self-identify one's gender, including as a "third gender" was a constitutional right linked to the right to dignity.[68] However, contrary to the position adopted the Supreme Court of India, the police as encountered by MaDube and Welly did not respect their identities and protect their rights. In Welly's case, the police were unable to help him have access to justice because they could not see anything wrong with the acts of violence that were perpetrated against him. In MaDube's case, the police continued to re-victimise her beyond her unwarranted arrest.

Additionally, in line with the Constitution, individuals who are born intersex must be protected against unfair discrimination based on their sex. A person's sex is also a prohibited ground for discrimination within the Constitution.[69] A person who is born intersex may be gender diverse or may not self-identify with the sex assigned at their birth.[70] In Welly's case, the police should have

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[67] Section 56(3) of the Zimbabwean Constitution.

[68] *National legal ser. auth. v Union of India* (Writ petition (civil) No(s) 400 of 2012, W.P(C) No. 604 of 2013) [2014] (15 April 2014) <https://web.archive.org/web/20140527105348/http://supremecourtofindia.nic.in/outtoday/wc40012.pdf>; SI Khan, NM Khan, M Rahman & G Gourab "Hijra/ Hejira" in NA Naples (ed) *The Wiley Blackwell Encyclopaedia of Gender and Sexuality Studies* (2016) 1-3, 2.

[69] Section 56(3) of the Zimbabwean Constitution.

[70] A Muller *Sexual Health for Transgender and Gender Non-Conforming People: Guidelines for Health Care Workers in Primary Care* (2013).

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applied the law, either way, to protect Welly from the abuse and arrested the perpetrators. The police clearly prevented Welly from accessing justice by not arresting the perpetrators of violence and perpetuating secondary emotional abuse. Through its agents, the state thus failed to comply with the Constitution, the African Charter and the Maputo Protocol prescribing the protection of women's rights to dignity, life, integrity, and security of the person, as discussed in parts 1 and 3.

Welly's and MaDube's experiences embody several violations of the African Charter and the Constitution. First, the African Charter condemns the torture, inhuman and degrading treatment that was perpetrated by community members who then went on to take Welly to a police station demanding his arrest.[71] Similarly, the violence that was perpetrated by the police when they raided GALZ's safe space as well as the subsequent follow-up visits to the homes of those who were arrested at GALZ offices as narrated by MaDube, was degrading. Second, the police who raided the GALZ safe shelter, as well as Welly's persecutors, also deprived diverse women of their liberty and freedom.[72] In its interpretation of the African Charter, Resolution 275 condemns the persecution of LGBTI individuals, in the manner that some of the police officers were perpetrating further abuse by demanding the undressing of Welly, even though he was a victim of SGBV. Lastly, the way that Welly's persecutors and the police acted in the two examples, violated diverse women's right to personal liberty,[73] right to human dignity,[74] right to personal security[75] and freedom from torture and inhuman treatment,[76] all of which are enshrined in the Constitution.

7 Conclusions and recommendations

Diverse women, for the many reasons as recorded in this article, are reluctant to seek recourse for SGBV. The Constitution, the African Charter, and the Maputo Protocol – the two latter interpreted through Resolution 275 – provide state obligations to guarantee that the police ensure access to justice for all without regard of their sexual orientation, gender identity or expression. However, as this article has established, in the homophobic political and religious context in Zimbabwe, the lack of awareness of the legal provisions that protect all women from SGBV as well as corruption among the police, prevents the police from accurately responding to SGBV cases reported by diverse women. As such the police is failing to fulfil its legal duties under the Constitution and regional human rights law. This is spurred by a lack of measures to check the abuse of its authority by the police.

This article argued that the legislature has an obligation to ensure that all laws of Zimbabwe conform to international human rights standards and that

[71] Article 5 of the African Charter.
[72] Article 6.
[73] Section 49 of the Zimbabwean Constitution.
[74] Section 51.
[75] Section 52.
[76] Section 53.

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the police abide by those standards. For the police to uphold the Constitution as well as the African Charter and the Maputo Protocol as interpreted in Resolution 275, the legislature has a responsibility to repeal its anti-sodomy laws that, have a detrimental effect on the rights of diverse women. Furthermore, although there is no right to marriage under international human rights law, when such an opportunity is only provided to some members of society the fundamental right to non-discrimination is violated. This is even more so when specific individuals are prohibited from exercising an opportunity that other individuals have based solely on the ground of sexual orientation. Thus section 78(3) of the Constitution should be amended.

Nevertheless, until such time that same-sex marriage and sodomy are de-criminalised in Zimbabwe, the police must take great care not to conflate non-heteronormative sexual orientations and gender identity, as identifying as an LGBTI is not a criminal offence – and expressing a non-heteronormative gender identity is not synonymous with engaging in homosexual sexual acts – this is not to say that the latter should in any way be criminalised. Essential to ending this conflation is knowledge about diverse identities, non-heteronormative gender identities and the position of the law.

Thus, considering the data and analysis provided in this article the following recommendations are made: First, the government of Zimbabwe should decriminalise sodomy and amend section 78(3) because they promote and support homophobia within Zimbabwean society. These restrictions in themselves violate international and regional human rights law; and in addition, cause the conflation of non-heteronormative gender identities and sexualities with the dire effects as detailed in this research. Second, the government of Zimbabwe should work to align its policing strategies with Resolution 275 to ensure the realisation of the rights that are protected in the African Charter and the Maputo Protocol for all Zimbabweans. Third, the government of Zimbabwe should provide training for the police on the rights of diverse women, so that they can protect them from SGBV and other discrimination and abuse and if such violations occur facilitate the victims' access to justice. Finally, entrenched cultures of homophobia and impunity within the police force must be dealt with through clear institutional messages that call out such practices. This message must be clearly communicated by the legislature through legislation and the repeal of legislation, the judiciary, the leadership of the police and the country itself.

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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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