Resocialisation as an Obligation, Right and Remedy under International and African Regional Human Rights Law in the Fulfilment of African Women's Rights

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Declaration

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Summary

Women have been considered inferior to men in all aspects of life for centuries. Such relegation has manifested in discriminatory practices, ultimately impacting women's autonomy and freedom to choose what serves them best. In viewing women as sub-human, society has come to associate certain norms and practices as falling exclusively within the domain of men while creating a discourse that views women as incapable of and prohibited from participating in such domains. The perpetuated narrative of women as lesser than men, based on stereotypes, assumptions, biases, and other socio-cultural norms and practices, will continue to dominate societal discourse, to the detriment of women, unless a meaningful shift in societal conceptions of women occurs.

Resocialisation as an obligation, right and remedy finds legitimacy in international and African regional law, instilling the necessity of modifying the underlying determinants of gender inequality. While progressive laws protecting the rights and freedoms of women exist, their utility will always remain subject to the biases, assumptions, and other limitations of those bound to uphold such rights. Similarly, the discrimination women experience at the hands of ordinary individuals in society will remain because of the normalised nature of such socio-cultural assumptions and behaviours, limiting women's access to domains long deemed male-only. The realisation of substantive and transformative gender equality remains contingent upon adequately implementing resocialisation across society.

At the international law level, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides a solid benchmark to analyse resocialisation on an African regional level. Moreover, African women benefit from progressive laws on the continent, providing extensive protections. Indeed, the African regional system's legislative framework is such that it holds significant potential to spearhead resocialisation in its interpretation and application in practice amongst its regional counterparts and beyond. This research analyses resocialisation on the continent compared to resocialisation on the international level. In doing so, it looks at how the Committee on the Elimination of Discrimination against Women (CEDAW Committee) interprets and applies resocialisation at the international level and compares it to the interpretation and application at the African regional level. The African Charter on Human and Peoples' Rights (African Charter) provides the

benchmark for resocialisation on the continent, with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) embedding resocialisation on the continent with several of its provisions. The manner in which states and the African Commission engage with resocialisation on the continent provides glimpses into the extent to which resocialisation plays a role on the continent and the seriousness afforded to its implementation. In analysing the state reports and Concluding Observations as well as decisions of the courts, it becomes clear that an adequate understanding and application of resocialisation on the continent is lacking and in need of enhancement. Notwithstanding the recognised challenges that come with the implementation of resocialisation, the law mandates states to modify the underlying socio-cultural norms underpinning discrimination. The triple approach to resocialisation – as an obligation, right and remedy – ensures that modification is not viewed singularly as an obligation on states but as a right owed to women and a remedy available where cases of the violation of rights are heard.

Opsomming

Vroue word eeue lank as minderwaardig aan mans in alle aspekte van die lewe beskou. Sulke degradasie het gemanifesteer in diskriminerende praktyke, wat uiteindelik vroue se outonomie en vryheid beïnvloed het om te kies wat hulle die beste dien. Deur vroue as sub-mens te beskou, het die samelewing sekere norme en praktyke begin assosieer wat as uitsluitlik binne die gebied van mans val, terwyl dit ’n diskoers skep wat vroue as onbekwaam beskou en verbied om aan sulke gebiede deel te neem. Die voortdurende narratief dat vroue as die mindere van mans is, gebaseer op stereotipes, aannames, vooroordele en ander sosio-kulturele norme en praktyke, sal voortgaan om die samelewingsdiskoers te oorheers, tot nadeel van vroue, tensy ’n betekenisvolle verskuiwing in die gemeenskapsopvattings van vroue plaasvind.

Hersosialisering as ’n verpligting, reg en remedie vind legitimiteit in internasionale en Afrika-streekreg, wat die noodsaaklikheid inbring om die onderliggende determinante vir geslagsongelykheid te wysig. Terwyl progressiewe wette bestaan wat die regte en vryhede van vroue beskerm, sal hul nut altyd onderhewig bly aan die vooroordele, aannames en ander sodanige beperkings van diegene wat verplig is om sulke regte te handhaaf. Net so sal die diskriminasie wat vroue ervaar in die hande van gewone individue in die samelewing voortduur as gevolg van die genormaliseerde aard van sulke sosio-kulturele aannames en gedrag, wat vroue se toegang beperk tot gebiede wat lank as slegs vir mans beskou word. Die verwesenliking van substantiewe en transformerende geslagsgelykheid bly afhanklik van die voldoende implementering van hersosialisering regoor die samelewing.

Op die vlak van internasionale reg bied die Konvensie vir die Uitwissing van alle Vorms van Diskriminasie teen Vroue (*Convention on the Elimination of All Forms of Discrimination against Women*, afgekort as CEDAW) ’n stewige maatstaf van waaruit hersosialisering op ’n Afrika-streeksvlak ontleed kan word. Vroue in Afrika het die voordeel van progressiewe wette op die vasteland wat uitgebreide beskerming bied. Inderdaad, die Afrika-streekstelsel se wetgewende raamwerk, in die interpretasie en toepassing daarvan in die praktyk onder sy streeks-eweknieë en verder, is sodanig dat dit aansienlike potensiaal inhou om die hersosialisering aan die spits te sit. Hierdie navorsing ontleed hersosialisering op die vasteland in vergelyking met hersosialisering op die internasionale vlak. Sodoende word gekyk na die wyse waarop

die Komitee vir die Uitskakeling van Diskriminasie teen Vroue (CEDAW-komitee) hersosialisering op internasionale vlak interpreteer en toepas en dit vergelyk met die interpretasie en toepassing op die Afrika-streeksvlak. Die Afrika-handves vir Mense- en Volkeregte (Afrika-handves) verskaf die maatstaf vir hersosialisering op die vasteland, met die Protokol tot die Afrika-handves vir Mense- en Volkeregte oor die Regte van Vroue in Afrika (Maputo-protokol) wat hersosialisering op die vasteland met verskeie van sy bepalings vaslê. Die wyse waarop state en die Afrika-kommissie met hersosialisering op die vasteland betrokke raak, gee ’n blik op die mate waarin hersosialisering ’n rol op die vasteland speel en die erns wat aan die implementering daarvan verleen word. In die ontleding van die staatsverslae en slotopmerkings sowel as beslissings van die howe, word dit duidelik dat ’n voldoende begrip en toepassing van hersosialisering op die vasteland ontbreek en verbeter moet word. Nieteenstaande die erkende uitdagings wat met die implementering van hersosialisering gepaard gaan, word state deur die wet gemagtig om die onderliggende sosio-kulturele norme wat diskriminasie onderlê, te wysig. Die driedubbele benadering tot hersosialisering – as ’n verpligting, reg en remedie – verseker dat wysiging nie alleen as ’n verpligting op state beskou word nie, maar as ’n reg wat aan vroue verskuldig is en ’n beskikbare remedie waar gevalle van die skending van regte aangehoor word.

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I was once advised to share my ideas with others in conversation, regardless of how incoherent those ideas might seem to be. In sharing and conversing with others, the once incoherent ideas crystallised into something more concrete and impactful. This was the beginning of a journey that has been incredibly rewarding. For that advice, thank you. And to those who provided me with the opportunity and space to unleash those ideas, you are appreciated.

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Abbreviations, short titles, and acronyms

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
Addis Ababa Draft	Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Addis Ababa
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CIL	Customary International Law
Committee of Experts	African Committee of Experts on the Rights and Welfare of the Child
Comments by the NGO Forum	Comments by the NGO Forum on the Final Draft including the amendments by the 2001 Meeting of Experts
Comments by the Office of the Legal Counsel	Comments by the Office of the Legal Counsel on the Final Draft including the amendments by the 2001 Meeting of Experts
Court Protocol	The Protocol on the Establishment of an African Court on Human and Peoples' Rights
CRC Committee	Committee on the Rights of the Child
Dakar Draft	African Charter on Human and Peoples' Rights, Draft prepared by a Meeting of Experts of the Organisation of African Unity, Dakar
Draft Convention on Harmful Practices	Organisation of African Unity Convention on the Elimination of all Forms of Harmful Practices Affecting the Fundamental Rights of Women and Girls

EAC	East African Community
EAC Treaty	EAC Treaty for the Establishment of the East African Community
ECOWAS	Economic Community of West African States
ECOWAS Court	ECOWAS Community Court of Justice
ECOWAS Protocol	ECOWS Protocol on Democracy and Good Governance
Final Draft	Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, final version of 13 September 2000
FGM	Female genital mutilation
FoRB	Freedom of Religion or Belief
HP	Harmful Practices
HRC	Human Rights Committee
IAC	Inter-African Committee on Traditional Practices
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
Joint General Comment	Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage
Kigali Draft	Draft Protocol to the African Charter on Women's Rights, 26th Ordinary Session of the African Commission on Human and Peoples' Rights
Maputo Protocol	Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa
Mbaye Draft	Mbaye Draft African Charter on Human and Peoples' Rights
Niamey Guidelines	The African Commission's Guidelines on Combating Sexual Violence and its Consequences in Africa

Nouakchott Draft	Experts Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott
OAU	Organisation of African Unity
Optional Protocol	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
PAPS	Political Affairs, Peace and Security
Report of the Meeting of Experts	Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa (2001)
SADC	Southern African Development Community
SADC Protocol	SADC Protocol on Gender and Development
SGBV	Sexual and gender-based violence
Special Rapporteur	Special Rapporteur on Women in Africa
SR	Special Rapporteur
Supplementary Act	Supplementary Act Relating to Equality of Rights Between Women and Men for Sustainable Development
UN	United Nations
UNDP	United Nations Development Programme
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

1 1 Background to the research problem

This research seeks to highlight an overlooked and underutilised legal concept that has the potential to accelerate substantive and transformative gender equality. The international human rights framework affirms the importance of advancing and protecting the rights and freedoms of all, regardless of any inherent or societally imposed distinctions. It does so on the premise that such rights and freedoms are held by all simply by virtue of being human; they are inherent, inalienable, and universal.[1] However, as Edwards points out, "[f]eminists have argued that human rights norms were initially articulated, and continue to be interpreted and applied, to reflect men's experiences, while overlooking the harms that most commonly or disproportionately affect women".[2]

Gender inequality continues to impact the lived realities of most women.[3] The underlying causes of gender inequality and its varied manifestations find their roots in socio-cultural norms, stereotypes, assumptions, and biases that have normalised a conception of women as inferior to men. As noted by the United Nations Development Programme (UNDP), "[g]ender social norms profoundly shape attitudes, social relationships and power dynamics, so that they matter a great deal for upholding (or addressing) injustice, as well as for shaping agency".[4] Regardless of the progressive nature of laws and policies aimed at protecting the rights and freedoms of women, socio-cultural norms and practices continue to serve as barriers to substantive gender equality. Oppression does not always present itself overtly. As products of our different societies, we are all raised within its structures, internalising its dominant patriarchal

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

[2] Alice Edwards, "The 'Feminizing' of Torture Under International Human Rights Law" (2006) 19 LJIL 349 <https://ssrn.com/abstract=1535414> accessed 26 June 2023. See also Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law" (1991) 85 Am J Int'l L 613, 621 where the authors states that the "structure of the international legal order reflects a male perspective and ensures its continued dominance".

[3] SDG Knowledge Hub, "UNDP Gender Equality Strategy Addresses Structural Barriers to SDG 5" (2015) <https://sdg.iisd.org/news/undp-gender-equality-strategy-addresses-structural-barriers-to-sdg-5/> accessed 8 June 2023.

[4] United Nations Development Programme, "Breaking Down Gender Biases: Shifting Social Norms Towards Gender Equality" (June 2023) 4 <https://hdr.undp.org/system/files/documents/hdp-document/gsni202303pdf.pdf> accessed 26 June 2023.

assumptions and logic to varying degrees. This often presents in the form of oppression and discrimination against women. However, because such behaviour is normalised, it often escapes scrutiny. Sepper notes, "[a]s legal barriers have been taken down, cultural barriers continue to impede women's advancement".[5] Thus, the development of laws advancing women's rights alone is insufficient to accelerate gender equality.

Based on international and African regional human rights law, this research focuses broadly on realising women's rights. Crucially, it aims to demonstrate that the development of strong laws on its own is insufficient if those laws are "filtered through the biases and limitations of the individuals and institutions, public and private, responsible for grounding [them] in reality".[6] The significant role that harmful socio-cultural norms, stereotypes, biases, and practices play in maintaining systemic and structural sexism limits the transformative potential of international and regional human rights law. If these continue to influence the conceptualisation, interpretation and application of international, regional, and domestic laws and policies aimed at improving the lives of women, the results of efforts made in pursuit of women's rights will remain minimal.

Resocialisation[7] remains central to this research and involves altering harmful socio-cultural values, beliefs, norms, and practices and replacing them with new, relearnt ones. In this context, those values, norms, beliefs, and practices that perpetuate gender discrimination are those that international and regional human rights laws require states to modify in the fulfilment of their obligations towards substantive gender equality. Resocialisation aims to replace harmful attitudes and behaviours that give rise to harmful conduct with new, positive ones that accelerate gender equality. This phenomenon of unlearning and re-learning is not new and exists

[5] Elizabeth Sepper, "Confronting the Sacred and Unchangeable: The Obligation to Modify Cultural Patterns Under Women's Discrimination Treaty" (2008) 30(2) UPa J IntIL 585, 587.

[6] UNGA "Report of the Working Group on the issue of discrimination against women in law and in practice" (2017) UN Doc A/HRC/35/29 para 20.

[7] This research employs the term resocialisation in a positive manner. It is, thus, important to distinguish the definition employed herein with the negative connotations the term has garnered in other contexts, including those that denote some form of indoctrination. This research employs this term in a manner wholly contrasted to indoctrination or other harmful practices and strictly aligns itself with the process of socialising people in a human rights centred way, giving effect to international human rights standards.

in all forms in society, whether it is consciously known as resocialisation or not. For instance, it exists in the context of restorative justice.[8]

Unless there is a movement towards actively dismantling harmful socio-cultural norms and practices, with the aim of resocialisation, the current human rights framework will fail to realise gender equality fully. The universality of human rights is distorted when considered in light of the prevalence of gendered discrimination. Where women's rights are recognised, they are often subject to cultural relativism, a justification for serving interests other than those of women.[9] As Sepper suggests, international law guarantees substantive equality for women by obliging states to consider cultural constraints to the realisation of substantive equality.[10] Where resocialisation exists, the appropriate formulation, interpretation, and application of the law become possible, thereby advancing gender equality. Crucially, the resocialisation measures implemented must target everyone. Thus, it involves addressing the underlying determinants of gender discrimination with individuals at all levels of society, including, *inter alia*, legislators, public servants such as judges and magistrates who interpret and apply the law, police officers and civil servants acting as the first responders to incidents of rights violations. Indeed, it requires everyone in society to benefit from resocialisation because everyone, as noted above, has internalised patriarchal assumptions, biases, and practices, undermining women's inherent dignity and value. The scope of its application, therefore, is broad in nature.

1 1 1 The legal framework

States are obligated to respond to and eliminate socio-cultural barriers to gender equality using "well-defined, rights-based and locally-relevant holistic strateg[ies] which includes supportive legal and policy measures, including social measures that

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[8] Greg Mantle, Darrell Fox and Mandeep K. Dhami, "Restorative Justice and Three Individual Theories of Crime" (2005) ICJ, 26; Tafadzwa Mukwende, "Reform, Reintegrate, Rehabilitate" (2014) 546 De Rebus 33.

[9] Diane Otto, "Rethinking the Universality of Human Rights Law" (1997) 29 Colum Hum Rts L Rev 1, 13. See also UNGA "Universality, cultural diversity and cultural rights" report prepared by the Special Rapporteur on the field of cultural rights, Karima Bennoune UN Doc A.73/227 para 51: "the fact that the [Convention on the Elimination of Discrimination against Women] is the human rights convention subject to the most reservations, many of which are based on unacceptable cultural relativist excuses for not implementing women's equality, is a matter of grave concern".

[10] Sepper (n 5) 597.

are combined with a commensurate political commitment and accountability at all levels".[11] Article 5(a) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) obligates states to implement resocialisation measures to modify social and cultural behavioural patterns of women and men to eliminate prejudices and harmful practices based on stereotypical, gendered roles.[12] Sepper importantly defines the role of article 5(a) as being a "guiding framework for the entirety of the Convention".[13] This implies that article 5(a) informs all measures formulated and implemented in pursuit of all obligations stipulated in CEDAW. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has confirmed this position.[14]

Despite authors such as Holtmaat and Sepper examining the theoretical significance of the object and purpose of article 5, what is lacking, as further explored in this research, is an analysis of the interpretation and practical application of this concept that can be gleaned from case law and state practice.[15]

Within the African continental human rights system, the African Charter on Human and People's Rights (African Charter),[16] together with the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)[17], emphasise and reflect the importance and the different aspects of

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[11] UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices" (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 para 33.

[12] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[13] Sepper (n 5) 598.

[14] UN Committee on the Elimination of All Forms of Discrimination against Women, "CEDAW General Recommendations 2, 3 and 4" (1987) UN A/42/38. Here the CEDAW Committee emphasised, in General Recommendation No 3, the prevalence of gender stereotyping that perpetuates the discrimination that women face, urging states to implement the obligations in article 5 to resocialise their population.

[15] Rickki Holtmaat, "Article 5" in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All forms of Discrimination against Women: A Commentary* (OUP 2011); Sepper (n 5) 585.

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

[17] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6.

resocialisation. In this regard, articles 2, 3, 18(3), and 25 of the African Charter are emphasised in this research as provisions that mandate the implementation of resocialisation by states. The Maputo Protocol also, and more specifically, holds significant potential for the advancement of women's rights with several provisions mandating resocialisation. These include articles 2(2), 5, 4(2)(c) and (d), 8(c) and (d), 12 and 17. The multiple ways in which resocialisation presents itself in the Maputo Protocol speaks not only to the progressive nature of this instrument but acknowledges the urgent attention that states need to give to resocialisation as a means to fulfilling the rights of women.

As Viljoen notes, whether the Maputo Protocol adds any value to the existing legal framework ultimately depends on the extent to which the lived realities of women and their enjoyment of rights are positively impacted. However, as Rudman notes, what remains a challenge is the "lack of implementation of such rights".[18] Resocialisation is, arguably, key to the implementation of rights and its accompanying impact on the lived realities of women.

Of value to this research, as noted above, is the practical interpretation and application of resocialisation on the continent. An analysis of this nature is possible when viewed through the jurisprudence of the African Court on Human and Peoples' Rights (African Court) and the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court).[19] Similarly, state reports and the accompanying Concluding Observations issued by the African Commission on Human and Peoples' Rights (African Commission), viewed in concert with its General Comments and the Resolutions and Guidelines of the Special Rapporteur on the Rights of Women in Africa (Special Rapporteur), provide insight into the interpretation and application of resocialisation as a precursor to substantive gender equality.[20]

1 2 Problem statement and research objectives

[18] Annika 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 Afr Hum Rts LJ 319, 322.

[19] In this regard, see Chapter 7 under 7 5 and 7 6.

[20] See Chapter 7 under 7 3 and 7 4.

In her famous essay, Lorde explains why "the master's tools will never dismantle the master's house".[21] Based on a similar premise, this research argues that the systemic oppression of women will continue until the law is explored from a new perspective. This new perspective must account for the fact that systems of oppression grounded in law – in the manner in which they are conceptualised, interpreted and applied – will continue to exert influence because, despite the often progressive nature of laws and policies, their impact on the lived realities of women will always remain subject to the system within which they operate. This necessitates a greater emphasis on resocialisation as a legal imperative to substantive gender equality. However, resocialisation, as defined in international and African regional human rights law, is often overlooked and underutilised by states as a key obligation, right and remedy in the fulfilment of substantive gender equality.

This research demonstrates that this relatively untapped and unexplored aspect of international and regional human rights law is crucial to any meaningful engagement with women's rights. Surprisingly, it remains underemphasised in case law, state reports, guidance issued by the African Commission, and scholarship, particularly under the African system.[22] If it is true, as this research suggests, that harmful socio-cultural norms and stereotypes require elimination in order to pave the way for substantive gender equality, this obligation should occupy a much more dominant space in the discourse on gender equality.

The objectives of this research are, therefore, multi-pronged. First, to position resocialisation within appropriate feminist legal theories. This lens allows for a proper assessment of the subordination and domination of women in society. Second, the gendered nature of the international legal framework itself is considered, demonstrating the utility of resocialisation in addressing systems of inequality. Third, in contextualising resocialisation and its utility in accelerating gender equality, related

[21] Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansberg, NY: Crossing Press, 1984).

[22] See Maame Efua Addadzi-Koom, "'He Beat Me and the State did Nothing About It': An African Perspective on Due Diligence Standard and State Responsibility for Domestic Violence in International Law" (2019) 19 Afr Hum Rts LJ 624, which provides a very cursory reflection on this obligation. See also John Cantius Mubangizi, "An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa" (2015) 16 J Intl WS 158. To date, no further literature has been found that engages with this obligation in a similar manner to this research.

concepts such as culture and religion are implicated and necessarily need to be assessed in relation to the rights of women. This is especially critical given the prevalence of cultural relativism as justification for denying women's rights. Therefore, the objective is to demonstrate that practices in the name of culture and/or religion cannot justify the denial of rights.

Fourth, this research assesses the existing legislative framework mandating resocialisation at both international and African regional levels to demonstrate the legislative embeddedness of resocialisation as an obligation, right and remedy. Notwithstanding the legislative landscape, how states and the African human rights mechanisms interpret and apply the provisions of resocialisation compared to that of the CEDAW Committee becomes a necessary component of this research. This analysis considers existing challenges in this regard while highlighting the opportunities available for greater and more in-depth engagement with resocialisation as an obligation, right and remedy.

A fifth and key objective of this research is to consider resocialisation in practical terms, thereby extending its significance beyond the purely theoretical. Thus, as discussed under 1 6, determining the types of resocialisation measures to be implemented in fulfilling this obligation and its target audience forms an integral part of the outcome of this research.

1 3 Research questions

This research focuses on the following primary research question: what is the role of resocialisation as an obligation, right and remedy in achieving substantive equality for women under CEDAW, the African Charter, and the Maputo Protocol? The primary assumption underpinning this question is that the "position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed".[23] Thus, addressing the underlying causes of discrimination through resocialisation is crucial to realising gender equality.

Ancillary to this primary question are the following secondary research questions:

[23] UN Committee for the Elimination of Discrimination against Women, "General Recommendation No 25: Article 4, paragraph 1 of the Convention (Temporary Special Measures)" (12 May 2004) UN Doc HRI/GEN/1/Rev.7 at 282 para10.

i) When examined through the lens of feminist legal theories presented in this research, is it possible to affirm the universal applicability of women's rights beyond just theory, and are practices endorsed by culture and religion acceptable grounds for rights violations?
ii) How can resocialisation alter the dominant socio-cultural norms and practices influencing the realisation of women's rights to gender equality?
iii) What concepts, definitions and state obligations arise from an analysis of the resocialisation provisions contained in CEDAW, the African Charter and Maputo Protocol, and how are these comparatively interpreted and applied by the CEDAW Committee and African regional and sub-regional judicial and quasi-judicial fora?
iv) What challenges and opportunities arise from this comparative analysis, and what are some of the good practices that exist?
v) How can the understanding of resocialisation be improved to give effect to women's substantive equality further?
vi) Who should resocialisation measures target to achieve women's substantive equality, and what types of harms should resocialisation measures address?
vii) What are good practices insofar as resocialisation methods are concerned?

Based on the above ancillary questions, this research departs from the following assumptions:

i) Cultural relativism is often used as justification for discriminatory behaviour against women, while the rights of women are disputed as universal in nature.
ii) All human beings possess intrinsic, unconscious biases which may perpetuate harmful stereotypes and other socio-cultural practices, whether consciously or unconsciously. These dominant socio-cultural norms and practices continue to influence the conceptualisation, interpretation and implementation of laws and policies. Unless the underlying causes of discrimination, often rooted in harmful socio-cultural perceptions about the value and status of women, are addressed, substantive equality is impossible. Resocialisation is, therefore, necessary to alter existing socio-cultural norms and should target everyone.
iii) Resocialisation is not afforded due recognition and priority under international and African regional human rights law and is generally a misunderstood and unexplored concept by member states and human rights mechanisms alike.

iv) Harmful cultural practices that need resocialisation include those that ordinarily escape scrutiny and are considered "lesser infringements", falling within the purview of resocialisation.

1 4 Theory and methodology

1 4 1 Feminist legal theories

What all feminist legal theories have in common is "a commitment to reform".[24] The intention is to "render patriarchal systems, methods and presumptions unable to function, unable to retain their dominance and powers".[25] This research does not attempt to situate arguments for resocialisation as a legal tool within a single feminist legal theory. Crucial to the success of resocialisation initiatives is the need to listen to the myriad of women's voices to understand the harms that require addressing. Mindful of this, this research draws on select characteristics of three key feminist legal theories: dominance theory, anti-essentialism and intersectionality.

Recognising and overthrowing male domination is an important objective of resocialisation. Domination is a construct of society deeply embedded in cultural patterns of conduct. Resocialisation is critical to dismantling the domination that women have suffered for centuries. Crucial, however, is the conceptualisation of womanhood and the associated violations of women's rights in an inclusive manner. Similarly, it is vital to guard against defining women by a set of characteristics deemed universal in nature and, by implication, excluding women that do not meet such standards. Not only is resocialisation a necessity for change on a large scale, but it also inherently requires identifying dominant harmful stereotypes and conduct, which asserts itself over all women, inclusively defined, regardless of what such domination looks like. Such identification is only possible when the concept of "woman" includes the experiences and characteristics of all women. Thus, an anti-essentialist approach is necessary when interrogating legal reform for the benefit of all women.

Crenshaw offers a viable framework, as applied in this research, within which to analyse resocialisation: intersectionality. Her theory of intersectionality arises from an

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[24] Jane Wong, "The Anti-Essentialism v Essentialism Debate in Feminist Legal Theory: The Debate and Beyond" (1999) 5 Wm & Mary J Women & L 273, 276.

[25] Elizabeth Gross, "What is Feminist Theory?" in Carole Pateman and Elizabeth Grosz (eds), *Feminist Challenges: Social and Political Theory* (Boston: Northeastern UP 1987) 190, 196–97.

observation that in both the fields of feminism and antiracism, women of colour are left out of the narratives because they do not fit into either.[26] While many have argued that the theory of intersectionality is implicitly anti-dominance theory, in her paper, *Close Encounters*, Crenshaw aligns her theory of intersectionality with the dominance theory.[27] Thus, domination as the target of reform still remains crucial to the theory of intersectionality.

In this regard, the theory of intersectionality has expanded beyond only including race in the discourse of feminism to including other intersecting identities. However, intersectionality is not simply an exercise in pinpointing differing identities. Intersectionality conceives of identities as "vectors for privilege and vulnerability within our social, cultural, political, economic and legal power structures".[28] The purpose of viewing discrimination through an intersectional lens is, thus, "the transformation of systems of intersectional disadvantage".[29] The commonly used single-axis model of assessing discrimination, which asks that each ground for discrimination be exclusively viewed independently, is the shortcoming that intersectionality aims to address. As Ajele and McGill note, the oversimplification of the complexities of peoples' lived realities that the single-axis approach inevitably results in not only essentialises experiences but also prevents the stories of elderly women, for example, from being heard.[30] When discrimination is considered in this narrow way, it arguably has implications for the remedies that courts offer and the measures that states might conceptualise and implement to resocialise the population towards rooting out discrimination against women. If resocialisation is to succeed at the level of structural reform, women's rights need to be viewed through an intersectional and anti-essentialist lens.

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[26] Kimberlé W Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) 43 Stan L Rev 1241, 1244.

[27] Kimberlé W Crenshaw, "Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality" (2010) 46 Tulsa L Rev 151. See also Devon W Carbado and Cheryl I Harris, "Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality and Dominance Theory" (2019) 132 Harv L Rev 2193, 2225.

[28] Grace Ajele and Jena McGill, "Intersectionality in Law and Legal Contexts" (2020) Women's Legal Education and Action Fund (LEAF) 3.

[29] Ajele and McGill (n 28) 3.

[30] Ajele and McGill (n 28) 5.

Because this research focuses on the African human rights system, it is crucial to consider the receptivity of feminism, as a concept, on the continent. The term "feminism" is steeped in controversy on the African continent, making the potential for its resistance likely. Since resocialisation within the context of this research has as its objective the advance of gender equality, addressing this resistance becomes crucial to ensuring that resocialisation and its potential to effect change in the lived realities of women is not a rejected concept on the continent. Indeed, this research demonstrates that male supremacy and patriarchal domination are present globally, the African continent included. The feminist legal theories presented can, arguably, serve as effective tools for examining the potential of resocialisation and its transformative impact on the African continent.

1 4 2 Methodology

As described above, this research undertakes a desktop comparative analysis of resocialisation under international and African regional law. It does so by analysing the overarching legal framework governing women's rights at international and African regional levels and examining the interpretation and application of the relevant provisions. It uses the international law framework as its benchmark, analysing the relevant provisions of CEDAW mandating resocialisation as an essential component to achieving gender equality. This research uses CEDAW as its point of departure for several reasons. The first is that resocialisation finds its origins in CEDAW article 5, as discussed in chapter 4. Second, the vast jurisprudence emanating from the CEDAW Committee, also discussed in chapter 4, provides a solid foundation from which to undertake a study on resocialisation and from which to compare the approaches taken within the African regional system. Indeed, CEDAW long preceded the Maputo Protocol, providing the CEDAW Committee greater opportunity to engage with resocialisation as compared to the African regional system. Closely connected to the jurisprudential volume emanating from the CEDAW Committee is the relative ease at which individual complaints may be made to the CEDAW Committee as compared to that at the African regional level, as discussed under 7 5. Finally, the transformative power of CEDAW's resocialisation provisions is explored together with the concept of resocialisation not only as an obligation but also as a right and remedy. The triple approach to resocialisation is exemplified by the CEDAW Committee, as discussed in

chapter 4, providing the basis upon which resocialisation is regarded as an obligation, right and remedy.

The interpretation and application of resocialisation are then considered through the decisions issued by the CEDAW Committee in response to individual complaints as well as through Concluding Observations to state reports. The manner in which resocialisation is interpreted and applied is underscored through a review of the relevant General Recommendations issued by the CEDAW Committee, where emphasis on resocialisation is placed. Similarly, how resocialisation is interpreted and applied is considered through an analysis of relevant sources emanating from the other Charter and treaty-based bodies, such as the United Nations (UN) Special Rapporteur (SR) on Violence against Women, the UN SR in the field of cultural rights, the Human Rights Committee (HRC), and others of relevance. Where appropriate, it will also draw on cases from the International Court of Justice (ICJ) while drawing on international law concepts. Notwithstanding the fact that academic engagement in secondary sources is limited in this context, this research will nevertheless draw on existing material to contribute to this gap in the literature.

The international law framework provides a sound basis for exploring resocialisation within the African regional human rights system. Notably, the comparative analysis of the legislative framework within which resocialisation exists on the continent is explored within the context of the relevant provisions of the African Charter and the Maputo Protocol. The African Charter is the starting point for resocialisation on the continent. Thereafter, the relevant resocialisation provisions of the Maputo Protocol are explored in depth, emphasising how this instrument prioritises resocialisation as a necessary element to the realisation of gender equality. For each of the relevant provisions in both instruments, the analysis of the legal framework includes an in-depth exploration of the drafting history, the concepts, and definitions, as well as the obligations on states. As with the approach taken in relation to CEDAW, the manner in which this framework is interpreted and applied is an important component of this research. This practical aspect is considered through the reports provided by states to the African Commission and the African Commission's corresponding Concluding Observations. It is also viewed through the relevant general comments, resolutions, and guidelines.

The interpretation and practical application of resocialisation by the African and ECOWAS Courts complete this practical analysis of resocialisation by exploring the

challenges and opportunities available in adjudicatory fora for an enhanced understanding and engagement with resocialisation. The result of this comparative exercise is to extract good practices to demonstrate the appropriate interpretation and application of resocialisation by states and human rights mechanisms while identifying opportunities for enhanced engagement.

1 5 Scope and limitations

As indicated above, this research is centred on examining resocialisation as an obligation, right and remedy as a tool for accelerating gender equality. In doing so, it utilises the framework of international and African regional law and operates within the bounds of CEDAW, the African Charter and the Maputo Protocol as the primary legislative framework. Sub-regional laws and policies emanating from the Southern African Development Community (SADC), the East African Community (EAC) and the ECOWAS are also highlighted where relevant to underscore the utility of resocialisation. The objective is to demonstrate that harmful socio-cultural norms, biases, and stereotypes will continue to hinder substantive gender equality unless modified through resocialisation. This is undertaken through the lens of specified feminist legal theories, which informs the analysis throughout.

This research does not consider the European or Inter-American human rights systems. While these systems could contribute to the discourse on resocialisation, the African regional system's vast and progressive legislative landscape, coupled with the potential the African system holds to spearhead resocialisation across the globe, requires that the analysis remain centred on Africa. In this regard, as the greater majority of African states have ratified CEDAW, the combined rights, obligations and remedies arising under the international and African regional systems constitute the bounds of this research.

Of importance is the manner in which the African human rights mechanism – by way of state reports, the African Commission's Concluding Observations and general comments, the Resolutions and Guidelines of the Special Rapporteur, and the jurisprudence of the African and ECOWAS Courts – engage with resocialisation. Insights emanating therefrom all provide a starting point from which to examine regional engagement with resocialisation, providing a platform from which a description of what enhanced engagement looks like can take place. The examination

of state reports, however, is limited to those dated 2012 onwards, which provides a 10-year period within which to consider resocialisation.[31] States have yet to adequately engage with reporting generally and specifically in terms of the Maputo Protocol. Thus, this research is limited in sample size where resocialisation in terms of the Maputo Protocol is concerned. While state reports provide important insights into resocialisation on the continent, the irregularity of the reports, the lack of seriousness afforded to reporting by states and other associated concerns relating to the reporting process in general fall outside of the scope of this research and is not addressed in any depth.

Resocialisation focuses on socio-cultural norms and practices. As a caveat, it should be noted that cultural and societal conduct comes in many forms. It is beyond the scope of this research to try and encapsulate the nuances of each cultural setting. However, many of the harmful practices prevalent globally present themselves in a similar manner and with common traits.[32] This research focuses on those commonalities while demonstrating some of the resocialisation measures that must be implemented to deconstruct those harmful traits, paving the way for the fulfilment of women's rights.

Resocialisation is key to modifying the underlying determinants influencing discrimination against women *and* girls.[33] Throughout this research, where reference is made to women and women's rights, this includes, where relevant, girls and the rights of the girl child. The Maputo Protocol's definition of women as inclusive of girls confirms such an approach.[34] The CEDAW Committee and the Committee on the Rights of the Child (CRC Committee), in their Joint General Recommendation, note

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[31] In other words, state reports that date back earlier than 2012 are not included unless to demonstrate a pattern of practice from earlier to more recent reports. In some instances, Concluding Observations dating back further than 10 years are utilised to underscore the points raised and because the number of Concluding Observations available for analysis is significantly less than state reports available.

[32] For example, that women should be submissive to men and remain their property, that sexual harassment is normal, that the way women dress and behave is to blame for violence experienced, that all women should be mothers, that girls are valuable only as brides, that women should be seen and not heard, that a girl who has lost her virginity is "impure", that women and girls should be accommodating to the needs of men, that women and girls are responsible for chores and child care, that women's opinions are inferior to men's etc.

[33] Own emphasis.

[34] Maputo Protocol (n 17) art 1(k).

the influence of entrenched social norms and attitudes, such as stereotypes, biases, and assumptions, on the harmful practices experienced by both women and girls.[35] However, it should be noted that this research neither includes a general analysis of the international and regional child rights instruments nor does it contextualise and analyse the specific concerns of the girl child.

Further, resocialisation is a concept universal in nature, as is its application. The fact that this research focuses on the African region should not be misconstrued as an attempt to single out harmful cultural norms and practices on the continent to the exclusion of others elsewhere. The focus on the African system is, as noted above, based solely on the richness of the African legislative landscape and the potential it holds to spearhead resocialisation for the realisation of the rights of women.

A further caveat is that while the very theory upon which this research is based recognises the intersectionality of identities and experiences, no single individual is adequately able to communicate, with real accuracy, the realities and experiences of all identities across the continent without falling into the essentialism trap that this research seeks to avoid. This is neither a possible nor an appropriate task. It remains crucial to the creation of effective resocialisation measures that the myriad voices of women are heard when developing responses. This research is thus limited, in this regard, to the voices “heard” through desktop research and will inevitably fail to “hear” the many voices that remain silenced or unrecorded in the available literature. Furthermore, this research is cognisant of the theory of positionality, which asks of legal advocates to remain mindful of their own limitations insofar as understanding the realities of others is concerned and to avoid reinforcing power dynamics in a way that could result in further discrimination.[36] Lastly, a purely theoretical engagement with resocialisation does little to alter the lived realities of women. Therefore, an important component of this research is an analysis of what resocialisation could and should look like in practice, as presented in Chapter 8.

As demonstrated throughout, this research maintains the importance of resocialisation as a means to realising gender equality. This should not, however, be misconstrued as maintaining that resocialisation is the only solution to achieving gender equality or that other challenges relating to such realisation will be eliminated

[35] Joint General Recommendation 31 (n 11) para 6.

[36] Ajele and McGill (n 28) 4.

simply due to resocialisation. This research demonstrates that overlooking resocialisation as mandated by the law results in a failure to address the underlying determinants to gender inequality, which when left intact will allow discriminatory practices to thrive. Resocialisation, therefore, while a crucial component to gender equality, works in tandem with other efforts aimed at gender equality. This research maintains that without resocialisation, all other efforts to address gender inequality will remain ineffective.

Finally, and most importantly, it is worth noting the limits of the law in adequately addressing a change in norms, values, and cultural practices. The underlying premise of this study is that an available tool – unlearning harmful aspects of humanity's consciousness that give rise to discrimination and replacing them with those that are consistent with an understanding of the equality of all human beings – remains unused. A legal obligation on the part of states to engage with such modification speaks not only to the importance of understanding this alternative, rights-based thinking but of the possibility of effecting change by doing so. Thus, while the assertion is that change is possible, this research does not claim to assert such change as instant or even simple.[37] In this regard, it is helpful to be reminded that the law is but one tool and modification is an ongoing process, likely to be met with much resistance and push-back.

1 6 The value of this research

This research is significant in that it is the first scholarly piece that centres entirely on resocialisation as a precursor to gender equality. While the international legal framework aptly emphasises the need for resocialisation, this topic remains relatively unexplored and untapped as a means to achieving gender equality both at the international and African regional levels. This research engages with resocialisation within the framework of the African regional human rights system because the African system's legislative framework is unmatched in terms of its substance and reach. Indeed, the African system improves on CEDAW significantly, signalling an awareness amongst its drafters of the necessity of modifying harmful socio-cultural norms and practices alongside, and to give effect to, the realisation of other substantive rights.

[37] UNDP (n 4) 13 and 15.

Notwithstanding this apparent awareness, little exists on this topic on the continent. Thus, this research brings resocialisation out of obscurity and emphasises its essential nature in the discourse of gender equality on the continent and beyond. Without resocialisation, substantive rights as contained in CEDAW, the African Charter and the Maputo Protocol have little hope of becoming a reality. Without resocialisation, these instruments risk emphasising formal equality only, the effects of which are that the lived realities of women remain relatively unchanged. Without resocialisation, the structural patriarchal constraints dictating the extent to which the humanity of women is recognised remain. Similarly, other actors will continue to allow their biases, assumptions, and stereotypes to influence their interactions with women, often violating women's rights. Resocialisation has the potential to alter, in a positive way, the lived realities of women when put into action on the ground. As a legal provision that has existed since the inception of CEDAW, it remains an untapped method of addressing gender equality.

Resocialisation seeks to modify patriarchal constraints by recognising its influence in the conceptualisation, interpretation, and implementation of women's rights and by highlighting the legislative mandate to which states are held accountable. Modifying those underlying determinants of gender inequality is a state obligation. Similarly, the African Commission and the African and ECOWAS Courts are required to interpret and apply resocialisation to ensure that the rights and freedoms of women are effectively upheld and to hold states accountable when they fail. The capacity of legal practitioners to engage with resocialisation is also significant where violations have occurred and where remedies are sought. As this research notes, resocialisation as a right and remedy exists in tandem to resocialisation as an obligation. Thus, where violations have occurred, this research assists practitioners and judges to utilise resocialisation as a right and remedy in an effort to prevent future violations and to provide women with the necessary reparations. Consequently, the import of this research extends beyond the theoretical and has implications for legal practitioners and advocates of women's rights, providing these and other role players with an underutilised tool with which to approach gender inequality.

1 7 Chapter outline

Chapter 2 explores the concept of resocialisation and considers its place in addressing the subordination of women through the law. To be able to reflect on this subordination, different accounts of feminist legal theory contextualise resocialisation, highlighting the aim of reform as well as the beneficiaries of such reform.

Chapter 3 explores the complex relationship between cultural rights, universality, and women's rights, highlighting the problematic nature of cultural relativism as a justification for the violation of women's rights. It first considers peremptory norms (*jus cogens*) in international law, examining the absence of the prohibition of discrimination against women from the list of such norms. Thereafter, this chapter considers the potential implications of resocialisation on the withdrawal of reservations made by states to CEDAW. The universality of women's rights is then explored, followed by an exploration of the role that practices in the name of culture and religion play in the denial of women's rights. It proceeds to explore the identification of harms requiring modification, highlighting the necessity of ensuring that harms are not overlooked.

Chapter 4 analyses resocialisation with CEDAW as its point of departure. It considers the purpose of CEDAW and its transformative potential on the lived realities of women. It analyses article 5(a) of CEDAW, the primary resocialisation provision, and considers the CEDAW Committee's characterisation of this provision as a core obligation in CEDAW. Furthermore, it delves into the role of gender stereotyping as a human rights violation and the fixed parental roles that society has come to attach to women and men. Importantly, it considers the triple approach to resocialisation as an obligation, right and remedy, which is informed by the jurisprudence of the CEDAW Committee and the due diligence obligations on states to resocialise its populace. Intertwined in this analysis are the relevant General Recommendations of the CEDAW Committee, highlighting the significance and role of resocialisation in accelerating gender equality.

Chapter 5 analyses the overarching legal framework governing human rights on the continent through the African Charter. The purpose is to demonstrate that resocialisation as a right, obligation and remedy is anchored in the African Charter with the provision of articles 2, 3, 18(3) and 25. Such an exploration is undertaken through an analysis of state reports and, where available, the accompanying Concluding Observations of the African Commission.

Chapter 6 provides an analysis of the Maputo Protocol. Like Chapter 5, the purpose is to highlight the relevant resocialisation provisions, of which there are several, further

embedding the legislative mandate of resocialisation. Where applicable, the analysis draws on sub-regional law from the SADC, the EAC and ECOWAS regions.

Chapter 7 considers the interpretation and application by states, the African Commission, the Special Rapporteur and the regional and sub-regional courts of the resocialisation provisions analysed in Chapter 6. The purpose is to determine where challenges and opportunities exist for an enhanced understanding of resocialisation.

Chapter 8 draws on the findings of Chapters 4 to 7 to compare the approaches taken in interpreting and applying resocialisation. It highlights good practices and opportunities for enhanced engagement with resocialisation alongside existing challenges. In doing so, it considers the triple approach to resocialisation, followed by a comparative exploration of the approaches taken by the CEDAW Committee, African states and the African Commission regarding resocialisation, its targets and measures implemented. The discussion about the targets of resocialisation highlights the importance of correctly identifying the harms requiring modification and the recipients of resocialisation. Thereafter, practical resocialisation measures are discussed, considering the findings in the preceding chapters.

Chapter 9 concludes this research by summarising its findings, making recommendations, and identifying areas for further research.

2 Theoretical framework

2 1 Introduction

The objective of this chapter is to further contextualise resocialisation and to provide a theoretical framework within which to posit arguments in favour of resocialisation for the benefit of all women. It is of particular interest to this research, and as noted by Menek-Meadow, "to keep theory grounded in real world conditions".[1] A theoretical analysis that is purely academic in nature and devoid of real practical benefit does little for women whose lives remain influenced and negatively impacted by the patriarchal structures that govern society.

Feminist legal theory speaks to the systemic nature of the patriarchy and its infiltration into general societal functioning. It aims to deconstruct the system through legal reform and does so by "provid[ing] a healthy scepticism toward traditional legal doctrine and insist[ing] that we reexamine even formally gender-neutral rules to uncover the problematic assumptions behind them".[2] As noted by Charlesworth *et al*., feminist legal theory "derives its theoretical force from immediate experience of the role of the legal system in creating and perpetuating the unequal position of women".[3]

This chapter first explores the concept of resocialisation and its place in addressing the subordination of women through legal reform. Second, to be able to reflect on the subordination of women, different accounts of feminist legal theory provide the necessary context within which to consider resocialisation, highlighting the aim of reform as well as the beneficiaries of such reform. Third, given the emphasis on resocialisation within the African regional system, this chapter explores feminism on the African continent specifically.

2 2 Resocialisation

2 2 1 Objectives of resocialisation

As alluded to in Chapter 1, not only is legal reform crucial for real change in the lives of women, so is legislatively mandated norm change within population groups.

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[1] Carrie Menkel-Meadow, "Mainstreaming Feminist Legal Theory" (1991) 23 Pac LJ 1493, 1495.

[2] Karen H Rothenberg, "Feminism, Law, and Bioethics" (1996) 6 Kennedy Inst Ethics J 69.

[3] Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law" (1991) 85 Am J Int'l L 613.

MacKinnon notes that societal power includes "the power to determine decisive socialization processes and therefore the power to produce reality".[4] Thus, the patriarchal society within which all are forced to operate is a result of a particular kind of resocialisation that sought to create such a reality. As noted in Chapter 1, stereotypes, biases, and other harmful norms continue to operate as the root cause of gendered discrimination. MacKinnon notes, "[i]f a stereotype has a factual basis, if it is not merely a lie or a distortion but has become empirically real, it is not considered sex discriminatory … [i]t is difference".[5]

So deeply embedded and internalised at an individual level, legitimised by community approval and perpetuation, that most fail to examine its authenticity or truth. Instead, consciously or unconsciously, these harmful, biased norms are passed on from generation to generation without question. Differentiating between genders by attaching certain characteristics to one or the other gender results in defining reality on fallacious bases and is masked as truth. To give a few common examples: that women are destined for homemaking while men are the breadwinners; that girls are suited for the arts and crafts while boys are best suited to the sciences and technology; that individual autonomy is generally acceptable as long as it is exclusively for men, depriving women of agency over their bodies or in making their own life choices; that the opinion of women, even if based on high levels of education and experience, is of less value to that of a man; or that women ought to make themselves available to men as and when needed.[6]

Patriarchal structures continue to maintain a hold when harmful conceptions, such as those alluded to above, remain part of the framework within which society operates. Humans are socialised within these confines, leaving the root causes of gender inequality unquestioned and intact and threatening the efficacy of CEDAW, the African

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[4] Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1991) 230.

[5] MacKinnon (n 4) 230.

[6] In this regard, see UNDP, "United Nations Development Programme, 'Breaking Down Gender Biases: Shifting Social Norms Towards Gender Equality'" (June 2023) <https://hdr.undp.org/system/files/documents/hdp-document/gsni202303pdf.pdf> accessed 26 June 2023. At page 4, the report notes that "[b]iased gender social norms are widespread world-wide: almost 90 percent of people have at least one bias". It suggests further that "[b]iases are prevalent among both men and women – suggesting that these biases are deeply embedded in society, reflecting widely shared social norms".

Charter and the Maputo Protocol, as further discussed in Chapters 4 to 7.[7] Noteworthy in this regard is intentionality. As MacKinnon suggests, sexism is so deeply embedded in attitudes and culture that it fails to subject people to natural human deliberation. It is a factual truth, free from critique and intention. In the context of proving that discrimination has indeed occurred and resulted in harm, MacKinnon states that "not knowing that one has sexist attitudes, or not knowing that they are influencing one's judgments, is legally taken as a reason that sex discrimination did not occur".[8] This reinforces the value and necessity of resocialisation as a means of realising equality in its truest form and elevating the ignorance that legitimises sexist behaviours from oblivion and into greater consciousness.

Socialisation is the "process by which individuals internalize the norms, values and culture of their society and learn to behave in socially acceptable ways".[9] Gender socialisation speaks to the internalised norms, rules and culture that define what it means to behave as a woman or a man, girl or boy.[10] The gendered norms and culture that form part and parcel of any given community and which impact the rights and freedoms of women are those very norms, values and culture that are normalised and considered empirical truth, as difference rather than discrimination, as noted by MacKinnon above.

Anthropologists refer to socialisation as a component of the culture created between groups of people "who share 'ways of thinking, feeling and acting', values and behavioural norms".[11] Sociologists consider socialisation as "the transmission of behavioural norms and models by persons and institutions".[12] Socialisation is a natural feature of life and asks of individuals to comply with particular norms and standards of

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[7] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6.

[8] MacKinnon (n 4) 230.

[9] Zina O'Leary, "Socialization" in *The Social Science Jargon Buster* (SAGE Publications Ltd 2007).

[10] Deena A Isom Scott and Toniqua Mikell, "'Gender' and General Strain Theory: Investigating the Impact of Gender Socialization on Young Women's Criminal Outcomes" (2019) 42 J Crim Justice 393, 395.

[11] Chantal Kourilsky-Augeven, "Legal Socialisation: From Compliance to Familiarisation Through Permeation" (2007) 1 Eur J Legal Stud 265, 267.

[12] Kourilsky-Augeven (n 11) 267.

behaviour as a prerequisite to participation and inclusion in society.[13] As Tapp notes, "[c]ompliance to laws and respect for authority is variously called socialization, internalization of norms, conformity to rules, identification, moral internalization, and conscience formation".[14]

Studies have shown that despite the culture of toxic masculinity and the acceptance and normalisation of harmful behaviour, men are capable of reorienting their mindsets and behaviour in a way that results in the modification of those harmful norms and culture.[15] The same is true of women who, despite being women, have similarly internalised harmful culture as the norm, accepting and advocating for its perpetuation on the basis of difference. This process of modification is what this research refers to as resocialisation; a commitment to socialising population groups already socialised in a particular way, hence "re", away from harmful norms and reorienting it towards equality-centred behaviour. In doing so, it addresses the root causes of gender inequality while progressively realising both the substantive and formal equality engendered in CEDAW and the Maputo protocol.[16]

It is worth noting that the concept of resocialisation is not limited to the realisation of gender equality rights only. Indeed, resocialisation is a necessary component to the realisation of all rights. In this regard, one other international law instrument makes explicit reference to modification as a means to realising substantive rights. The Convention on Rights of Persons with Disabilities (CRPD), article 8 mandates awareness-raising, combating of stereotypes, prejudices and harmful practices relating to persons with disabilities, and mandates states to promote awareness of the

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[13] Ari Neuman and Oz Guterman, "What Are We Educating Towards? Socialization, Acculturization, and Individualization as Reflected in Home Education" (2017) 43 Educational Studies 265, 266.

[14] June L Tapp, "Reflections" (1971) 27 Journal of Social Issues 1, 4.

[15] Ashley Rivera and Jonas Scholar, "Traditional Masculinity: A Review of Toxicity Rooted in Social Norms and Gender Socialization" (2020) 43 Advances in Nursing Science E1.

[16] Resocialisation is not a novel concept. In fact, it is expressed in restorative justice: a process concerned with repairing harm and restoring relationships. While the concept is used primarily in criminal matters, it is also utilised in other contexts where disputes and harm have occurred, for instance in civil matters, school, and workplace disputes. However, restorative justice is based on righting a wrong already caused and thus, presupposes that harm has occurred. Resocialisation aims to address the inequalities women operate within by modifying harmful norms and culture in order to prevent further acts of discrimination and to prevent harm. It asks for norm change as discussed under 2 2 3.

capabilities and contributions of persons with disabilities.[17] The International Convention on the Elimination of Racial Discrimination (ICERD) contains a single educational provision, implicating the importance of resocialisation in the realisation of the substantive rights contained therein, though it is not as explicit in its modification obligation as the CRPD. Indeed, ICERD member states are obligated to adopt "measures in the field of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups".[18]

Resocialisation, however, is not simply an idealistic notion based on a naïve aspiration that society's ordering is capable of change. It is deeply embedded in CEDAW, the African Charter and Maputo Protocol as an obligation, right and remedy, as is explored in Chapters 4, 5 and 6. This is so because of the promise resocialisation holds in modifying harmful norms and habits in a way that appreciates the equal humanity of women. Thus, the role that law plays in resocialisation should not be underestimated or dismissed as utopian. Rather, as Otto suggests, a different viewpoint should "convey a sense of excitement about what new ways of thinking might offer to familiar conversations and discoveries".[19]

Often termed sensitisation programmes, the methods employed to fulfil this resocialisation obligation are varied.[20] It includes, amongst others, widespread educational and training programmes together with media campaigns developed and tailored to a defined audience, which could include schools, civil society and the like. Whatever the method, the content is informed by the realities of the women in the target community, thus emphasising the importance of both the feminist methods used to extract such realities and the theory underpinning the overall resocialisation aims, as discussed under 2 3.

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[17] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006) UNGA Res A/Res/61/106 article 8(1)(a)-(c).

[18] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965) UNGA Res 2106 (XX) article 7. It remains beyond the scope of this research to include an analysis of these two resocialisation provisions and the accompanying engagement therewith.

[19] Dianne Otto, "Prospects for International Gender Norms" (2011) 31 Pace L Rev 873, 874.

[20] See for example, African Court in *Association Pour Le Progrés et la Défense des droits des Femmes Maliennes (APDF) and The Institution for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380, in Chapter 7 under 7 5 1, where the court refers to resocialisation methods as sensitisation programmes.

Some argue that the process of resocialisation is not only an impractical and aspirational aim of legal reform but one that belies any sense of urgency that legal reform might require.[21] Indeed, the enormity of the task at hand is not lost in this research and neither should it be underestimated by those who seek to implement it. As mentioned in Chapter 1, this research does not suggest that resocialisation will yield instant returns. It is an ongoing process; one that requires action-orientated commitment and perseverance, regular reflection, and robust adaptation to ensure that the specificities of any given target group remain at the forefront of resocialisation methods. It is, crucially, a legal obligation that must be complied with.

2 2 2 Resocialisation as a legal concept

Legal socialisation "assumes the law is an essential institution within the fabric of the social environment, one that is just as important in terms of ordering society, guiding human behaviour, and facilitating interpersonal interactions as the home, the school, and other social institutions".[22] The modification obligation contained in international law, as is further discussed in Chapter 4, reinforces the value of the law in ordering society, more specifically through the resocialisation of society in a way that modifies harmful culture and behaviour.

Resocialisation focuses on two distinct processes: First, the conceptualisation and implementation of laws and policies by legislatively mandated persons in a manner that remains uninfluenced by the prejudices, biases and harmful culture that have thus far legitimised the misogynistic society within which women are forced to exist. Such would require reaffirming the equal status of women in society in form and substance. Second, the corresponding need to actively engage in altering the discriminatory framework influencing the lives of individuals within respective communities. Such alteration requires modifying harmful cultural practices for the distinct purpose of reducing incidences of gender discrimination in families, communities, and institutions. Applying underutilised modification obligations in international and regional human

[21] Anne N Arbuckle, "The Condom Crisis: An Application of Feminist Legal Theory to AIDS Prevention in African Women" (1996) 3 Ind J Global Legal Stud 413, 447.

[22] Rick Trinkner and Tom R Tyler, "Legal Socialization: Coercion versus Consent in an Era of Mistrust" (2016) 12 Annu Rev Law Soc Sci 417, 418.

rights law provides foundational support to the realisation of the substantive rights of women, as demonstrated in Chapters 4, 5 and 6.

It is crucial to note that regardless of personal convictions relating to the law's reach and ability to facilitate a shift in harmful culture, attitudes and norms, the influence of international law in promoting norm change is significant, as discussed under 2 2 3.[23] As Cherif states in the context of norm change within states, "commitment to norms, and pressure for reform from transnational networks and international institutions, produces changes in the way states speak and act".[24] This then results in a "process of socialization where human rights norms … replace previously held ideas".[25] Similarly, the manner in which the African and ECOWAS Courts interact with the modification obligation, as discussed in Chapters 5 and 6, has the potential to overcome societal opposition to norm change.[26]

2 2 3 Social norms and the law

According to Bicchieri *et al.*, a social norm is defined as a rule of behaviour that individuals conform to because most in their immediate circles not only conform to that rule but believe they ought to conform.[27] Gender and its associated harmful norms are not only conformed to by most, but the treatment of women as subpar humans indicates a belief that individuals ought to conform to such norms. Elsewhere norms are defined as "values, beliefs, attitudes and practices that assert preferred power

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[23] Tuba Inal, "The Role of the European Court of Human Rights in Changing Gender Norms in Turkey: The Case of Women's Maiden Names" (2020) 21 Turkish Studies 524, 536.

[24] Feryal M Cherif, "Culture, Rights, and Norms: Women's Rights Reform in Muslim Countries" (2010) 72 The Journal of Politics 1144, 1147. Cherif suggests further that "[f]or scholars of norms building, these processes can bring about important changes and reform even in countries which are often seen to be unreceptive to change or where unfavourable domestic conditions exist".

[25] Cherif (n 24) 1147.

[26] Laurence R Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" (2014) 68 International Organization 77, 79.

[27] Cristina Bicchieri, Ting Jiang and Jan Willem Lindemans, "A Social Norms Perspective on Child Marriage: The General Framework" (2014) 13 Penn Social Norms Group (Penn SoNG) 2, 11. See also UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices" (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 para 57.

dynamics for interactions between individuals and institutions … [a]s broader constructs, norms are operationalized through beliefs, attitudes and practices".[28]

The law aims to modify discriminatory norms, like those that govern the lives of women, through resocialisation. Though norm change is somewhat more complicated than custom or moral change, it is not impossible.[29] Thus, while scepticism might exist regarding the law's ability to impact the hearts and minds of individuals and communities, failure to consider the influence of norms on societal behaviour ignores a crucial element required for social change and gender equality.[30]

Research suggests that gender bias begins as early on as childhood, internalised and learned over the years.[31] While resocialisation aims to target those who implement the laws, as mentioned under 2 2 2, it also aims to change the hearts and minds of the community in general. This is so because community members similarly serve as gatekeepers to equality when, for example, preference is given to the boy child over the girl child when it comes to education, where the girl child is married off at an early age, where the boy child is taught to exhibit harmful, masculine norms and so forth. Thus, where social convention dictates compliance with harmful norms, they remain uninterrupted and unquestioned, perpetuated from generation to generation.[32] Offering an alternative option, one that produces positive normative behaviour through resocialisation, presents a perspective and awareness that often lacks in communities that remain steeped in a particular, harmful way of thinking. As noted by the UNDP, "[s]ince gender remains one of the most prevalent bases of discrimination, policies addressing deep-seated discriminatory norms and harmful gender stereotypes, prejudices and practices are key for the full realization of women's human rights".[33]

Despite the prevalence of gender discrimination, the modification obligations are ill-utilised as a means to effect change. This despite research confirming the basis of discrimination as harmful norms and cultural behaviour. For instance, in the UNDP's

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[28] United Nations Development Programme, *Tackling Social Norms: A Game Changer for Gender Inequalities* (UN 2020) 6 <https://www.un-ilibrary.org/content/books/9789210051705> accessed 5 July 2021.

[29] Bicchieri, Jiang and Lindemans (n 27) 15.

[30] UNDP (n 28) 9.

[31] UNDP (n 28) 10.

[32] UNDP (n 28) 10.

[33] UNDP (n 28) 13.

comprehensive document on norm change, no mention is made of the modification provisions in international and regional law as influencers of normative change.[34]

As Ocheje notes, "[l]aw can be an effective tool of social change because legal intervention can coordinate social behaviour by creating new expectations".[35] Gender norms are capable of change when the law is effectively utilised. However, the law remains ineffective if, according to Ocheje, their proximity to established norms remains too wide.[36] Bicchieri *et al*., too, suggest that for law to be enforceable, it should not be too far removed from existing norms.[37] The authors note another scholar who similarly suggests that "[i]f the law strays too far from the norms, the public will not respect the law, and hence will not stigmatise those who violate it … [l]oss of stigma means loss of the most important deterrent the criminal justice system has".[38]

Existing gender norms are so deeply embedded in societal culture that expecting the law to make the necessary shifts in the attitudes of society towards women simply because the law demands it, failing to interrogate and modify those harmful social norms that legitimise discrimination, is akin to conferring a particular power on the law that it inherently lacks on its own. The gender norms that maintain patriarchal structures are so far removed from gender equality laws; it is no wonder that compliance with such laws remains unattainable. However, the alternative is not to dilute rights in order to bridge the gap between the two. Resocialisation is key to bridging the gap between norms and the promise of the law.

2 3 Feminist legal theory and methods

2 3 1 Introduction

At the heart of feminist legal theory lies the dismantling and overcoming of the subordination and oppression of women. For change to occur, the law and the context within which it exists require a particular kind of adaptation that appropriately reflects

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[34] See also the more recent report, which highlights the harmful effects of biased norms on women's rights but does so with no reference to international and regional law. UNDP (n 6).

[35] Paul D Ocheje, "Norms, Law and Social Change: Nigeria's Anti-Corruption Struggle, 1999–2017" (2018) 70 Crime Law Soc Change 363, 364.

[36] Ocheje (n 33) 364.

[37] Cristina Bicchieri and Hugo Mercier, "Norms and Beliefs: How Change Occurs" (2014) 63 The Jerusalem Philosophical Quarterly 60, 65.

[38] William J Stuntz, "Self-Defeating Crimes" (2000) 86 Virginia Law Rev 1871, 1872.

and accounts for the different lives of women in any given society.[39] For it to be meaningful, this adaptation must result in formal and substantive gender equality.

What follows under 2 3 2 to 2 3 6 is an account of feminist legal theory, departing from a narrow, inward-looking orientation, emerging into a broader approach viewing "women" not as a group with defined attributes and characteristics but "women" as an evolving concept who, regardless of definition, categorisation, or identity, all exist within the patriarchal structures that remain exploitative, oppressive, and inhibiting. Under each account of a feminist legal theory, the relevance of resocialisation is further highlighted to support the discussion under 2 2.

As Charlesworth *et al.* state, "[m]ost feminists would agree that a diversity of voices is not only valuable, but essential, and that the search for, or belief in, one view, one voice is unlikely to capture the reality of women's experience or gender inequality".[40] This statement is foundational to any resocialisation efforts since reality is only determinable by those who experience it. A number of scholars have provided an account of the movement and development of these differing theories throughout time.[41] Bowman and Schneider, for instance, assert that feminist legal theory has evolved into four distinct categories: "formal equality theory, 'cultural feminism', dominance theory and post-modern or anti-essentialist theory".[42] Rothenberg, on the other hand, categorises the theories as "liberal feminism", "cultural feminism", and "radical feminism".[43] Chamallas divides feminist legal theory into distinctive decades, with the equality stage appearing in the 1970s, the difference stage in the 1980s and the diversity stage of the 1990s.[44] The lack of uniformity in the way in which the unfoldment of feminist legal theory is described is not in and of itself problematic, given

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[39] Robin West, "Women in Legal Academy: A Brief History of Feminist Legal Theory" (2018) 87 Fordham L Rev 977, 988.

[40] Charlesworth, Chinkin and Wright (n 3) 613.

[41] Rosalind Dixon, "Feminist Disagreement (Comparatively) Recast" (2008) 31 Harvard Journal of Law & Gender 277; Cynthia Grant Bowman and Elizabeth M Schneider, "Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession Symposium: The Legal Profession: The Impact of Law and Legal Theory" (1998) 67 Fordham Law Review 249; Martha Chamallas, "Past as Prologue: Old and New Feminisms Symposium: Rhetoric & Relevance: An Investigation into the Present and Future of Feminist Legal Theory: Closing Presentation" (2010) 17 Michigan Journal of Gender & Law 157; Menkel-Meadow (n 1)

[42] Bowman and Schneider (n 41) 251.

[43] Rothenberg (n 2).

[44] Chamallas (n 41) 158.

that the general characteristics of the various stages of feminist legal theory remain the same. While this research refers to feminist legal theory in a particular manner, it does so, mindful that scholars differ in their descriptions. The approach taken in this research, as well as the intentional omission of select feminist legal theories, is not an implicit critique of the many accounts of feminist legal theory.[45]

2 3 2 Liberal feminism

Liberal feminism was founded on the assertion that women were not represented in the law and were, therefore, not afforded the same legal protections as men. It can be characterised as the movement that aimed to ameliorate the lived realities of women by identifying difference as the source of discrimination and inequality and attempting to remedy such by emphasising sameness as an alternative.[46]

Liberal feminism was based on Aristotle's theory that like be treated alike and unalike be treated unalike.[47] Thus, liberal feminism was premised on formal equality, supporting the notion that for women to live full lives, they ought to be treated the same as men.[48] In doing so, it challenged "the linkage of biology with particular social domains or spheres".[49] Equality of outcome, or *de facto* equality was not a primary concern as long as women were treated the same as men and equality of treatment was measured in accordance with how closely it resembled the treatment of the default male.[50] Noteworthy in this regard is that the above premise emanated from the same person who, as MacKinnon suggests, "defended slavery and lived in a society in which prostitution – the buying and selling of women for sex – thrived, and in which no women were citizens".[51]

Liberal feminism's faulty premise relies on and perpetuates the notion that the male is the default human. Resocialisation aims to level the playing field by advocating for

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[45] For example, Different Voice Theory.

[46] Rothenberg (n 2); Catharine A MacKinnon, "Reflections on Sex Equality Under Law" (1991) 100 Yale LJ 1281, 1287.

[47] MacKinnon (n 46) 1287.

[48] Rothenberg (n 2) 70; Chamallas (n 41) 158; Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv L Rev 537, 543; West (n 39) 980.

[49] Dixon (n 41) 281.

[50] Arbuckle (n 21) 436.

[51] MacKinnon (n 46) 1287.

equality, not sameness. To advocate for resocialisation that looks to men as the default while overlooking the unique needs of women, in essence, leads to no more than perpetuating the very difference that the patriarchy relies upon to maintain its hold. Similarly, if sameness is measured against the male default, the perpetuation of non-biological and gendered differences between women and men over centuries makes the pursuit of equality based on sameness impossible. The same is true of legitimate biological difference that remained unacknowledged and, therefore, unaddressed, overlooking the crucial need for equality of results (*de jure* equality).

Resocialisation cannot be achieved by appealing to sameness simply because women and men are not, in fact, the same. Difference is inevitable. It is part and parcel of who we are as human beings. Appealing to difference as a source and justification for discrimination dooms the gender equality movement to failure. To modify harmful norms and culture that legitimise discriminatory practices, effective resocialisation requires an understanding of what it means to live as a woman. Understanding this distinction is, thus, crucial to the success of resocialisation.

This failure to account for the differences between women and men, utilising manhood as the standard by which all others were to be measured, soon revealed itself as ineffective at addressing the needs of women.

2 3 3 Radical feminism

As is noted under 2 3 1, feminist legal theory has undergone significant changes throughout history, and for good reason. In response to the purely formal approach to legal reform taken by liberal feminists, MacKinnon suggests that the root cause of sexism is domination and that formal equality alone will do little to effect meaningful change.[52] Substantive equality provides wholeness to the equality agenda, with the dominance theory beginning to critique the sameness approach taken by liberal feminism and emphasising domination instead.

MacKinnon's theory of domination rejects the masculine as default human and that women require special treatment, centring her attention on male domination as the

[52] Ann C Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale LJ 1373, 1382.

source of inequality and insisting that men refrain from imposing their will on women.[53] In contrast to liberal feminism, where sameness is utilised to advocate for equality, radical feminism addresses the inevitable consequence of the sameness approach – that perceived difference implied justifiable discrimination and that women were only justified in expecting equality to the extent of their sameness to men.[54] This reliance and emphasis on the male default as the yardstick for whether discrimination against women occurred became etched into law through the similarly situated approach.[55] MacKinnon exposes this approach as inherently flawed because not only is difference a characteristic imposed on women only, but crucially because the liberal approach to sameness and difference overlooks the power dynamics inherent to gender.[56] According to MacKinnon, "gender is more an inequality of power than a differentiation that is accurate or inaccurate".[57] Likewise, existing inequality impedes the similarity requirement for equitable treatment.[58] As MacKinnon aptly states, "[w]hy should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?"[59]

Aristotle's theory of equality, as alluded to under 2 3 2, is questioned by radical feminism as an androcentric view of what the world should look like and how it ought to operate, with any departure from the male standard (being a woman, for instance) as the exception to standard behavioural norms, not the rule. This imposition and expectation on women to live as men or face differential treatment when stepping out of line is not equality. Aristotle's standard of sameness, born out of the masculine image and perspective, makes equality an impossibility, exposing his theory as advancing domination over women rather than an equality agenda.[60]

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[53] Adrienne E van Blerk, *Jurisprudence: An Introduction* (Butterworths Publishers 1996) 177; Clare Huntington and Maxine Eichner, "Introduction, Special Issue: Feminist Legal Theory' (2016) 9 Stud L Pol & Soc 1, 2.

[54] MacKinnon (n 4) 220.

[55] Adopted by the United States Supreme Court. For example, see *Reed v Reed*, 404 US 71 (1971); *Rostker v Goldberg*, 453 U.S. 57 (1981).

[56] MacKinnon (n 4) 218.

[57] MacKinnon (n 4) 218.

[58] MacKinnon (n 4) 224.

[59] MacKinnon (n 46) 1287.

[60] MacKinnon (n 4) 225.

Where difference is acknowledged, the accompanying treatment is regarded as special treatment or special benefit. Disguised as recognising differences and protecting women, special treatment often results in perpetuating the very power dynamics that called for such special treatment in the first place. Rather than transforming the harmful power dynamics, women are infantilised and sometimes afforded equal opportunities but not equal access to those opportunities on the premise that such opportunities might place women in harm's way. Not only does this provide the patriarchy with an out, refusing change, it arguably perpetuates the harmful norms that view women as subpar to men; in need of the protection and assistance of men to thrive.

Domination and power dynamics lay at the heart of radical feminism rather than binary differences and sameness.[61] Resocialisation as a method for achieving gender equality is premised on a need to dismantle harmful constructs that perpetuate inequality. Domination is one such harmful construct that maintains its hold by appealing to harmful norms and cultural practices. Any notions regarding the inferiority of women are deeply embedded in male domination, and such notions will not be done away with simply by legislative change. As MacKinnon notes, in the context of stereotyping, power includes the power to produce reality through socialisation.[62] Male supremacy currently holds that card deeply within its clutches, with any revisions to current reality risking the *status quo* that ultimately benefits men to the exclusion of women. These social realities that have become accepted as absolute truth and which are premised on male domination are what radical feminism aims to dismantle.[63]

Resocialisation aims to do the same: to dismantle the distorted view of reality that continues to inform not only legislation and policy, but also its implementation and acceptance within the larger community and to give effect to substantive gender equality. As a legal tool, it sees domination as the source of inequality and seeks to address it by recreating an equal reality that accounts for women as valuable human beings. In doing so, equality transcends the formal boundaries to embracing substantive change. The necessity of resocialisation as a means to elevating the

[61] Menkel-Meadow (n 1) 1501.

[62] MacKinnon (n 4) 230.

[63] In this regard, see Emily Jackson, "Catherine Mackinnon and Feminist Jurisprudence: A Critical Appraisal" (1992) 19 JL & Soc'y 195, 211. Here the author notes "that the way men see the world has become synonymous with rationality. So, if men see women as sex objects, this will be regarded as an objective determined truth".

promise of the law into a reality that positively impacts women is reaffirmed by MacKinnon's assertion that in "societies governed by the rule of law, law is typically a status quo instrument; it does not usually guarantee rights that society is predicated on denying".[64] Where formal notions of equality, those focussing on sameness and difference and legislating to that end, reign the reach of law in guaranteeing rights is limited. Where overcoming domination and subordination serve as the goal for equality laws, substantive notions of equality prevail. Resocialisation assists in overcoming such domination and subordination. As MacKinnon notes, "[i]f the law requires equality, in a society that is structurally and pervasively unequal, and the social status quo were no longer to be maintained through the abstract (formal) equality model, then equality law could not even be applied without producing social change".[65]

2 3 4 Consciousness-raising

For resocialisation to be truly effective, harmful culture and attitudes that continue to serve as impediments to gender equality require effective modification. How to ascertain and define what constitutes "harmful" is an important question that requires sufficient consideration. The theory that informs and contextualises resocialisation efforts and its aims ought to be determined by the realities of the lives of the women for whom such measures are developed and implemented. One way in which to ascertain such realities is through consciousness-raising.

Distinguished from feminist theories, consciousness-raising is a method of extracting information needed to develop the theories that underlie movements for change. For change to occur, identifying the problem is crucial. As Cain states, "[i]f we are careful to listen to women when they describe the harms they experience as women, we are likely to get the legal theory right (i.e., perceive the problem correctly

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[64] MacKinnon (n 46) 1325. In this regard, Jackson (63) 211 notes that MacKinnon's work is "infused with a paradoxical mix of debilitating pessimism and unfathomable optimism". According to Jackson, despite the lurking male domination that is seemingly impossible to overcome, "MacKinnon is clearly guided by the belief that, as a crucial part of the existing power settlement, law is an instrument for social change".

[65] MacKinnon (46) 1325.

and propose the right solutions)".[66] Grounding theories in appropriate feminist methods is, thus, crucial to the legitimacy of any theory about women's equality.

Cain suggests that feminist legal theory fails to account for the lived realities and experiences of women "who do not speak the 'dominant discourse'".[67] Historically, the dominant discourse remained one associated with white, heterosexual, economically privileged women. And yet, in the same breath, most also agree that what constitutes womanhood and its associated experiences manifests uniquely from person to person, and while similarities are what bind women in their fight against oppression, difference, in like manner, is an important factor to acknowledge and understand.[68]

Absent such an understanding and acknowledgement of differences amongst women risks marginalising women on the fringes of dominant discourses in much the same way as patriarchal oppression does, though on different grounds. For instance, no matter how well-intended current "politically correct" statements such as "I don't see colour" might be, they essentially overlook the experiences of a woman of colour, erasing the value and truth of her experience while perpetuating the privileged narrative that the oppression worthy of dismantling looks a particular way only. It results in the removal of one privileged reality (the male reality) only to replace it with another (the essentialised woman).[69] As Cain suggests,

> [a] normative principle that honors only what I have in common with each of you fails to respect each of you for the individual woman that you are. To respect you, despite your difference, is an insult. Such respect is not respect for your difference, but only for our sameness. Such respect belittles your difference and says it does not matter. Such 'respect' falls into the assimilationist/essentialist trap.[70]

The aim of consciousness-raising, according to MacKinnon, is to distil a commonality of experience from amongst women's voices through the sharing of stories and experiences.[71] This suggests that difference is irrelevant to creating and moulding knowledge as a weapon against male domination. Placing commonality at the centre

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[66] Patricia A Cain, "Feminist Jurisprudence: Grounding the Theories" [1989] Berkeley Women's LJ 191, 195.

[67] Cain (n 66) 205.

[68] Cain (n 66) 206.

[69] Cain (n 66) 211.

[70] Cain (n 66) 206.

[71] MacKinnon (n 4) 83.

of womanhood certainly has its value.[72] However, such commonality should not come at the expense of demonising women for inevitable differences.

MacKinnon seeks to exclude difference as the source of inequality and, in doing so, looks to the power and domination men exert over women as the primary concern of women, though the definition of women is seemingly defined as whatever is the basis of their commonality. In critiquing Gilligan's notion that morality is made apparent through different voices, MacKinnon suggests that the only difference to women's morality is that it is more feminine, with a higher register.[73] According to her, the power dynamics at play are insufficiently considered, for those very power dynamics that serve to oppress women are the same power dynamics that serve as the framework within which we all – women and men alike – operate. Thus, to assume that difference exists is to assume that some women live life free of oppression.[74]

To a large extent this resonates with the purpose of resocialisation. To assume that women are free from the influences of the oppressive system within which they were raised and consequently that opinions and beliefs are moulded with such freedom is, as MacKinnon suggests, perhaps naïve. Resocialisation seeks to address the domination of men over women in all spheres of life, cognisant of the fact that how domination is perceived by individuals will differ according to the extent to which that domination has influenced their lives.[75] What is crucial to note, however, is that resocialisation does not deny the reality of different voices and the value of the voices in attempting to address such domination.

Regardless of the extent to which domination influences a woman and her perspectives, her difference, as Cain states, is valuable to the creation of appropriate measures, for without its acknowledgement and understanding, resocialisation

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[72] MacKinnon (n 4) 86. She states that: "[w]hat brings people to be conscious of their oppression as common rather than remaining on the level of bad feelings, to see their group identity as a systematic necessity that benefits another group, is the first question of organizing. The fact that consciousness-raising groups were there presupposes the discovery that they were there to make. But what may have begun as a working assumption becomes a working discovery: women are a group, in the sense that a shared reality of treatment exists sufficient to provide a basis for identification – at least enough to begin talking about it in a group of women".

[73] MacKinnon (n 4) 51.

[74] MacKinnon (n 4) 116.

[75] Note that this suggests that domination occurs differently to different women but affirms that no one is free from it.

remains limited in its success. Thus, while dismantling male domination is certainly a crucial element of resocialisation, it cannot presume to do so only for a particular category of women. Not only does this fail to meet the universal objectives of CEDAW, as well as the African Charter and Maputo Protocol, of achieving both *de facto* and *de jure* equality for all women, it would also overlook and discount the realities of women by ignoring differences within. It is possible for both truths to coexist. Indeed, dismantling patriarchal dominance and power as the sources of the inequality that women experience while guarding against implicitly essentialising womanhood remains at the forefront of resocialisation. Success, therefore, remains subject to ensuring that the voices of all women are heard, acknowledged, and valued.[76]

2 3 5 Anti-essentialism

A universalised formulation of womanhood, one which paints a particular picture of what it is to be a woman, thereby excluding those falling on the periphery, as referred to under 2 3 1, evidently not only remains beneficial only for some, but allows the patriarchy to continue to thrive. As Spelman notes, essentialising women "obscures the heterogeneity of women and cuts off examination of the significance of such heterogeneity for feminist theory and political activity".[77] Further, Spelman notes that discussions relating to 'women' most often describe the realities of "white, middle-class women of Western industrialized countries".[78] There is no essential characteristic that makes up womanhood and, by implication, excludes those who fail to meet such criteria. Neither is it desirable to essentialise womanhood as that would imply that beyond the essentialised woman "we needn't know anything about any woman in particular. For the details of her situation and her experience are irrelevant to her being a woman".[79] Such an approach runs counter to the realisation of gender equality. Thus, without an inclusive conception of women, gender equality will only ever benefit those with the requisite power to make their womanhood define what it

[76] Martha Albertson Fineman, "Gender and Law: Feminist Legal Theory's Role in New Legal Realism" [2005] Wis L Rev 405, 407

[77] Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press Books 1988) ix.

[78] Spelman (n 77) 3.

[79] Spelman (77) 158.

means to be a woman. Anti-essentialism aims to counter this by expanding the ambit of womanhood to include all women.

As Harris states, "[i]f no women are free until all are free, then racism, heterosexism, and all other unjust social hierarchies must be eliminated".[80] Just as patriarchal norms and standards become ingrained into society in a way that results in inequality, so too do essentialist conceptions of women become ingrained into societal consciousness, implicitly creating hierarchies within womanhood.[81] Harris, for instance, employs abortion and its accompanying freedom to choose as an example of the indispensable need to widen the scope of womanhood from the essentialised one alluded to above, to one that considers what it might mean for a woman of colour to benefit from "choice".[82] Choice remains elusive if a range of influencing factors such as socio-economics and social justice remain overlooked, factors that may not impact the lives of the essentialised woman in the same way. This, then, becomes the norm, and any movement away from this norm requires specific articulation in order to ensure that those considered the non-norm still belong. Significantly, while resocialisation would remedy such ingrained harmful norms, anti-essentialism sufficiently remedies the criticism that the dominance theory ignores different voices by expanding the framework to include all women. Failure to remain inclusive is, arguably, a failure to hear women.[83]

Despite charges of essentialism against radical feminism, MacKinnon maintains her assertion that power through the subordination of women forms the basis of the commonality that characterises womanhood, not the essentialised white woman.[84] She states that, "to argue that oppression 'as a woman' negates rather than encompasses recognition of the oppression of women on other bases, is to say that there is no such thing as the practice of sex inequality".[85] In reaffirming her non-essentialised position, MacKinnon rejects the notion that radical feminism defines

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[80] Angela P Harris, "What Ever Happened to Feminist Legal Theory?" (2011) 9 Issues in Legal Scholarship [i] 5.

[81] Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan L Rev 581, 589.

[82] Harris (n 80) 6.

[83] Harris (n 81) 602.

[84] Catharine A MacKinnon, "From Practice to Theory, or What Is a White Woman Anyway?" (1991) 4 Yale JL & Feminism 13, 15.

[85] MacKinnon (n 84) 20.

womanhood in a concrete, universalised manner, thus creating a default woman for whom feminist legal theory aims to benefit.[86] Being a white woman is not the default woman, even if it is misconstrued as such by anti-essentialists, and neither is radical feminism about confining subjects of oppression to the white woman, according to MacKinnon. In fact, 20 years prior to Harris' account alluded to above, MacKinnon claimed that male control over women (inclusively defined) is what forms the basis of the harms women experience and that women are "deprived of procreative choice through sterilization … and criminalized and unfunded and bureaucratically burdened abortions the law deems adequate".[87] While it is certainly true that issues of reproductive rights, as an example, disproportionately affect women of colour, scholars such as Frank have asserted that feminism is not blameworthy for that fact.[88] Similarly, to assert that feminism is a white woman's movement erases the contributions of Black feminists to the discourse.[89]

Interestingly, MacKinnon states that women may prefer to be associated with any given group only insofar as the makeup of that group includes men, emphasising the earlier observation that no one is free from the influences of patriarchy, including, in this case, women who might, according to MacKinnon, determine the value of membership of a group based on the absence or presence of the masculine, "valuable" norm.[90] Emphasising intersecting forms of discrimination, those which impact men too, might afford the oppressive experience a level of seriousness not afforded to women as a category on its own.[91]

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[86] MacKinnon (n 4) 1299.

[87] MacKinnon (n 46) 1301.

[88] Mary Anne Franks, "I Am/I Am Not: On Angela Harris's Race and Essentialism in Feminist Legal Theory" (2014) 102 Calif L Rev 1053, 1059. Frank states that "it seems odd to lay the blame for this at feminism's doorstep, given that many feminists of all races do in fact agitate for reproductive rights for all women".

[89] Franks (n 88) 1059. See also MacKinnon (n 84) 21; Linda Gordon, "'Intersectionality', Socialist Feminism and Contemporary Activism: Musings by a Second-Wave Socialist Feminist" (2016) 28 Gender & History 340, 343.

[90] MacKinnon (n 84) 22.

[91] MacKinnon (n 84) 22.

MacKinnon does, however, appear to contradict herself.[92] She does this by emphasising a particular reality of womanhood as the only reality.[93] Her dominance theory is, nevertheless, premised on the need to develop theories "comprised of the diversity of all women's experiences".[94] This arguably overcomes the tensions that critics have raised as problematic. For the purposes of resocialisation, this is indeed appropriate and highlights the shortcomings of feminist legal theory in general; that no perfect theory, one devoid of criticism, exists. What is and will always remain crucial to resocialisation is the shifting of reality from its current dominance over women to one in which equality is a reality for all women, inclusively defined. In fact, according to MacKinnon, "the assumption that all women are the same is part of the bedrock of sexism that the women's movement is predicated on challenging".[95]

Right or wrong, seemingly essentialist or not, feminist theories will continue to remain at the forefront of overthrowing patriarchal oppression. And yet, a single overarching framework most suited to tackle patriarchal oppression does not exist, nor should it, given the fluidity of social experience.[96] Thus, to centre discussions relating to resocialisation under the umbrella of a single feminist legal theory is misguided. Doing so may implicitly result in a different type of essentialism regardless of intention. As Wong points out, "essentialism is unavoidable because there is always a need to define the category of 'woman'".[97] Rather, she advocates for approaches that aim to overcome the critiques of essentialism.[98] As Franks notes, in the battle for change, energies are best spent on dismantling the most powerful forces of oppression.[99] In the fight for gender equality, the most powerful force of oppression is male domination.

2 3 6 Intersectionality

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[92] MacKinnon (n 4) 116. "Although feminism emerges from women's particular experience, it is not subjective or partial, for no interior ground and few if any aspects of life are free of male power".

[93] Cain (n 66) 211.

[94] MacKinnon (n 84) 22.

[95] MacKinnon (n 84) 22.

[96] Deborah L Rhode, "The Woman's Point of View" (1988) 38 J Legal Educ 39, 41.

[97] Jane Wong, "The Anti-Essentialism v Essentialism Debate in Feminist Legal Theory: The Debate and Beyond" (1999) 5 Wm. & Mary J Women & L. 273, 292.

[98] Wong (n 97) 292.

[99] Franks (n 88) 1059.

Arguably the most appropriate way in which to view womanhood and its associated oppression is through the framework of intersectionality. A concept coined by Crenshaw, intersectionality aims to move away from viewing women's issues in isolation to other interconnected and equally important forms of oppression so as to avoid marginalising women who experience discrimination on multiple grounds.[100] Often mistaken with anti-essentialism, intersectionality seeks to highlight oppression based on a number of factors, including sex, gender, race, and class.[101]

To illustrate the value of an intersectional analysis, Crenshaw refers to *DeGraffenreid v General Motors* (*DeGraffenreid*),[102] where the plaintiffs alleged discrimination by General Motors on the grounds of both race and sex. In dismissing the application, the court noted that, at that time in 1976, Black women were not regarded as a special class worthy of protection against discrimination because they failed to cite any prior decisions protecting Black women as a group.[103] The court ruled that it could evaluate a cause of action relating to either sex discrimination or race discrimination, but not one seeking an evaluation of both.[104] As Crenshaw notes, the court's unwillingness to consider the experiences of Black women "implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences".[105] While Crenshaw's early critique of the single-axis approach is provided within the context of race, class and sex discrimination, other forms of discrimination, such as those based on immigration status, religion and the like, identities developed over time, are equally critical to

[100] Wong (n 97) 294. See also Spelman (n 77) 58 where the author notes that a "troubling characteristic of much contemporary feminist theory is its failure to take seriously the intertwining of sexism with other forms of oppression". Later at 81, Spelman notes that "[m]uch of feminist theory has proceeded on the assumption that gender is indeed a variable of human identity independent of other variables such as race and class, that whether one is a woman is unaffected by what class or race one is".

[101] Chamallas (n41) 168; Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241, 1296. Devon W Carbado and Cheryl I Harris, "Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality and Dominance Theory" (2019) 132 Harv L Rev 2193, 2196.

[102] *DeGraffenreid v General Motors* 413 F Supp 142 (E.D. Mo. 1976).

[103] *DeGraffenreid* (n 102) 143.

[104] *DeGraffenreid* (n 102) 143.

[105] Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U Chi Legal F 139, 143.

consider when analysing the discrimination women face. As suggested by Grillot, "we all stand at multiple intersections of our fragmented legal selves".[106]

In her work on intersectionality, Crenshaw refers to three types of intersectionality: structural, political, and representational.[107]

Structural intersectionality refers to those factors compounding violence that women experience, including language barriers, unemployment and poverty, childcare responsibilities, immigration status, level of education and skills, coupled with little to no access to information. Any number of structural barriers exist for women of colour seeking safe alternatives to violence, barriers that are not necessarily an experience of white, privileged women.[108]

Political intersectionality refers to the limitations of both anti-racist and feminist politics; where the experiences of Black women differ markedly from those of Black men and white women. Here the existing gaps of both frameworks in their ability to address the needs of women of colour are underscored. This is particularly concerning given that "one analysis often implicitly denies the validity of the other".[109]

Representational intersectionality, depicted as two distinct processes, involves the manner in which women of colour are represented in imagery and that imagery's contribution to and perpetuation of the continued marginalisation of women of colour.[110] What this illustrates is that intersectionality is not a buzzword that seeks to simply include all people under one umbrella for the sake of unifying difference. It should not be understood to mean that it "evacuates questions of power".[111] Despite this, the term is often misused or misunderstood to expand the scope of inclusion in a manner that absolves blame should any unintended exclusion result. Such misuse, arguably, has the potential to render the term meaningless.

A danger exists, however, that both intersectionality and anti-essentialist analyses have the potential to create a situation in which discussions relating to any form of

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[106] Trina Grillot, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Mater's House" (1995) 10 Berkeley Women's LJ 16, 18.

[107] Crenshaw (n 101).

[108] Crenshaw (n 101) 1246.

[109] Crenshaw (n 101) 1252.

[110] Crenshaw (n 101) 1283.

[111] Gordon (n 89) 346.

oppression is no longer possible.[112] Similarly, emphasising differences among women runs the risk of reducing womanhood to a group so vastly different from within that the very notion of a group remains at risk where no commonality exists.[113] As noted by Grillo, overcoming such critiques is possible by recognising that essentialism is often unavoidable, a situation that is not, by default, problematic if it is "explicit, is considered temporary, and is contingent".[114] Where such deliberate essentialism exists, intersectionality saves it from becoming prescriptive, allowing the very notion of womanhood to remain fluid and capable of including varied experiences for the purposes of addressing domination. Indeed, as mentioned in Chapter 1, Crenshaw aligns her theory of intersectionality with the dominance theory indicating that both speak to power and domination and share concerns relating to sameness and difference.[115]

What remains the main concern relating to the dismantling of power inequalities is ensuring that when viewing resocialisation as means to gender equality, the beneficiaries of such behavioural modification are identified based on "what is in front of our faces … that we believe what our bodies tell us".[116] Naturally, this takes on different forms, and it emphasises a movement away from a "one size fits all"

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[112] Grillot (n 106) 21.

[113] Grillot (n 106) 21.

[114] Grillot (n 106) 21. See also Carbado and Harris (n 101) 2196. Here the authors state that "[i]n the context of disaggregating intersectionality from anti-essentialism, we contest the view that feminism and critical theory must always avoid essentialism to achieve normative commitments to social transformation". See also Kimberlé Crenshaw, "Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality" (2010) 46 Tulsa L Rev 151, 160. Here the author states, "[T]his sense that race and gender projects occupy mutually exclusive social universes may explain a certain tension that is sometimes apparent between the adherents of these two perspectives. Yet radical sensibilities – the unrelenting focus on power dynamics structures along race or gender lines – need not be framed as oppositional to one another. Indeed, an affinity for structural accounts of power along one domain may actually make such critics more rather than less receptive to similar analytical projects in other domains".

[115] Crenshaw (n 114) 151. See also 178 where Crenshaw states "both dominance theory and the intersectional frame take up the ways in which operating exclusively within either a sameness or difference frame can lead to contradictory and counterproductive debates within equality doctrine". Further, at 181 she states "[s]ameness/difference discourses that underlie at least some reservations about dominance feminism elide the recognition that both positions inevitably reinscribe existing configurations of power".

[116] Grillot (n 106) 22.

approach. It requires reform in ways that value the fact that oppression does not emanate from a single power imbalance, but often multiple ones and that the dismantling of power that resocialisation aims at – patriarchal power in this case – will always remain unsuccessful if it is based on a conception of womanhood that fails to incorporate the realities of less privileged, often already silenced women. Whether essentialism is inevitable in some instances or not is asking the wrong question. In the final analysis, "[r]ecognizing that identity politics takes place at the site where categories intersect thus seems more fruitful than challenging the possibility of talking about categories at all".[117]

2 3 7 Gender, feminism, and its place in Africa

Given that the focus of this research is on the African regional human rights system, as referred to in Chapter 1, it is imperative to consider the way in which African scholars have considered gender and feminism. As a point of departure, it is crucial to note that how African women and African feminist scholars interact with these concepts generally remains controversial.[118] Such controversies can potentially detract focus and attention from a general acceptance of resocialisation as a feminist tool in the pursuit of equality, risking the very foundation of this research. For this reason, an analysis of gender within the African context its analysis remains a crucial part of this research.

Viewed as a largely Western phenomenon, feminism, despite its gender egalitarianist aims, is generally met with much resistance on the continent. As Atanga

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[117] Crenshaw (n 101) 1299.

[118] Becky L Jacobs, "Unbound by Theory and Naming: Survival Feminism and the Women of the South African Victoria Mxenge Housing and Development Association" (2011) 26 Berkely Journal of Gender, Law and Justice 19; Clenora Hudson-Weems, *Africana Womanism: Reclaiming Ourselves* (5th edn, Routledge 2019); Agnes Atia Apusigah, "Is Gender Yet Another Colonial Project?" [2008] Quest: An African Journal of Philosophy 23; Susan Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (2000) 3 Palabres, Revue d'Etudes Africaines 37; Lilian Lem Atanga, "African Feminism?" in Lilian Lem Atanga and others (eds), *Gender and Language in Sub-Saharan Africa: Tradition, Struggle and Change* 33 IMPACT: Studies in Language and Society, (John Benjamins Publishing Company) 301; Azille Coetzee, "Feminism Is African, and Other Implications of Reading Oyèrónké Oyèwùmí as a Relational Thinker" (2018) 1 Gender and Women's Studies; Susan Arndt, "African Gender Trouble and African Womanism: An Interview with Chikwenye Ogunyemi and Wanjira Muthoni" (2000) 25 Signs: Journal of Women in Culture and Society 709.

asserts, “west-imported” theories are viewed as inherently paternalistic and, therefore, with much circumspect and caution.[119] Similarly, feminism as a Western notion is considered “insular or essentialist … reflect[ing] the world as viewed through the eyes of white, middle class women”.[120] Fundamentally, it ignores the impact that colonialism has had on the lives of women in the South.[121] It is further argued that the manner in which the West articulates social difference is not universally applicable. It is due to colonialism and the importation of Western notions that such “truths” became perceived as universally applicable, “inject[ing] Western problems where such issues originally did not exist”.[122]

Not only is feminism approached with great caution, but anti-feminist positions also remain dominant in varying spaces on the continent.[123] This is often attributed to the widely held view that labelling oneself as a feminist and working towards transforming gender relations is an implicit denial of Africanness, that it equates to favouring lesbian relationships and undermines the marital and family institutions which serve as the basis of society on the continent.[124] Thus, not only is the term traditionally met with opposition due to the historical and cultural imperialism of the West, but also due to the negative impact it is thought to have on the relationships between women and men.[125]

Notwithstanding such objections, an understanding and commitment nevertheless exist to address the existing harmful circumstances under which women continue to

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[119] Atanga (n 118).

[120] Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart Publishing 2005) 7-8.

[121] Banda (n 120) 8.

[122] Oyeronke Oyewumi, “Conceptualizing Gender: The Eurocentric Foundations of Feminist Concepts and the Challenge of African Epistemologies” (2002) 2 Journal of Culture and African Women Studies 5, 9. In this regard, the subsequent sections provide a more detailed discussion on this notion that gender is a Western construct.

[123] Arndt “Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism” (n 118) 38.

[124] Arndt “Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism” (n 118) 38.

[125] Arndt, “Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism” (n 118) 39. At 38 Arndt notes that, “[f]eminism is mainly equated with radical feminism and this in turn with hatred of men, penis envy … the fundamental rejection of marriage and motherhood … and the endevor to transform the relationship of the genders into its opposites”.

live.[126] Different scholars have attempted to circumvent the above-mentioned rejection by coining differing phraseologies that centre the African experience while excluding any Western imports that might be rejected outright.[127]

2 3 7 1 Womanism

Womanism is an alternative version of feminism developed by Walker, an African-American scholar.[128] She defines a womanist as a Black feminist or feminist of colour interested in seeing not only women thrive, but men too.[129] However, according to Walker's theory, a man could never be a womanist.[130] As Arndt points out, it is the work of women, according to Walker's womanism, to change the world for the benefit of both women and men.[131] However, this framework does not seek to completely dissociate itself from feminism. Instead, it emphasises Black African-American women's experiences as distinct from that of white women, experiences compounded by other forms of discrimination such as those relating to race, poverty and so on.[132]

Arndt suggests that while Walker's womanism remains the most widely known theory among African scholars, it is nevertheless received with much criticism as the theory that "does not consider African peculiarities and concentrates on race-class-gender-approach that is by far not complex enough for the African context".[133]

African scholar, Ongunyemi, provides her own version of womanism, which she describes as a broadened form of feminism that approaches the question of gender through the context of African reality. This excludes white women and is intolerant of

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[126] Arndt, "African Gender Trouble and African Womanism" (n 118) 710.

[127] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 42.

[128] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 42.

[129] Selena T Rodgers, "Womanism and Afrocentricity: Understanding the Intersection" (2017) 27 Journal of Human Behavior in the Social Environment 36, 37.

[130] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 45.

[131] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 45.

[132] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 42.

[133] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 52.

lesbian relationships.[134] She uses this term independently of Walker and, in fact, distances herself from Walker's womanism.[135] While initially named Womanism, Ongunyemi later modified it to African Womanism.[136] In contrast to African-American accounts of Black women's experiences, Ongunyemi is emphatic in delineating differences in the lives of African women, differences "which Blacks in America cannot deal with – issues like extreme poverty and in-law problems, such as older women oppressing younger women, women oppressing their co-wives".[137] Other realities include "interethnic skirmishes and cleansing, … religious fundamentalism, … the language issue, [and] gerontocracy".[138] Thus, Ongunyemi differentiates her version of womanism from white feminism as well as from African-American womanism/feminism.[139]

Ongunyemi states that,

> [a]s a woman with her own peculiar burden, knowing that she is deprived of her rights by sexist attitudes in the black domestic domain and by Euro-American patriarchy in the public sphere…the black female novelist cannot wholeheartedly join forces with white feminists to fight a battle against patriarchy that, given her understanding and experience, is absurd. So she is a womanist because of her racial and sexual predicament.[140]

In a recorded conversation with Ongunyemi and Muthoni, Arndt questioned the need for an alternative name to feminism, which can potentially dilute the movement towards equality as argued under 2 3 7 3 below.[141] In response, Ongunyemi suggested that a particular power exists when self-naming, rather than having a name imposed; a name that has little relevance or even meaning.[142] However, she notes that the

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[134] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 43 & 45.

[135] Arndt, "African Gender Trouble and African Womanism" (n 118) 712; Chikwenye Okonjo Ongunyemi, "Womanism: The Dynamics of the Contemporary Black Female Novel in English" (1985) 11 Signs: Journal of Women in Culture and Society 63, 72.

[136] Arndt, "African Gender Trouble and African Womanism" (n 118) 713.

[137] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 43.

[138] Arndt, "African Gender Trouble and African Womanism" (n 118) 712.

[139] Arndt, "African Gender Trouble and African Womanism" (n 118) 711.

[140] Ongunyemi (n 135) 79.

[141] Arndt, "African Gender Trouble and African Womanism" (n 118) 720.

[142] Arndt, "African Gender Trouble and African Womanism" (n 118) 721.

naming itself is not entirely problematic. Rather, she argues that what is problematic is that feminism remains unconcerned by the oppression of men because feminism was founded on white ideology, where white male oppression was not a reality. Thus, it defies African logic to speak about the freedom of women without remaining cognisant of the fact that African men remain oppressed on a global scale and, thus, that the discussion ought to include their freedom too.[143] As she states,

> [t]he intelligent black woman writer, conscious of black impotence in the context of white patriarchal culture, empowers the black man … [g]iven this commitment, she can hardly become a strong ally of the white feminist until (perhaps) the political and economic fortunes of the black race improve.[144]

Racism and sexism, according to Ongunyemi, need to be overcome together, not in isolation of each other.[145]

For Muthoni, the name remains insignificant, with her focus remaining on the work being done to address oppression on the basis of a "common ground".[146] Thus, of greater importance is determining the common issues that require addressing. This avoids the diversion that renaming could result in, focusing instead on overcoming the oppression of women. This can, arguably, best be done through consciousness-raising, as described under 2 3 4.

2 3 7 2 Africana Womanism

Hudson-Weems argues that Africana women "adopt feminism because of the absence of a suitable framework for their individual needs as Africana women".[147] She argues that feminism, as a term, was aimed at addressing the sexism white women experienced, convincingly citing the racist beginnings of the feminist movement in the United States of America to validate her point.[148] She states that "the fact remains that

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[143] Arndt, "African Gender Trouble and African Womanism" (n 118) 721.

[144] Ogunyemi (n 135) 69.

[145] Ogunyemi (n 135) 70.

[146] Arndt, "African Gender Trouble and African Womanism" (n 118) 722.

[147] Hudson-Weems (n 118) 18.

[148] Hudson-Weems (n 118) 20-21. Here she states, "the true history of feminism, its origin and its participants, reveals its blatant racist background, thereby establishing its incompatibility with Africana women. Feminism, earlier called the Women's Suffrage Movement, started when a group of liberal

placing all women's history under White women's history, thereby giving the latter the definitive position, is problematic".[149]

Further, while Black Feminism exists, it relates to African-American women and remains unsuitable as a term for "the true Africana woman".[150] As indicated under 2 3 7 1, the realities of African women differ markedly from those of African-American women.[151] That difference, according to Hudson-Weems, remains ignored in Black Feminism. Similarly, the term African feminism implicitly accepts feminism as a concept, a contradictory alternative given that the term feminism, according to

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White women, whose concerns then were for the abolition of slavery and equal rights for all people regardless of race, class and sex, dominated the scene among women on the national level during the early to mid-nineteenth century. At the time of the Civil War, such leaders as Susan B. Anthony and Elizabeth Cady Stanton held the universalist philosophy on the natural rights of women to full citizenship, which included the right to vote. However, in 1870 the Fifteenth Amendment to the Constitution of the United States ratified the voting rights of Africana men, leaving women, White woman in particular, and their desire for the same rights, unaddressed. Middle-class White women were naturally disappointed, for they had assumed that their efforts toward securing full citizenship for Africana people would ultimately benefit them, too, in their desire for full citizenship as voting citizens. The result was a racist reaction to the Amendment and Africanans in particular. Thus, from the 1880s on, an organized movement among White women shifted the pendulum to a radically conservative posture on the part of White women in general. In 1890 the National American Woman Suffrage Association was founded by northern White women, but 'southern women were also vigorously courted by that group', epitomizing the growing race chauvinism of the late nineteenth century….They asserted that the vote for women should be utilized chiefly by middle-class White women, who could aid their husbands in preserving the virtues of the Republic from the threat of unqualified and biological inferiors (Africana men) who, with the power of the vote, could gain a political foothold in the American system".

[149] Hudson-Weems (n 118) 21.

[150] Hudson-Weems (n 118) 18.

[151] See Ongunyemi's account of the African woman's experience under 2 3 7 1. Arndt, "African Gender Trouble and African Womanism" (n 118) 714. Here she states, "[w]hen I was thinking about womanism, I was thinking about those areas that are relevant for Africans but not for blacks in America – issues like extreme poverty and in-law problems, older women oppressing younger women, women oppressing their co-wives, or men oppressing their wives. Religious fundamentalism is another African problem that is not really relevant to African Americans – Islam, some Christian denominations, and also African traditional religions. These are problems that have come to mind to be covered from an African-womanist perspective. So I thought it was necessary to develop a theory to accommodate these differences".

Hudson-Weems, is “a concept that has been alien to the plight of Africana women from its inception”. [152]

Resistance to the term feminism is not unwarranted. With the significant harm that Western imperialism caused people of colour, it is understandable that such rejection exists, with scholars arguing that feminism remains deeply steeped in a movement favouring white women to the exclusion of women of colour. Hudson-Weems states that feminism is a term “conceptualized and adopted by White women … to meet the needs and demands of that particular group”.[153] Inevitably, such exclusion has the potential to result in an inability on the part of women of African descent to align themselves with this concept. Her alternative, Africana Womanism, refers to the power dynamics prevalent within the United States of America between Black men and women. She notes that “Africana men have never had the same institutionalized power to oppress Africana women as White men have had to oppress White women”.[154] Based on this, she rejects the term feminism outrightly and instead advocates for a theory that focuses on women of African descent.[155] This was necessary given the distrust with which the Black community generally interacts with anything “white” in origin.[156] However, she takes this one step further by characterising gender as secondary to the other concerns, that issues such as race ought to be addressed first before gender can become a priority.[157] Furthermore, she advocates for addressing gender within the framework of the African culture rather than through the lens of feminism.[158]

While there is merit to dissociating from a term that historically favoured white women only, what Hudson-Weems does is arguably conflate a negatively conceived term with its actual definition. As noted under sections 2 3 1 to 2 3 6, the essence of

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[152] Hudson-Weems (n 118) 18; Arndt, “Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism” (n 118) 50.

[153] Hudson-Weems (n 118) 27.

[154] Hudson-Weems (n 118) 25.

[155] Hudson-Weems (n 118) 24.

[156] Hudson-Weems (n 118) 26.

[157] Hudson-Weems (n 118) 26. Hudson-Weems also states at 29, “[i]f one considers the collective plight of Africana people globally, it becomes clear that we cannot afford the luxury, if you will, of being consumed by gender issues”.

[158] Hudson-Weems (n 118) 27.

feminism was and still remains about advocating for equality.[159] Where the term has garnered a distorted view, this speaks to a need to modify harmful, negative cultural norms contributing to its distortion rather than advocating for an outright dissociation with a movement that aims to see gender equality actualised or with a preoccupation with redefining feminism in a way that risks undermining the universal nature of women's oppression.[160] As Shamase notes, resistance to feminism demonstrates a misunderstanding of the concept.[161]

The preoccupation with terminology change begs the question of whether such attempts are made to distract from the main issue of gender inequality that women face. Furthermore, the arguments presented by Hudson-Weems arguably risk perpetuating harms that women experience by appealing to African culture, patriarchal and harmful in nature, as a source of eliminating societal concerns. Dominant harmful culture is often the very reason for the disenfranchisement of women and appealing to such culture as a means of addressing inequality will inevitably result in perpetuating the harms that women experience.

2 3 7 3 Gender and feminism as a Western construct

Another scholar who speaks to gender within Africa is Oyêwùmí. She contends that gender is a Western construct that was imported into Africa through colonialism.[162]

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[159] Maxwell Z Shamase, "A Theoretical Exposition of Feminism and Womanism in African Context" (2017) 15 Gender and Behaviour 9181. Here Shamase notes that "feminism is a struggle to end sexist oppression. Its aim is not to benefit specific group of women, or any particular race or class of women. It does not privilege women over men. On the contrary, it is a movement that has the power to transform the whole of society in a meaningful way".

[160] Cheryl Johnson-Odim, "Common Themes, Different Contexts: Third World Women and Feminism" in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds) *Third World Women and the Politics of Feminism* (Indiana University Press 1991) 316.

[161] Shamase (n 159) 9183.

[162] Coetzee (n 118) 2. See also Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African* Society (Zed Books, 1987, republished 2015). At 185 the author notes that "[i]n the indigenous society [Nnobi], the dual–sex principle behind social organization was mediated by the flexible gender system of the traditional culture and language. The fact that biological sex did not always correspond to ideological gender meant that women could play roles usually monopolized by men, or be classified as 'males' in terms of power and authority over others. As such roles were not rigidly masculinized or feminized, no stigma was attached to breaking gender rules…In contrast, Western

Her objective was not to coin an alternative, less offending term to feminism but rather to demonstrate that gender is an entirely Western construct devoid of real meaning or applicability within the African context pre-colonialism. Thus, she questions the role of gender as a universally applicable phenomenon in Africa, that gender is a foundational organising principle, that an essential category of women exists and that women are universally subordinated.[163]

In referring to the Yorùba people, Oyěwùmí asserts that the Yorùba society was not formally organised according to gender. Rather, members of the Yorùba society were categorised as "trader, hunter, cook, farmer or ruler".[164] These categories were all based on gender equivalence, not gendered hierarchy. In fact, seniority is what reigned and established the hierarchy in that community. As mentioned under 2 3 7 1, gerontocracy remains an African reality, distinguished from the realities of the West.

Coetzee's reading of Oyěwùmí's work is that "there are ways of doing feminism that are not 'unAfrican'".[165] This is so because of the gender equivalence that existed based on the relational nature of the community. Thus, the fluidity of identity within the Yorùba society that Oyěwùmí describes, emphasises the gender equivalence existing in the community. This contrasts the theories that emphasise gendered difference within various African societies, which are considered a Western import on gender relations.

In expanding this idea of identity in African society, Coetzee claims that African thought is based on placing individuals within the community, or the whole, rather than the typically individualistic approach of the West.[166] She quotes Mbiti, who famously wrote "I am, because we are; and since we are therefore I am".[167] Thus, according to Coetzee, Oyěwùmí's position is that gender is a "pre-established and essentialist notion that clings to individual identity (individual identity being a contradiction in terms in relational African thinking)".[168] However, other scholars have argued that this notion

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culture and the Christian religion, brought by colonialism, carried rigid gender ideologies which aided and supported the exclusion of women from power hierarchy".

[163] Oyèrónkẹ́ Oyěwùmí, The Invention of Women: Making an African Sense of Western Gender Discourses (University of Minnesota Press 1997).

[164] Coetzee (n 118) 3.

[165] Coetzee (n 118) 9.

[166] Coetzee (n 118) 36.

[167] Coetzee (n 118) 4.

[168] Coetzee (n 118) 6.

of “we” in African philosophy is inherently the default masculine and ignores the realities of women.[169]

Oyěwùmí’s approach is appealing in that it suggests that if pre-colonial societies were structured on community and hierarchy based on seniority rather than gender, feminism as inclusively defined, does not, in fact, offend Africanness. Rather, it emphasises a return to a hierarchy based on seniority, one which, it should be added, is not devoid of its own criticisms and oppressive characteristics but is nevertheless predicated on valuing women and men as equal. Essentially it asks for a return to gender equivalence, not defined as dichotomising genders, but rather by insisting that fixed roles such as gender run counter to the fluidity that characterises individuals in this society.[170]

Insofar as resocialisation within African societies is concerned, the position posited by Oyěwùmí suggests that resocialisation for the purposes of achieving equality between women and men would be met with little resistance for two reasons. First, since the community is said to be ordered according to seniority rather than gender, resocialisation in a manner that results in equality and based on what existed pre-colonialisation could garner the support of the community if framed as a return to true Africanness.[171] Second, given that African society has indeed been distorted by imperialism, it was done so through a different process of resocialisation. Thus, appealing to resocialisation as a means to reclaim historical equality is logical. However, this presupposes that what Oyěwùmí suggests is true in all of Africa, which itself amounts to essentialising Africanness.[172] As noted by Dosekun, “[t]he notion that something is or is not ‘African’ is essentialist if it rests on the premise that there is an inherently unique place called Africa”.[173]

The societal structure described by Oyěwùmí remains disputed and, as stated by Oyowe and Yurkivska, overlooks the real role that gender plays in African culture. In fact, Dube argues that the very absence of gender relations in African philosophy

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[169] Oritsegbubemi A Oyowe and Olga Yurkivska, “Can a Communitarian Concept of African Personhood Be Both Relational and Gender-Neutral?” (2014) 33 South African Journal of Philosophy 85.

[170] Coetzee (n 118) 8.

[171] Simidele Dosekun, “Defending Feminism in Africa” (2007) 3 Postamble 41, 44.

[172] Susan Geiger, “Women and Gender in African Studies” (1999) 42 African Studies Review 21, 30; Oyěwùmí (n 163).

[173] Dosekun (n 171) 41.

merely highlights the lack of interest in the topic and the influence and presence of the default male as the centre and subject of all theorising.[174] Dube alleges that women are entirely absent from theory and subsumed in discussions involving "we".[175] According to Oyowe and Yurkivska, this silence is simply because theories have only ever conceptualised the meaning of the life of African men and never the life of African women.[176] Thus, the exclusion of gender issues in African philosophy is not because gender issues do not exist, but rather that the default man has deemed gender relations inconsequential and of no influence on their lives. Focusing on relational personhood as inherently equal because it focuses on the "we", rather than the "I", risks perpetuating the patriarchy that resides in communities.[177] Oyowe and Yurkivska note that "to be a person, by definition, is to be related, i.e. placed within a complex web of communal social relationships and the latter are gendered".[178] In Africa, "[t]he masculine represents the subject while the feminine is the other".[179] This is no different to the West. Similarly, it has been noted that "scholars of African difference were so much steeped in articulating the ideological divides between African and Western worldviews that they *lost the real self*".[180]

This controversy over what feminism ought to be referred to and how it is defined in specific locations detracts from the overarching question of oppression – that it exerts itself over all women, no matter its form. The more appropriate question, rather, asks how inclusive the definition of feminism is, what its agenda includes and the appropriate responses.[181] As referenced earlier, Crenshaw's theory of intersectionality arguably provides an adequate framework within which to ensure that vectors of discrimination are all considered in expanding the scope to beyond race and class, and that harmful cultural norms are not inadvertently used as shields against equality aims. This approach is inherently more inclusive than those posited by African authors

[174] Coetzee (n 118) 10; Oyowe and Yurkivska (n 169) 85.

[175] Coetzee (n 118) 10.

[176] Oyowe and Yurkivska (n 169) 86.

[177] Oyowe and Yurkivska (n 169) 87.

[178] Oyowe and Yurkivska (n 169) 93

[179] Coetzee (n 118) 10.

[180] Oyowe and Yurkivska (n 169) 87. Emphasis in original text.

[181] Johnson-Odim (n 160) 319.

who attempt to distinguish themselves from feminism and who refer to race and class as the primary sources of oppression that require addressing.

Furthermore, anti-essentialist theory widens the scope of liberal and radical feminism by advocating for a position that no longer essentialises women as white, heterosexual, Christian and middle class, without demonising feminism as a concept and without engaging in discourse that could see other women alienated. It, arguably, also addresses concerns raised by African authors about the exclusion of non-white women in the discourse on feminism.

2 3 7 4 Feminism and gender as accepted norms in Africa

It appears that the context in which discussions relating to feminism take place often influences the extent to which African scholars will identify with or criticise feminism as a concept.[182] When such discussions take place in the United States of America or Europe, rejection of the term becomes more pronounced, not because the term itself is problematic, but because scholars resist agreeing with a West-imported concept when in the West.[183] As Ongunyemi notes,

> If I am talking in Europe, I do not want somebody to tell me what to deal with. And then, if I am talking at home, I think I can be more – what shall I say? – outspoken, more candid. I may say frankly, 'Listen, this female circumcision is terrible'. At home I may be more open and more critical about it. Whereas, when I come here, if somebody is going to dictate the agenda and limits me to female circumcision, not inviting or enabling me to talk about other areas that I think he or she can help me with, I get annoyed … [b]ecause I do not want to be objectified.[184]

Thus, as Arndt notes, the anti-feminist stance in Africa is more an attempt to overcome or resist the importation of concepts coined outside of the continent, as an anti-colonial

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[182] Arndt, "African Gender Trouble and African Womanism" (n 118) 724; Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 51.

[183] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 52. Here Arndt quotes Denish Kirsten Holst-Petersen who states. "I will not be called a feminist *here*, because it is European. It is as simple as that, I just resent that. Otherwise, if you look at everything I do, it is what feminists do, too; but it is just that it comes from Europe, or European women, and I don't like being defined by them. But in almost everything, except perhaps the question of family, my books have the same ideas as they do. It is just that it comes from outside, and I don't like people dictating to me".

[184] Arndt, "African Gender Trouble and African Womanism" (n 118) 724.

stance might take, rather than a legitimate disagreement with its applicability and appropriateness as a framework within Africa.[185] Notwithstanding this, as Arndt states, no matter how deserved such criticisms are, it cannot justify an entirely separatist agenda intent on distinguishing itself from a movement that ultimately serves the same ends as the African one; freeing women from the dominance exerted by the patriarchy. Feminists are those committed to gender equality, regardless of how the realities differ in their manifestation.

Additionally, efforts to find phraseology that suits the needs of all is not an easy task, nor is it a legitimate use of the finite resources available to counter patriarchal domination. This is evident by the attempts made by various authors in this regard as well as by evidence that "[h]ardly a single meeting of African women committed to gender issues goes by without a discussion of whether they are feminists or womanists or something else entirely".[186] Not only is the task itself challenging, but so too is convincing others to begin using a different phrase altogether without the risk of undermining the movement that advocates for the rights of women.

In this regard, resocialisation is particularly useful for changing dominant biases and norms. Rather than a disunified course of action, one that ultimately seeks to address gender inequality in the same way as feminism generally does, why not commit to resocialising communities towards understanding feminism in light of how it ought to have been understood before it became distorted and stained by the racial supremacy of the West. Agreeing with Odim, a more pressing concern is the participation of African women in reconceptualising feminism to suit the African context rather than terminology change.[187]

Male supremacy is just as real a phenomenon in Africa as it is elsewhere in the world.[188] Despite terminological and etymological concerns, the existence of

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[185] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 52.

[186] Arndt, "Who Is Afraid of Feminism? Critical Perspectives on Feminism in Africa and African Feminism" (n 118) 51.

[187] Johnson-Odim (n 160) 316.

[188] Oyěwùmí (n 163) 153. Oyěwùmí, for instance, readily accepts that the "precolonial Yorùbá system was displaced by a European system of hierarchy of the sexes in which the female sex is always inferior and subordinate to the male sex. The ultimate manifestation of this new system was a colonial state that was patriarchal and that has unfortunately survived the demise of the 'the empire'". See also,

patriarchal domination remains not only evident in the lived realities of women, such as child marriage, female genital mutilation (FGM), gender-based violence and other such oppressive expressions of inequality, but also as a matter of general consensus.

What remains at the heart of the dispute is the framework employed to address concerns unique to African women in a manner that avoids essentialising the experiences of all African women and which accounts for the multiple forms of discrimination faced without appearing unAfrican or influenced by Western constructs. However, a preoccupation with a theory that speaks of the African experience, as though all women in Africa experience harm in the same way, detracts from the bigger, more pressing concern relating to the oppression itself.[189] Where the theories of intersectionality and anti-essentialism exist to counter a justifiably perceived white-dominant feminist discourse, the need for alternatives that speak to African experience is not only questionable, but also essentialising and potentially harmful for the very women that the alternatives seek to protect. Thus, insofar as the reception of the term feminism and gender in African discourses are concerned, the arguments presented above suggest that concerns relating to an outright rejection of the term, a rejection with the potential to jeopardise resocialisation efforts on the continent, are unfounded. Where such discussions take place in Africa by African women and concern the lives of African women, the focus is not, in fact, primarily on a rejection of terminology and its associated need to change such terminology, but rather on the rights and freedoms of women.

The African regional human rights mechanism, as is further discussed in Chapters 5, 6 and 7, has the potential to lead the discourse on behavioural modification given the progressive substantive framework within which it operates – a framework drafted in Africa by Africans for Africans. This potential for influence is possible through the framework of the feminist theories posited in the sections above, theories that not only respect that women in Africa are different and experience harm in different ways, but also without undermining or dismissing the legitimate concern that what continues to

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Amadiume (n 162) 99. Here the author notes in the context of pre–colonialism "there were also beliefs and practices derived from a patriarchal ideology…These generated and legitimized anti–female beliefs and practices". Later at 194 the author notes that "[a]s a result of Western influence, however, local men now manipulate a rigid gender ideology in contemporary sexual politics and thereby succeed in marginalizing women's political position, or in excluding them from power altogether".

[189] Atanga (n 118) 301.

exert influence over the continent is "the use of borrowed concepts, perceived to be hegemonic intellectual tools in explaining African social realities".[190] Dismissing anything that has the potential to impact the lives of women in a positive manner, purely because it is perceived as another Western import, risks appealing to harmful cultural norms that serve to undermine the domination that feminism seeks to address; this notwithstanding its divergence away from its former, inclusive mission of promoting the rights and freedoms of all women. As Nnaemeka eloquently puts it:

> [T]he majority of African women are not hung up on articulating their feminism, they just do it. In my view, it is what they do and how they do it that provide the 'framework'; the 'framework' is not carried to the theatre of action as a definitional tool. It is the dynamism of the theatre of action with its shifting patterns that makes the feminist spirit/engagement effervescent and exciting but also intractable and difficult to name.[191]

As stated at the onset, a theoretical framework that fails to elicit practical outcomes is of little benefit to the lives of women. Keeping theories grounded in reality, as noted by Menek-Meadow under 2 1, remains the primary concern. Women living under oppressive conditions are little concerned with what the terminology is that explains or frames the responses to such oppression. As long as resocialisation efforts are considered and conceptualised with an understanding of the need to overcome the domination that all women experience, whether equality concerns are termed as feminism or as a Western, white, privileged construct arguably remains of limited value to the outcome in lived, practical terms.

2 4 Concluding remarks

This chapter sought to establish an appropriate theoretical framework within which to consider resocialisation for the benefit of all women. Where the subordination of women is identified and analysed on a theoretical basis, methods to address such subordination on a practical basis, for the purposes of change, become the goal of feminism.[192] Grounding such change and reform in feminist legal theory provides the necessary framework within which to analyse and understand subordination.

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[190] Atanga (n 118) 304.

[191] Obioma Nnaemeka, *Sisterhood, Feminisms, and Power: From Africa to the Diaspora* (Trenton, NJ: Africa World Press 1998) 5.

[192] Fineman (n 76) 407.

In order to adequately recognise the objectives of resocialisation, this chapter demonstrated the shortfalls of the liberal feminist theory and argued, instead, for the use of dominance theory, coupled with consciousness-raising as a feminist method, as an appropriate, alternative framework. However, no one theory is perfect, as also demonstrated, and shortfalls in each are inevitable. Attempting to consider resocialisation within a single feminist framework, thus, remains counterproductive.

While overcoming male dominance is a foundational concern, viewing domination through anti-essentialist and intersectional lenses is crucial. This ensures that women on the margins, those already at a disadvantage due to overlapping forms of oppression, are not further marginalised by an exclusive, insular focus on what it means to be a woman for whom domination requires overthrowing. Thus, the framework within which to consider resocialisation is one that perceives male domination as the source of inequality and attempts to remedy that through the type of reform that views womanhood in a manner that remains anti-essentialist. Womanhood, however, cannot be conceived of in isolation from other overlapping sources of discrimination, and an intersectional analysis is, thus, crucial to understanding womanhood in its wholeness.

It is important to note that resocialisation itself is the legal imperative, yet the methods employed to realise this obligation to modify harmful behaviour are not necessarily entirely law based. Naturally, the law plays a role in influencing any commitment to gender equality. For instance, where harmful behaviour might be met with the threat of criminal sanctions or where legal obligations are explored to bolster any sense of commitment to modifying harmful behaviour. However, as noted in this chapter, where social norms and law remain conceptually disconnected, the reach of the law is limited. Thus, norm change – in this case, gender norm change – through resocialisation brings the two in closer alignment.

The obstacles facing the African continent, which is the focus of this research, are not insignificant. While feminism and gender are considered foreign constructs, they play a significant role in African culture. Terminology change, as discussed, is not the solution as these risks deflecting attention away from the real obstacles and challenges that women face. Rather, a commitment to equality, one that already exists on the continent regardless of phraseology, will benefit the movement considerably more than a preoccupation with labels and concerns that its acceptance is an implicit acceptance of imperialism. Notwithstanding the legitimate concerns raised regarding

the place of Western constructs on the continent, it is clear that male domination, viewed through an intersectional and anti-essentialist lens, remains a concern. Such concern continues to occupy African feminists, regardless of label or name, and this is echoed by the existence of regional human rights laws that aim to protect the rights and freedoms of women on the continent. Thus, resocialisation remains relevant on the continent, not only because it is legislatively mandated by regional human rights law but also because feminism is, indeed, an African concern.

Chapter three explores the complex relationship between cultural rights, universality, and women's rights, highlighting the problematic nature of cultural relativism as a justification for the violation of women's rights. It also speaks to the impact that resocialisation could have on states withdrawing their reservations to women's treaties, particularly those that relativise these rights.

3 Cultural rights, universality, and the rights of women

3 1 Introduction

Whether human rights norms are universally applicable is the subject of much debate. Women's inequality remains a global concern, with culture and religion dictating the extent to which rights and obligations are deemed universally applicable. Arguments made against fulfilling legal obligations owed to women based on culture or in the name of religion are often coupled with those against the universality of women's rights.[1] Nowhere does an appeal to harmful cultural norms and standards reverberate more loudly than in response to gender equality demands. As discussed in this chapter, the sheer number of reservations to CEDAW is a testament to that.[2]

The purpose of this chapter is to demonstrate that the modification obligations contained in international law have the potential to not only improve the conditions within which women live but may also profoundly reconceptualise the development and functioning of the framework of the law in a manner that is no longer androcentric, but inclusive of all women.

Notwithstanding frequent appeals to culture and religion to justify undermining the rights of women, as explored in this chapter, culture and religion are also important aspects of the human rights framework.[3] However, such rights cannot be utilised as a shield to legitimise discrimination against women, and herein lies the tension. Where cultural practices and those in the name of religion remain harmful and embedded in patriarchal constructs, the realisation of the rights of women should not be made

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[1] UNGA, "Cultural rights", Report of the Special Rapporteur in the field of cultural rights (10 August 2012) UN Doc A/67/287 para 3. See also UNGA, "Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed" (22 March 2010) UN Doc A/HRC/14/36 para 32.

[2] UNGA, "Universality, cultural diversity and cultural rights", Report of the Special Rapporteur in the field of cultural rights (25 July 2018) UN Doc A/73/227 para 51.

[3] This research briefly touches on the distinction between culture and religion under 3 5. Notwithstanding this important difference, and the very superficial glance at freedom of religion or belief, where mention of cultural norms and harms are made, such mentions include those arising out of oppressive behaviours undertaken in the name of religion. This conflation, however, should not be misconstrued as undermining the value and distinction of either of these important rights contained in the international human rights framework. See also Frances Raday, "Culture, Religion, and Gender" (2003) 1 International Journal of Constitutional Law 663, 666. As Raday notes, "'cultural patterns of conduct' in CEDAW must be understood as those referring to cultural norms that are at variance with human rights culture" and the same is rings true of practices undertaken in the name of religion.

contingent upon their alignment with those cultural norms, for that would render women's rights meaningless.

This chapter addresses cultural rights and freedom of religion or belief (FoRB) – often at odds with women's rights – to demonstrate their dominant role in realising women's rights. Where dominant biases and culture continue to influence the conceptualisation and implementation of laws and policies, substantive equality remains illusory. Addressing the underlying causes of discrimination, rooted in cultural and social patterns of behaviour, through the process of resocialisation remains key to the realisation of the rights of women. Thus, this chapter emphasises the dominant role that culture and religion play in the functioning of society and the need to employ resocialisation to eliminate cultural relativism as a basis of discrimination while maintaining and advancing the importance of the right to culture and FoRB.

Before delving into cultural rights and FoRB, this chapter considers, under 3 2, peremptory norms in international law. The exclusion of the prohibition of discrimination against women from the list of such norms is telling. This section, thus, explores the implications of resocialisation on the elevation of the prohibition of discrimination against women to a *jus cogens* norm. Thereafter, under 3 3, the potential implications of resocialisation on the withdrawal of reservations made by States to CEDAW, reservations which are often made on the basis that culture trumps women's rights, are considered. The universality of women's rights, explored under 3 4, is a similarly valuable discussion given that the denial of the universality of the rights of women is frequently employed to justify ongoing discrimination. 3 5 explores the denial of women's rights in the name of religion and the complexities surrounding the distinction between religion and culture as sources of gendered oppression, while 3 6 delves into cultural rights, the rights to culture and cultural relativism. As this research implicates harmful cultural norms and practices as barriers to gender equality, 3 7 explores the identification of the harms requiring modification. In doing so, it highlights the necessity of ensuring that, for the purposes of resocialisation, harms are not overlooked.

3 2 Peremptory norms in international law

In general terms, human rights are not absolute. They always require contextual balancing against other competing rights. This is true for all rights barring a few; no

derogation from a particular group of norms known as *jus cogens* norms may, under any circumstances, occur.[4] *Jus cogens* are those norms that "protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable".[5] As noted by the International Law Commission's (ILC) SR on Jus Cogens, "since the idea of norms of general international law that cannot be derogated from is exceptional, it should be the case that such norms are few in number".[6] Even though there is no absolute consensus within the international community on what qualifies as *jus cogens*, included in this exceptional list is the prohibition on the use of force, genocide, torture, crimes against humanity, the prohibition of slavery and the slave trade, of piracy, racial discrimination and apartheid, and the basic rules of international humanitarian law.[7] States are bound to these, irrespective of express consent and thus acknowledge the universality of such norms. What is most illuminating, for the purpose of this research, is that women's rights fall outside this category.

As noted by Charlesworth and Chinkin, "[m]uch of the importance of the *jus cogens* doctrine lies not in its practical application but in its symbolic significance in the international legal process … [i]t, thus, incorporates notions of universality and superiority into international law".[8] As also noted by Charlesworth and Chinkin, *jus*

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[4] ILC, "Report of the International Law Commission on the Work of its 71st Session" (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 142.

[5] ILC (n 4) 142.

[6] UNGA, "Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur" (29 April–7 June and 8 July–9 August 2019) UN Doc A/CN.4/727 para 57. As no exhaustive list of jus cogens norms exists, it is useful to consider the way in which international case law interacts with this issue. For instance, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States)* [1986] ICJ Rep 14 para 190 states that "[t]he International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'". In *Case Concerning Armed Activities on the Territory of the Congo, (Democratic Republic of Congo v Rwanda)* [2006] ICJ Rep 6 para 64, the court affirms the prohibition of genocide as a principle of jus cogens stating, "the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot itself provide a basis for the jurisdiction of the Court to entertain that dispute".

[7] UNGA "Fourth report on peremptory norms" (n 6) paras 58 and 60. See below on the discussion regarding racial discrimination.

[8] Hilary Charlesworth and Christine Chinkin, "The Gender of Jus Cogens" (1993) 15 Hum Rts Q 63, 66.

cogens "is not a logical necessity so much as a compelling psychological association of normative superiority with universality".[9] Elsewhere it is noted that *jus cogens* is presented as "guarding the most fundamental and highly-valued interests of international society".[10] While elevation to a *jus cogens* norm does not equate to state compliance, it signals the extent to which the international community considers violations especially egregious, triggering state responsibility and even individual criminal responsibility and universal jurisdiction.[11] Thus, even if only effective in its reaffirmation of importance, the absence of the prohibition of discrimination against women from that list arguably speaks volumes about the significance the global community affords to the protection of women's rights.

Jus cogens, when translated, means compelling law. Implicitly, norms that do not meet the requirements of *jus cogens* are not as compelling to elicit the same level of responsiveness and concern. Specific requirements need to be met to reach the superior classification of *jus cogens*. Such include "that it is a norm of general international law and is accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[12] This begs the question, therefore, why the prohibition of discrimination against women falls outside the scope of *jus cogens*, particularly given its frequency in domestic and international treaty law. Aside from questioning the legitimacy of the entire system in excluding gender from *jus cogens*, as suggested by Simma and Alston, it remains clear that the harmful cultural norms and practices that serve as gatekeepers to the realisation of women's rights serve, also, as gatekeepers to an elevation of this norm to *jus cogens* status.[13]

In determining the emergence of a *jus cogens* norm, it is pertinent first to analyse the status of the prohibition of discrimination against women as a principle of

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[9] Charlesworth and Chinkin (n 8).

[10] See Charlesworth and Chinkin (n 8); Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" 12 Aust YBIL 82. See also, ILC (n 4).

[11] Annika Tahvanainen, "Hierarchy of Norms in International and Human Rights Law" (2006) 24 Nordisk Tidsskrift for Menneskerettigheter 191, 195–196. See also ILC (n 4) 143.

[12] ILC (n 4) 142.

[13] Simma and Alston (n 10) 95. They state, "it must be asked whether any theory of human rights which singles out race but not gender discrimination … is not flawed in terms both of the theory of human rights and of United Nations doctrine".

customary international law (CIL). In *North Sea Continental Shelf*,[14] the ICJ noted that two requirements need to be fulfilled for a norm to qualify as CIL. The first is that the principle is settled practice, and the second, that such practice be "carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it".[15] Thus, state practice and *opinio juris* form the basis of CIL. Albeit an old source, The Restatement of the Foreign Relations Law of the United States[16] (Restatement) suggests that "gender discrimination as state policy … may already be a principle of customary international law".[17] Similarly, some have argued that the principles contained in the UDHR, in its entirety, are principles of CIL.[18]

Furthermore, feminists suggest that the documents emanating from the UN themselves indicate that the prohibition on discrimination against women has garnered international acceptance.[19] The existence of CEDAW, the Nairobi Declaration[20] and the Beijing Platform of Action[21] are "manifestations of international consensus".[22] The codification of this prohibition in international law, together with CEDAW's widespread ratification further suggests a level of consensus. As Guertin notes, "[t]he fact that such a large number of the world's nations have bound themselves by the documents is indicative of an emerging customary rule, and this is true even if that law is never applied".[23] In this regard, the practice of states ratifying other treaties prohibiting

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[14] *North Sea Continental Shelf, Germany v Denmark* [1968] ICJ Rep 3.

[15] *North Sea Continental Shelf* (n 14) para 77.

[16] American Law Institute, "Restatement of the Law: The Foreign Relations Law of the United States" (1986).

[17] Anne F Bayefsky, "General Approaches to Domestic Application of International Law" in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 362. Here Bayefsky cites the Restatement.

[18] Simma and Alston (n 10) 90.

[19] Radhika Coomaraswamy, "Are Women's Rights Universal? Re-Engaging the Local" (2002) 3 Meridians 1, 6.

[20] Nairobi Declaration Women's and Girls' Right to a Remedy and Reparation (21 March 2007) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 12 November 2021.

[21] Beijing Declaration and Platform for Action, Fourth World Conference on Women (15 September 1995) A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) (Beijing Platform of Action).

[22] Coomaraswamy (n 19) 6.

[23] Judith E Guertin, "Customary International Law and Women's Rights: The Equal Rights Amendment as a Fait Accompli" [1987] Det CL Rev 121, 140. See also Rebecca J Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women" (1990) 30 Va J Int'l L

discrimination against women, such as the International Covenant on Civil and Political Rights[24] (ICCPR), is similarly indicative of state practice concerning women's rights and as noted by Simma and Alston, "practice had priority over *opinio juris*; deeds were what counted, not just words".[25]

Also illustrative is the *Asylum* case,[26] where the Colombian government contended that the Montevideo Convention of 1993 was recognised by Latin-American states as custom, proving the existence of CIL to which Peru was arguably bound. The ICJ rejected this on the basis that few states had ratified the convention.[27] Expanding on this, the ICJ stipulates that the rejection of the convention by some states, its inconsistent application by others and its implementation only in times of political expediency are illustrative of a lack of uniform state practice.[28]

In contrast, despite the numerous reservations to CEDAW, as discussed under 3 3 below, CEDAW's ratification status demonstrates state commitment to eliminating discrimination against women. By demonstrating that the prohibition of discrimination against women qualifies as a principle of CIL, an argument for its elevation to a *jus cogens* norm is reasonable given that "the threshold requirement for the emergence of *jus cogens*, namely the generality, or universality, of acceptance and recognition, is set at least as high as that necessary for the development of general (or universal) customary law".[29]

Naturally, arguments in favour of the inclusion of discrimination against women as a *jus cogens* norm are not new in international law.[30] The SR on Jus Cogens addresses this in the ILC's report, though arguably inadequately.[31] The SR highlights

643, 684 where the author notes that "[a] stronger ground for this claim (that the Women's Convention must preserve its integrity) is that obligations of nondiscrimination on grounds of sex are now part of customary international law".

[24] International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 art 18(3).

[25] Simma and Alston (n 10) 88.

[26] *Asylum, Colombia v Peru (Merits*) [1950] ICJ Rep 266.

[27] *Asylum* (n 26) 277.

[28] *Asylum* (n 26) 277.

[29] Simma and Alston (n 10) 103.

[30] Charlesworth and Chinkin (n 8).

[31] Mary H Hansel, "'Magic' or Smoke and Mirrors? The Gendered Illusion of Jus Cogens" in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021).

the question raised by some: If racial discrimination is considered a *jus cogens* norm, why is discrimination against women not given the same status? In this regard, the SR notes that the principle of non-discrimination generally has garnered "some support for peremptory status".[32] Notwithstanding, the SR argues that racial discrimination is not in and of itself a *jus cogens* norm. Rather, what constitutes a *jus cogens* norm is the prohibition of apartheid and racial discrimination as a "composite prohibition".[33] This is despite scholarly literature and case law suggesting the contrary.[34] Thus, according to the SR, because racial discrimination does not, on its own, constitute a *jus cogens* norm, its extension to include gendered discrimination or even the more general principle of non-discrimination is baseless. Therefore, as far as the SR is concerned, this provides sufficient bases for excluding gendered discrimination as a *jus cogens* norm, though no further elaboration is provided.

The SR is emphatic that the prohibition of discrimination against women does not constitute a *jus cogens* norm.[35] As Hansel notes, the reasoning provided is so cursory that it is relegated to the footnotes, referencing the number of reservations to CEDAW as justification.[36] Further, the report suggests that while support can be found for its inclusion in the Inter-American Court of Human Rights (IACtHR), there remains "limited explicit *opinion juris cogentis* regarding the prohibition of discrimination in general (or the more limited prohibition of gender discrimination)".[37] This is despite the numerous cases cited in the report as evidence of a consensus that the prohibition of discrimination against women is already considered *jus cogens*. In this regard, Hansel argues that neither the ILC report of the SR nor the former chair of the ILC, Allain

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[32] UNGA (n 6) para 135.

[33] UNGA (n 6) para 135.

[34] See Michelle Foster and Timnah Rachel Baker, "Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?" (2021) 11 Columbia Journal of Race and Law 83; Li Weiwei, "Equality and Non-Discrimination under International Human Rights Law" (2004) Norwegian Centre for Human Rights and Dinah Shelton, "Are There Differentiations Among Human Rights? Jus Cogen, Core Human Rights, Obligations Erga Omnes and Non-Derogability" 21, in UNIDEM Seminar Report "The Status of International Treaties on Human Rights" (7–8 October 2005). See also, International Court of Justice, *Barcelona Traction Belgium v Spain* [1970] ICJ Rep 3.

[35] Hansel (n 31) 478.

[36] UNGA (n 6), footnote 411 states "… one of the hurdles that this proposition would have to overcome is the significant number of reservations that are attached to the principal instrument on gender discrimination". See also, footnote 412.

[37] UNGA (n 6) para 135.

Pellet, in excluding the prohibition of discrimination against women as a *jus cogens* norm, provide sufficient reasoning for such exclusion.[38]

As noted by the SR, the IACtHR, in its advisory opinion, declared the principle of equality and non-discrimination of fundamental importance and did so without elevating one ground of discrimination above another and without distinguishing between racial discrimination and apartheid as a composite prohibition. The court states:

> The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons... Accordingly, this court considered that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.[39]

Given that the UDHR clearly affirms that *all* are entitled to rights and freedoms without distinction on any ground, the above reasoning follows.[40] As Bianchi notes, central to *jus cogens* is human rights. As *jus cogens* initially developed through legal scholarship and was only confirmed in its validity by judicial decisions in the 1990s, "[t]he introduction of ethical and moral concerns into the international legal system takes place for the first time in an overt manner … [t]he inner moral aspiration of the law thus materialized in international law with the advent of *jus cogens*".[41] On this premise, non-discrimination and equality on all grounds, as elucidated by the IACtHR, belong to the *jus cogens* norms group. This position is confirmed in a subsequent case in the IACtHR, *Yatama v Nicaragua,* where the same court confirmed the nature of non-

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[38] Hansel (n 31) 479.

[39] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) paras 100-101.

[40] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) art 2. Emphasis added.

[41] Andrea Bianchi, "Human Rights and the Magic of Jus Cogens" (2008) 19 European Journal of International Law 491, 495.

discrimination as a *jus cogens* norm.[42] Furthermore, in *Kadi v Council of the European Union and Commission of the European Communities*,[43] the European Court of Justice elevated human rights in its entirety to the ranks of *jus cogens* norms from which states are prohibited from derogating.[44] Judge Tanaka's minority judgment in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*,[45] states that "surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*".[46] Simma and Alston, however, express reservations to "the peremptory nature of the entire body of today's human rights and humanitarian law".[47]

In this regard, in arguing that the threat or use of force and fundamental human rights share the characteristic of a *jus cogens* norm, Simma and Alston qualify the term "fundamental human rights" in terms of the list provided by the Restatement. This list includes "slavery, genocide, torture, mass killings, prolonged arbitrary imprisonment, and systematic racial discrimination, or any consistent pattern of gross violations of internationally recognised human rights".[48] What constitutes a consistent pattern of gross violations of internationally recognised human rights is elaborated upon in the Restatement and is said to include,

> systematic harassment; invasions of the privacy of the home; arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave the country denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of consciences and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial and religious discrimination.[49]

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[42] Inter-American Court of Human Rights, *Yatama v Nicaragua* (Preliminary Objections, Merits, Reparations and Costs) (2005) Ser C No 127 para 184.

[43] *Kadi v Council of the European Union and Commission of the European Communities* (2005) ECR II-3649, Case T-315/-01.

[44] *Kadi* (n 43) para 231.

[45] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (Advisory Opinion) 1970 ICJ 16 minority opinion of Judge Tanaka 298.

[46] *Legal Consequences* (n 45) 298.

[47] Simma and Alston (n 10) 103.

[48] Simma and Alston (n 10) 93.

[49] Simma and Alston (n 10) 94.

Aside from the above-mentioned "internationally recognised human rights", Simma and Alston do not include other international human rights law norms. It is within this context that they base their hesitation that the entire body of international human rights law constitutes *jus cogens*.

Notwithstanding that the above demonstrate regional consensus rather than a necessary broader international consensus, a distinction between differing grounds of discrimination as constituting *jus cogens* norms is arguably arbitrary. Furthermore, as mentioned above, documents emanating from the UN, together with scholarly work and case law, provide sufficient bases for the prohibition of discrimination against women to be considered a *jus cogens* norm. This is so because if there are grounds for considering gendered discrimination as a principle of CIL, as is argued above, the first hurdle to determining the eligibility of this prohibition as a *jus cogens* norm – namely state practice and *opinio juris* – is overcome. What remains a barrier, however, is, as argued in this research, the patriarchal constructs undermining the rights of women. Unfortunately for women, "[j]us cogens norms reflect a male perspective of what is fundamental to society that may not be shared by women or supported by women's experience of life".[50]

Given the superior nature of *jus cogens* norms, its violation is considered particularly egregious and compliance with these norms is, thus, held to a higher standard. Additionally, *jus cogens* norms may not be made subject to reservations, a characteristic of *jus cogens* that would significantly impact the ease at which states enter into reservations to CEDAW, were it to apply.[51] This, thus, begs the question about the role resocialisation can play in modifying the dominant, harmful discourses that dictate which norms succeed in being elevated to the status of *jus cogens*. Resocialisation has the potential to alter not only individual conceptions regarding the value and role of women in society, but the structures of society too, including the legal. Any attempts at elevating the prohibition of discrimination against women to that of a *jus cogens* norm will fail until such time as the harmful cultural attitudes and behaviours that legitimise discrimination against women are altered to those that value women in their full humanity. Until then, *jus cogens* norms remain exclusive to those

[50] Charlesworth and Chinkin (n 8) 67.

[51] ILC (n 4) 144.

norms that protect "what men fear will happen to them, those harms against which they seek guarantees".[52]

3 3 Reservations to treaties

As alluded to under 3 2, dominant cultural norms, practices, stereotypes, and biases act as gatekeepers to the systemic functioning of the international legal system expressed through reservations to women's rights treaties. Reservations permit States to enter into treaties while excluding the provisions they are unwilling to accept.[53] Within the context of human rights law, reservations often threaten the integrity of the treaty.[54] Currently, 189 states are party to CEDAW, yet despite this widespread "acceptance", the effectiveness of CEDAW remains limited by, *inter alia*, the number of reservations States have entered.[55] Of those, 72 States have entered one or more reservations.[56] Twenty-six of those states have removed some of their reservations, while others remain, and 19 have removed all reservations.[57] The CEDAW Committee has stated that "reservations to any human rights treaties limit the applicability of internationally accepted human rights norms at national level".[58]

The premise underlying the rationale for most reservations to CEDAW is that of the inferiority of women, even if not explicitly expressed as such, a premise that will remain intact where resocialisation is overlooked. Insofar as CEDAW is concerned, maximising participation to reach universal coverage was seemingly the primary goal, a goal arguably compromising the integrity of CEDAW's implementation.[59] As Riddle notes, "[a] treaty's ability to establish law is undermined if few countries ratify its provisions … [b]ut a treaty containing many signatures has limited value when the

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[52] Charlesworth and Chinkin (n 8) 69.

[53] Jennifer Riddle, "Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process" (2002) 34 Wash Int'L Rev 622, 606.

[54] Riddle (n 53) 606.

[55] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[56] This was done by manual count of reservations only.

[57] This was done by manual count of states that have removed some or all reservations.

[58] CEDAW Committee, "Statements on Reservations to the Convention on the Elimination of all Forms of Discrimination against Women" in *Report of the Committee on the Elimination of Discrimination against Women* UN Doc A/53/38/Rev.1, 1998, 47.

[59] Riddle (n 53) 622.

signatures come at the cost of so many reservations that the treaty provisions have little to no effect on the domestic policy of state parties".[60] The traditional approach to treaties required unanimity. Where a state entered into a reservation deemed objectionable by another state, the reserving state could only ratify the treaty without the reservation or not become party to the treaty.[61] Thus, "[t]he purpose of requiring unanimous consent was to protect the integrity of the treaty".[62] The approach to reservations has moved away from the unanimity rule, which has implications for the human rights system where the integrity of treaties is seemingly secondary to participation, even if that participation is rendered illusory due to reservations.[63] This begs the question, then, if the current reservations regime adequately caters to human rights treaties as compared to other multilateral treaties.

Human rights treaties differ from treaties covering other subject matters in international law. The protections and benefits afforded in human rights treaties are not owed to states but rather by states to individuals within their respective jurisdictions. Unlike other treaties, there is no direct harm to any given state where another enters into reservations to a human rights treaty.[64] While other treaties are founded on a contractual-type notion of state reciprocity, this characteristic does not exist in human rights treaties. Thus, the current reservation regime, which requires states to object to reservations entered into by other states actively, is an inappropriate requirement in human rights treaties, given that states have no direct interest in ensuring that other states comply. As noted by Riddle, not only does the system presuppose that states are interested in the preservation of the treaty, states may

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[60] Riddle (n 53) 623.

[61] Riddle (n 53) 607.

[62] Riddle (n 53) 607.

[63] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) *(*Advisory Opinion) [1951] ICJ Rep 15 (*Genocide Case*). This case was integral to a movement away from the unanimity principle towards the principle that reservations are permissible and have no impact on ratification despite objections. If a state were to object based on a reservation being incompatible with the object and purpose of the treaty, that treaty would not be in force as between the two states. Again, this was done on the basis of maximum treaty participation and in order to ensure that "minor reservations to the treaty should not prevent state ratification". See also Riddle (n 53) 609.

[64] Riddle (n 53) 624. See also Human Rights Committee, "CCPR General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant" (11 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 para 8.

deliberately refrain from making objections to reservations to preserve state relations, leaving the reservation intact.[65]

Guided by the Vienna Convention on the Law of Treaties (VCLT)[66] and the ILC in *Reservations to the Genocide Convention*,[67] within the framework of general international law, states may object to those reservations they deem offensive, leaving the offending provision ineffective as between the objecting and reserving states.[68] In effect, what such objection amounts to is the removal of that provision as between states, which in the case of human rights treaties diminishes a treaty's scope as between the objecting and reserving state. Further, failure to object to a reservation amounts to tacit acceptance, which modifies or removes the reserving provision as between the accepting and reserving state.[69] Treaties covering other matters in international law operate as a "web of inter-State exchanges of mutual obligations".[70] Rather than regulating inter-state actions, human rights "concern the endowment of individuals with rights … [t]he principle of reciprocity has no place".[71] Without a direct state interest, which often lacks in human rights treaties, states are likely to accept reservations, known as "acceptance by acquiescence", tacitly.[72]

Given the nature and special character of human rights treaties and the problems arising out of the requirement that states object to offending reservations, the HRC's General Comment 24 has confirmed that where reservations that run counter to the object and purpose of a treaty are entered into,

> The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be

[65] Riddle (n 53) 610 & 625.

[66] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. The VCLT codified the decision in the *Genocide Case* (n 63).

[67] *Genocide Case* (n 63).

[68] VCLT (n 66) arts 20 and 21. See also International Law Commission, "Guide to Practice on Reservations to Treaties" (2011) 63rd Session of the International Law Commission from 26 April to 3 June and 4 July to 12 August 2011, A/66/10 art 2.6.

[69] ILC (n 68) art 2.8.2.

[70] HRC (n 64) para 17.

[71] HRC (n 64) para 17.

[72] Richard W Edwards, "Reservations to Treaties" (1989) 10 Mich J Int'l L 362, 372.

> severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation.[73]

The HRC (and in the case of CEDAW, the CEDAW Committee) determines such compatibility.[74] CEDAW, article 28 notes that "any reservation incompatible with the object and purpose of the present Convention shall not be permitted".[75] The Committee has emphasised that reservations to articles 2 and 16, of which there are many, are invalid as those provisions remain central to the object and purpose of the convention.[76] Interestingly, few states have entered reservations to article 5, the

[73] HRC (n 64) para 18. It should be noted here that the comment was made in relation to reservations to the ICCPR, though the underlying premise is equally applicable in other international human rights law instruments.

[74] Riddle (n 53) 631. Here Riddle cites the SR appointed by the ILC who states that while human rights treaties are not exempt from the VLCT, human rights bodies are authorised in determining the validity of reservations as an exercise falling within their ordinary functions under the treaty.

[75] CEDAW (n 55) art 28. See also Cook (n 23) 679 where the author notes that "[t]he implication of article 28(2) is that tests of incompatibility of reservations are objective and justiciable and do not turn simply on whether other state parties have expressly or tacitly accepted a particular reservation or have objected to it".

[76] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28 para 41; UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 29 on Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and their Dissolution)" (30 October 2013) UN Doc CEDAW/C/GC/29 para 3. In this regard, the following countries have noted reservations to Articles 2 and/or 16: Algeria, Bahamas, Bahrain, Bangladesh (now withdrawn, reservation to article 2 still stands), Brazil (now withdrawn), Democratic People's Republic of Korea, Egypt, France (all but reservations to article 16(1)(g) now withdrawn), India, Iraq, Israel, Jordan, Kuwait, Lebanon, Lesotho, Libya, Luxembourg, Malaysia (now withdrawn), Maldives, Malta, Mauritius (now withdrawn), Micronesia, Monaco, Morocco, New Zealand, Niger, Oman, Qatar, Republic of Korea (now withdrawn), Singapore, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey (now withdrawn), United Arab Emirates, United Kingdom (withdrawn in relation to article 2, article 16 reservation still stands). The above is the status quo as of 1 April 2006. More recent information is not available online. See Meeting of State Parties to the Convention on the Elimination of Discrimination against Women, "Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women" (10 April 2006) UN Doc CEDAW/SP/2006/2.

modification obligation, presumably because those relating to the core obligations provide states with the requisite justifications for non-observance of women's rights.[77]

Notwithstanding arguments about the legality of reservations, in particular, those that run counter to the object and purpose of CEDAW, the mere existence and volume of reservations speak to the widespread state practice of disregarding the rights of women as well as to the necessity of modifying the underlying notions giving rise to such an anti-women stance.[78] Reservations to treaties have implications for the preservation of the universality of human rights norms by downgrading those global standards where conditions to its application are attached. In terms of CEDAW, reservations impact the extent to which consensus exists around women's rights as universally applicable.

3 4 Universality

The ease with which states enter into reservations with regard to CEDAW necessarily impacts the extent to which states consider women's rights as universal. Human rights are rights held by all simply by virtue of being human. This deems human rights universal.[79] Seemingly simple, the notion of the universality of rights has garnered much debate amongst proponents and opponents alike.

As demonstrated in Chapter 2, feminist legal theory has shown that essentialising womanhood and the subjects for whom gendered reform is intended, is problematic. Therefore, debates regarding the universality of women's rights might be perceived as reverting to theories that value the essentialised woman over all other women and are,

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[77] Most recent data of 2006 indicates that the following countries have entered reservations to article 5: India, Malaysia, Micronesia, New Zealand and Niger. See Meeting of State Parties to the Convention on the Elimination of Discrimination against Women (n 76).

[78] While it is beyond the scope of this research to delve into the specificities and arguments made in relation to reservations to treaties it is useful to note in this regard that those reservations that run counter to the object and purpose of a convention are, according to HRC General Comment 24, unacceptable and severable, leaving the reserving party without the benefit of the reservation. See Cook (n 23) 685 where the author argues that "[c]ountries unwilling to assume a complete commitment to [CEDAW] should not abuse the treaty by a pretense of commitment; they may retain more general commitments under instruments such as the U.N. Charter and the human rights Covenants".

[79] Jack Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6 Hum Rts Q 400.

naturally, approached with much circumspection.[80] However, arguments for the universality of the rights of women are not the same as stating that womanhood is a universal concept or those contending that all women belong under a single, universalised, homogenised umbrella of womanhood. As noted by Coomaraswamy, MacKinnon "sees dominance of women by men as a near-universal phenomenon".[81] Thus, MacKinnon "sees universality in the condition of women and a shared sense of oppression and exploitation".[82] This distinction is crucial given the framework under which resocialisation is approached: the international and regional human rights framework, which emphasises the universality of women's rights.

The universal nature of the rights of women and the girl child was reaffirmed in the Vienna Declaration and Programme of Action in 1993.[83] As the SR on Cultural Rights noted, "highlighting the cultural dimensions of all human rights should in no way be understood as undermining universality but rather as encouraging a sense of ownership of these rights by all, in their diversity".[84] Conversely, the universal nature of human rights does not translate into arguments in favour of the erasure of cultural rights and diversity, despite arguments levied suggesting as much.[85] The notion of universality is met with much circumspection given the historically imperialist imposition of Western "standards" onto other parts of the world, much like the circumspection with which the inclusion of feminist discourse in Africa, as discussed in Chapter 2, is viewed.[86]

Given that universality and cultural erasure are not synonymous, the question remains whether the rights of women are a universal concern, despite legal convention and documents affirming such. Charlesworth asks, "[can] women's rights be universal? Put another way, is the idea of women's international human rights,

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[80] Jill Steans, "Debating Women's Human Rights as a Universal Feminist Project: Defending Women's Human Rights as a Political Tool" (2007) 33 Review of International Studies 11, 14.

[81] Coomaraswamy (n 19) 4.

[82] Coomaraswamy (n 19) 4.

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

[84] UNGA (n 1) para 19.

[85] Dianne Otto, "Rethinking the Universality of Human Rights Law" (1997) 29 Colum Hum Rts L Rev 1, 7.

[86] Abdullahi Ahmed An-Na'im, "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws" in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 171.

premised as it is on the fact that women worldwide suffer from patriarchy, misconceived?"[87] Coomaraswamy expresses astonishment at the existence of doubt regarding the universality of women's rights, given the widespread acceptance by states of CEDAW and other international documents. She suggests that this could be due to the attitudes of those refusing to accept universality, allowing cultural relativism to trump women's rights.[88]

As noted by the SR on Cultural Rights, the term universalism is employed in a manner that defies its inherent truth by suggesting that it is only applicable where everyone agrees to its application. The SR notes that "[a]nti-rights actors manipulate the use of the terms 'universal' and 'fundamental' rights to apply only to certain human rights, often attempting to cast sexual and reproductive rights or the rights related to sexual orientation and gender identity as optional … [u]niversality is a framework for inclusion, not exclusion".[89] According to the SR, it is a cultural project that necessitates modifying the harmful anti-rights stances taken, as alluded to above.[90] Regardless of the arguments on either side of the spectrum of universality and whether this is an internationally accepted concept, women's rights remain a universal concern. The exclusion of the prohibition of discrimination against women as a *jus cogens* norm, the large numbers of reservations to CEDAW, the arguments against the universality of women's rights and those relating to culture and cultural relativism, as explored under 3 5 tell a similar story: that the rights of women are of little real, practical concern to the international structures, beyond its theoretical protection in CEDAW and related instruments, as important as those are. It speaks to the prevalent attitudes that exist in a patriarchal society. In this regard, resocialisation features centrally in shifting attitudes and practices prevalent in every cultural setting globally in order to facilitate the necessary acceptance of the human rights of women. As the SR notes, it is a cultural project in that the shifting of attitudes on the value and role of women necessarily impacts the universality, *jus cogens* and reservations discourses.

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[87] Rebecca J Cook, "Women's International Human Rights Law: The Way Forward" in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 5.

[88] Coomaraswamy (n 19) 6.

[89] UNGA (n 2) para 34.

[90] UNGA (n 2) para 43.

3 5 Inequality in the name of religion

Article 5 of CEDAW obligates states to modify social and cultural patterns of conduct underlying the denial of the equal rights of women. Practices and behaviours materialising in the name of religion are not explicitly referenced. Notwithstanding, such behaviours remain a significant barrier to gender equality in real terms and as discussed under 3 3, this is evident not only in the practices themselves but in the reservations made by States based on conflicts with religion. While the resocialisation obligation remains largely uninfluenced by such a distinction, for the purposes of clarity and to ensure that harms emanating in the name of religion do not escape the scrutiny and reach of the modification obligation, the right to FoRB in this context requires attention, even if cursory.

While Article 5 of CEDAW does not explicitly implicate denial of rights in the name of religion as harms requiring modification, and notwithstanding the distinction between cultural and religious rights in international human rights law, the denial of rights in the name of religion arguably falls within the scope of the modification obligation.[91] Cultural rights are codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[92], while FoRB is codified in the ICCPR, though overlaps between the two exist. Indeed,

> the fact that a certain right is considered a cultural right does not mean that it cannot also be considered a civil, political, economic and social right. For instance, the rights to freedom of religion and freedom of expression can be seen as cultural rights, but they can also be considered political or civil rights.[93]

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[91] Frances Raday, "CEDAW and the Jurisprudence of the UN Human Rights Mechanisms: Women's Human Rights in the Context of Religion and Culture" (2019) 33 Canadian Woman Studies 60, 62. See also Raday, "Culture, Religion, and Gender" (n 3). At 667 Raday states that "[r]eligion is a part of culture in its wider sense. It might even be said that it is an integral part of culture". It is argued that the reason why FoRB is a separate right is because of its sacredness. In this regard, see Mariam Rawan Abdulla, "Culture, Religion, and Freedom of Religion or Belief" (2018) 16 The Review of Faith & International Affairs 102, 103–104.

[92] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI).

[93] Yvonne Donders, "Cultural Rights in International Human Rights Law: From Controversy to Celebration", Japanese Yearbook of International Law (International Law Association of Japan 2020) 63–64.

As Raday notes, "[c]ulture … is a microconcept, definitive of human society, and the concept of 'cultural practices' thus subsumes the religious norms of societies".[94] The HRC has noted that the pervasive discrimination women face worldwide remains "deeply embedded in tradition, history and culture, including religious attitudes".[95] While the wording seemingly conflates culture and religion under a single umbrella, the comment subsequently separates the two when advising states to refrain from violating the rights of women by appealing to "traditional, historical, religious or cultural attitudes".[96] Insofar as the modification obligation is concerned, the term culture in CEDAW is arguably an all-embracing term envisaged not only to include a wider array of actions falling within its scope, but also, as noted by Raday, "'culture' as a fig leaf for religion, which is a more rigidly defended construct than culture in the human rights treaties".[97] To attract signatories, therefore, reference to such rigidly defended concepts such as religion had to remain implicit, failing which consent to be bound may not have been as forthcoming. It is not untenable to assume that drafters were aware that an explicit inclusion of an obligation to modify harmful practices undertaken in the name of religion might impact the readiness of States to ratify CEDAW. As Raday notes, the importance given to religion over culture is demonstrated in the vast numbers of reservations based on religion, the effect being the diminishing of women's rights as discussed under 3 3.[98]

Article 5 provides for the elimination of *all practices*[99] based on the idea of the inferiority of women, providing the necessary scope for the inclusion of practices undertaken in the name of religion, should culture as an umbrella term remain

[94] Raday (n 3) 678.

[95] Office of the High Commissioner for Human Rights, UN Human Rights Committee (OHCHR) "CCPR General Comment 28: Article 3 (The Equality of Rights Between Men and Women)" (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 5.

[96] OHCHR (n 95) para 5.

[97] Raday (n 3) 679.

[98] Raday (n 3) 679. See Abdulla (n 91) 103. Here the author suggests that religion carries greater weight evidenced by the language used: "We can see this in the fact that is has protection as a separate category as opposed to it simply being protected within 'freedom of thought and conscience' and that it carries more legal weight than cultural rights".

[99] Emphasis added.

unconvincing. In *APDF v Mali* (*APDF*),[100] the applicant's relied on article 5 of CEDAW and article 2(2) of the Maputo Protocol to hold Mali accountable for discrimination against women and girls in the name of religion. In response, Mali claimed that a movement by Islamic organisations against a legally compliant code, coupled with the threat of violence and social disruption, prevented the state from promulgating the code. Thus, the influence of actions taken in the name of religion by non-state actors was enough for the state to shelve the progressive and human rights-compliant code and to revisit the text for further reading with the input of Islamic organisations.[101] This second reading was, according to Mali, adopted to "garner consensus and avoid unnecessary disruptions".[102] The African Court, however, found that Mali violated its international commitments by "adopting the Family Code and maintaining therein discriminatory practices which undermine the rights of women and children".[103] While the case does not delve into whether practices in the name of religion fall within the ambit of the modification provisions, no challenges in this regard were raised in the case. It, thus, confirmed that practices in the name of religion do fall within the scope of the modification provisions and are subject to the resocialisation that this research focuses on.

While theoretical debates suggest that it is often challenging to distinguish the two and that overlaps exist, perhaps the most pertinent distinction between religion and culture is, as the SR on FoRB notes, that most religions "claim a transcendent – and in this sense 'trans-human' – origin".[104] Culture, in contrast, is marked by its fluidity, as noted under 3 6. Actions taken in the name of religion are often predicated on an unalterable, transcendent instruction, thereby acting as validation for harms emanating therefrom. On the other hand, culture emanates from humans and is inherently alterable. However, there "appears to be a correlation between certain

[100] African Court in *Association Pour Le Progrés et la Défense des droits des Femmes Maliennes (APDF) and The Institution for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380. See Chapter 7 for further discussions on this and other African cases.

[101] *APDF* (n 100) para 65.

[102] *APDF* (n 100) para 65.

[103] *APDF* (n 100) para 124.

[104] UNGA, "Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt" (29 December 2014) A/HRC/28/66 para 24. See also Abdulla (n 91). Here the author who suggests that "in many cases, this distinction between culture and religion is not so distinct, with cultural practices becoming 'religionized' and religious ideas and spaces becoming part of the culture".

cultural practices and the religious environments in which they thrive".[105] A definitive distinction between the two is seemingly challenging. Notwithstanding the above and as noted by Abdulla,

> many interactions take place between culture and religion. At a fundamental level, they are impossible to separate. Culture is a manifestation of humans seeking to express and understand what is within them and what this life means, and religion is one crucial way in which humans find this meaning.[106]

This might further explain the absence of the term religion in article 5 of CEDAW and the inclusion of religion under the umbrella term of culture. Where rights compete, as noted in greater depth under 3 6, article 5 provides the requisite superiority to gender equality over practices in the name of culture and religion, "thus creating a clear hierarchy of values".[107] Article 18(3) of the ICCPR itself provides for the limitation of FoRB where necessary and to protect the fundamental rights and freedoms of others.[108] What requires careful reflection, however, is that states

> adopt a position of 'respectful distance' towards religion or belief, rather than rejecting or embracing religion or belief. Evidence shows that FoRB rights are most frequently violated where the State is either closely entangled with religion or is hostile towards religion.[109]

The implications of States actively embracing or rejecting religion or belief is evident in *APDF* where the state chose to side with interpretations of religion to the detriment of women and girls, a choice rendered unlawful by the court.

At this juncture, it is useful to caution against suggestions that religion itself is a cause of oppression as such a stance overlooks, as the SR on FoRB suggests, the complexities of religious communities, which are not monolithic.[110] Like culture, religion can act as a source of empowerment for many women. Religion itself is not the source of oppression but rather the "interpretations of those beliefs, which are not

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[105] Raday (n 3) 676.

[106] Abdulla (n 91) 107.

[107] Raday (n 3) 679.

[108] ICCPR (n 24) art 18(3).

[109] Ahmed Shaheed, "Protecting and Promoting the Right to Freedom of Religion and Belief for All" (2019) 16 SUR International Journal on Human Rights 41, 43–44.

[110] UNGA, "Gender-based Violence and Discrimination in the Name of Religion or Belief", Report of the Special Rapporteur on Freedom of Religion or Belief (24 August 2020) UN Doc A/HRC/43/48 para 38.

protected [by FoRB] per se, and which are not necessarily held by all members of a religious community, [and] are often the source of gender-based violence and discrimination".[111]

Thus, where reference is made to religion as a source of oppression, it is more accurate to refer to such practices in the name of religion. Notwithstanding, such reference does not intend to overlook the significance of religious motives in violence and other harms. Instrumentalising religion, as noted by the SR, "denies that religious motives can play a genuine role in incidents of violence".[112] Here the SR notes that where motives are overlooked, it excludes religious leaders and communities "from taking any genuine responsibility for violence in the name of religion and, by implication, cannot contribute meaningfully towards tackling the problem".[113] A balance, therefore, is required to ensure that religion is not villainised due to the actions taken in the name of religion while ensuring that religious communities are not absolved of the responsibilities of adequately engaging with adherents to address harms committed in the name of religion.

In the final instance, insofar as the overlaps and distinctions of culture and religion are concerned, and whether the term culture is used to encompass religion, it matters little to the resocialisation and the value of its implementation within all societies. Just as cultural norms present barriers to equality, so do actions taken in the name of religion, and it is, thus, pertinent to ensure that all behaviours and actions taken that undermine women are subject to the modification obligation.

3 6 Cultural rights

3 6 1 The right to culture

The significant role that resocialisation plays with respect to restructuring society around positive conceptions of the value and non-gendered role of women in society remains the primary concern of this research. This includes resocialisation in a manner that values the role of positive culture and cultural rights in the lives of all.

[111] UNGA (n 110) para 39.

[112] UNGA (n 104) para 16.

[113] UNGA (n 104) para 17.

As mentioned above, cultural rights exist within the international human rights framework and as other rights, are universal, indivisible and interdependent.[114] This right is recognised in article 27 of the UDHR, which states that "everyone has the right freely to participate in the cultural life of the community". It is given further credence in article 15 of the ICESCR, which recognises the rights of everyone to, *inter alia*, take part in cultural life.[115] Furthermore, this right protects access and contribution to cultural life as well as the right to the creation of culture, "including through the contestation of dominant norms and values within the communities they choose to belong to as well as those of other communities".[116] This is particularly important given resocialisation obligations to modify harmful practices, an obligation which inevitably results in the creation and moulding of new cultural practices.

The right to culture includes the right to choose to participate in a particular culture.[117] Forced assimilation is strictly prohibited.[118] To force a girl child into FGM or child marriage runs counter not only to the provisions of CEDAW, but also to the provisions relating to the right to culture in the ICESCR. The same is true of normalised cultural practices within society, such as toxic masculinity, the gender pay gap, undervaluing of women and their place in society, and the like. The right to benefit from culture ought to be free from gendered inequality, including the elimination of institutional and legal obstacles that prevent women from participating in cultural life.[119] Thus, cultural rights not only serve as justification for the failure to realise the substantive rights of women, the right to cultural creation and cultivation is frequently denied to women.

The African regional expression of cultural rights is illuminating. Article 17 of the African Charter, protects the rights of individuals to take part in the cultural life of the

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[114] United Nations Committee on Economic, Social and Cultural Rights (CESCR) "General Comment 21, Right of Everyone to Take Part in Cultural Life" (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21.

[115] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI).

[116] UNGA "Report of the Independent Expert in the Field of Cultural Rights" (n 1) para 10. See also General Comment 21 (n 114) paras 7 and 12.

[117] General Comment 21 (n 114) para 49.

[118] General Comment 21 (n 114) para 49.

[119] General Comment 21 (n 114) para 25.

community.[120] Articles 22 and 29(2) make further provisions in this regard, while the Maputo Protocol, importantly, protects the rights of women to "live in a positive cultural context and to participate at all levels in the determination of cultural policies".[121] This has been further elaborated upon by the African Commission, where it limits the right to culture to those "positive African values consistent with international human rights standards, and implies an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights".[122] As noted by Tamale, the African Charter is informed by African "tradition and values".[123] Compared to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[124] the African Charter clearly stipulates the importance of preserving African cultural identity, provided those cultural norms do not undermine other rights. Entrenching the importance and value of African culture into human rights law is undoubtedly crucial to maintaining the varying African cultures that imperialism has sought to eliminate, and it is, thus, unsurprising that culture features prominently in the preamble of the African Charter. In the context of feminism on the continent, Tamale notes that the role of culture in realising feminist goals requires a "move away from

[120] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 17.

[121] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 art 17.

[122] African Commission on Human and Peoples' Rights, "Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights" (24 October 2011) <https://www.achpr.org/legalinstruments/detail?id=30> accessed 16 September 2021.

[123] Sylvia Tamale, "The Right to Culture and Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa" (2008) 16 Fem Leg Stud 47, 54.

[124] Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights, as amended) (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221. In this regard, the European Court of Human Rights has read in the rights to culture via case law brought before it. See for example *Chapman v the United Kingdom* (GC) App No 27238/95 (ECtHR, 18 January 2001), where the court notes at para 93 that "there may be said to be an emerging international consensus amongst the Contracting State of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle …, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community".

the dogmatic and rigid view of culture".[125] Indeed, positive "[c]ulture is a neglected pathway to women's justice".[126]

Given that culture is an inherently fluid notion, one that remains alive to the changing realities of any given community, culture can provide the necessary framework within which to assess which practices are harmful with a view to modifying them in accordance with international human rights standards.[127] On several occasions, the CEDAW Committee has expressed its view of culture as "a dynamic aspect of the country's life and social fabric and is subject, therefore, to change".[128] The right to culture within the African context includes respecting the rights of women to not only live in positive cultural contexts, but also to contribute to the "formulation of cultural policies at all levels".[129] This particular provision, therefore, legitimises the notion that culture is fluid and capable, undeniably requiring of change over time, as discussed above. This characteristic of culture, its inherent flexibility and fluidity, reinforces the notion that culture and women's rights, or any other rights for that matter, are not, in fact, oppositional to one another.[130] Rather culture is capable of modification in a way that recognises and upholds the rights and freedoms of individuals while also encouraging a greater acceptance of human rights norms within the community in which the culture is being modified.

3 6 2 Cultural relativism

Notwithstanding provisions protecting cultural rights, as with other rights, this right is not absolute, requiring tempering against other equally important rights. Thus, as

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[125] Tamale (n 123) 54.

[126] Tamale (n 123) 55.

[127] UNGA, "Report of the Working Group on the issue of discrimination against women in law and in practice" (2 April 2015) UN Doc A/HRC/29/40 para 11. See also Tamale (n 123) 48.

[128] UNGA, "Report of the Committee on the Elimination of Discrimination against Women", Thirtieth session (12–30 January 2004) and Thirty-first session (6–23 July 2004) UN Doc A/59/38 para 147; UN CEDAW Committee, "Concluding Comments of the Committee on the Elimination of Discrimination against Women: Mozambique" (11 June 2007) UN Doc CEDAW/C/MOZ/CO/2 para 21; UN CEDAW Committee "Concluding Observations of the Committee on the Elimination of Discrimination against Women, Madagascar" (7 November 2008) UN Doc CEDAW/C/MDG/CO/5 para 17.

[129] Maputo Protocol (n 121) art 17(2).

[130] See Celestine Nyamu Musembi, "Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol" in Anne Hellum and Heriette Sinding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law (Cambridge University Press (2013)* 183, 205.

stated in General Comment 21, the implementation of the rights to culture, as contained in article 15 of the ICESCR, must be done together with, and mindful of, the other rights contained in the ICESCR as well as other international instruments.[131] As the SR on Cultural Rights noted, not all cultural rights are protected human rights, and harmful culture, which remains a root cause of discrimination against women, does not benefit from legal protection.[132] Thus, where necessitated, cultural rights may be limited. Such limitations would occur where culture involves "negative practices, including those attributed to customs and traditions, that infringe upon other human rights".[133]

Relativising human rights on any bases, including on cultural grounds, is fundamentally flawed in that "[i]f human rights are based in human nature, on the simple fact that one is a human being, and if human nature is universal, then how can human rights be relative in any fundamental way?".[134] While uniform state practice is generally perceived as tacit, if not explicit acceptance of the validity of a human right, the state practice of disregarding rights cannot be viewed as tacit acceptance of or an argument for its invalidity; for that would render any positive cultural change impossible, leaving cultural practices stagnant and rigid.[135] It would, similarly, have implications for the strength and legitimacy of international human rights instruments. As with *jus cogens*, where state practice is a requirement for its recognition and acceptance as a superior norm, if the exercise in determining the recognition of a norm as acceptable is majority rule, thereby permitting cultural relativism where it serves the interests of the patriarchy, it leaves very little hope for the successful promotion of the rights of women. Thus, any moral claims to an overarching culture as the basis for the denial of rights are tenuous, at best. In fact, "[h]uman rights have become part of a norms cascade in the past two decades and have contributed to a significant transformation of the international system".[136] This, even though norms have been met

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[131] General Comment 21 (n 114) para 17.

[132] UNGA (n 1) para 34.

[133] General Comment 21 (n 114) para 19.

[134] Donnelly (n 79) 403.

[135] Donnelly (n 79) 405. Here the author states "[i]f a practice is nearly universal and generally perceived as obligatory, international community standards require that practice of all members of the community, and preclude the legitimate development of alternative practices".

[136] Hans Peter Schmitz and Kathryn Sikkink, "International Human Rights", in W Carlnaes, T Risse and B Simmons (eds), *Handbook of International Relations* (London: Sage 2002) 521.

with opposition by those in power and have, nonetheless, bypassed the majority consensus requirement.

An-Na'im argues that cultural values and practices should be used as a natural buffer or qualifier to the inclusion of rights in non-western states. This approach encourages the universal cultural legitimacy of human rights while avoiding the imposition of Western ideologies.[137] In his opinion, by testing and incorporating human rights norms through the framework of local cultural norms, as contended, human rights are given greater legitimacy and applicability in non-western states because it is no longer a matter of an un-critiqued, wholesale adoption of such norms in each setting.[138] Thus, "the norms of the international system should be validated in terms of the values and institutions of each culture, and also in terms of shared or similar values and institutions of all cultures".[139] In other words, international human rights law, according to An-Na'im, has no hope of legitimate acceptance and implementation within a state until that state has absorbed and understood those norms within the existing cultural framework. This is so because he considers it ill-conceived to coerce people "into implementing human rights systems they do not accept as legitimate".[140] Falk similarly suggests that,

> without mediating international human rights through the webs of cultural circumstances, it will be impossible for human rights norms and practice to take deep hold in non-Western societies except to the partial, and often distorting, degree that these societies – or, more likely, their governing elites – have been to some extent Westernized. At the same time, without cultural practices and traditions being tested against the norms of international human rights, there will be a regressive disposition toward the retention of cruel, brutal, and exploitative aspects of religious and cultural tradition.[141]

Falk further argues that standing by for states and the UN to bring about the necessary change needed to align culture and human rights is naïve given that a "cultural outlook becomes of transcending importance to the realization of human rights".[142] As Falk

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[137] An-Na'im (n 86) 171.

[138] An-Na'im (n 86) 174.

[139] An-Na'im (n 86) 174.

[140] An-Na'im (n 86) 171.

[141] Richard Falk, "Cultural Foundations for the International Protection of Human Rights" in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives* (University of Pennsylvania Press 1992) 45–46.

[142] Falk (n 141) 53.

suggests, giving cultural heritage the benefit of the doubt as catalysts of positive change facilitates and inspires meaningful attempts at such alignment.[143] This, it seems, is a means of overcoming the tension between culture and human rights, though what remains unclear is the extent to which cultural norms may act as a buffer and the potential such an approach has for relativising the rights of women. Furthermore, such an approach feeds into the fallacious stance that human rights are Western in nature, are measured against Western culture as a standard, and with which non-Western states ought to align themselves. This rhetoric does more damage than good to the discourses on universality and the rights of women, as it reinforces the notion that universality is only met when non-Western states incorporate Western standards into their communities, albeit once they have been rigorously tested against applicable cultural dictates and norms. Furthermore, it tacitly accepts cultural relativism as a tool against the emancipation of women.

Notwithstanding the above arguments, a balance between accepting international standards through cultural assimilation and the use of culture as a shield to justify women's continued oppression would pave the way for a greater acceptance of the fundamental rights and freedoms of the marginalised. This balance, though difficult to achieve, has yet to be struck, and one that will remain out of reach until the dominating patriarchal attitudes remain unchanged. On the one hand, arguments in favour of the former appear to be based on a belief in the power of cultural settings to accept international norms, including women's rights, as local norms. History has, however, demonstrated otherwise. Such an argument might suggest a reliance on the fluidity of culture to accepting human rights norms, though such fluidity will only remain as enlightened as those who determine its content, the patriarchs in power. For cultural fluidity to be truly beneficial to all, it ought to involve women in its reconceptualisation, just as envisioned in the Maputo Protocol's obligation where states are required to facilitate a shift in power to women to determine what positive culture looks like.[144]

There remains few, if any, reasons for women to accept that men will consider women's interests over their own, and to ask women to have faith in patriarchy to do so is simply unreasonable. Thus, what remains unaddressed is what happens when culture legitimises the dismissal of norms, as evidenced globally to date. An'Na'im

[143] Falk (n 141) 54.

[144] See the discussion in this regard in Chapters 6 and 7 under 6 8 and 7 2 6.

suggests that any rejection of an international law ought to be "extremely strong to justify discarding or reformulating the right in question".[145] This leaves room for the possibility for cultural contexts to reject established human rights norms, contrary to the spirit of international human rights law and the notion of the universality of all rights.

Conversely, arguments have been levied against multiculturalism altogether, suggesting that culture and women's human rights are irreconcilable. Indeed, that culture remains a threat to the advances made by feminism thus far.[146] In elucidating this point, Okin presents a number of examples of culturally derived justifications for the prevalence of violence against women and other forms of domination.[147] She states that the liberal defence to multiculturalism – that minority cultures require special rights, without which those cultures may very well become extinct – is premised on a false claim that cultural groups are internally liberal and, therefore, self-governing insofar as individual development and freedom, key features to liberalism, is concerned. This is rarely true insofar as women's rights are concerned as discrimination against women "whether severe or mild – often has very powerful cultural roots".[148] She suggests that minority rights might exacerbate discrimination, particularly where cultures steeped in patriarchal control over women continue to exert dominance. Rather, she suggests that where such patriarchal minority cultures exist, women may very well prefer its dissolution over its continued practice where such practices include harm to women and girls. This would be especially true where such dissolution lends itself to integration into alternative cultures where equality exists.[149] Alternatively, rather than live under cultural constraints, women might choose to modify the culture in a way that would enhance the equality between women and men.[150]

While this approach may appear to benefit women, and while concerns that culture hampers the emancipation of women are not entirely unfounded, a complete denial of culture and the positive role it plays in the lives of women is itself undermining its

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[145] An-Na'im (n 86) 172.

[146] Will Kymlicka, "Liberal Complacencies", in Joshua Cohen, Matthew Howard and Nussbaum, Martha C (eds) *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 32.

[147] Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 17–19.

[148] Okin (n 147) 22.

[149] Okin (n 147) 23.

[150] Okin (n 147) 23.

emancipatory potential. It presupposes that women have the choice to either eliminate an entire culture or that women have the necessary influence with which to impact cultural change. It also presupposes that women have a voice with which to begin conversations about independence from their own cultural contexts. Further, it fails to consider the impact that culture itself has on freeing women from other forms of oppression, undermining the intersectional approach advanced in Chapter 2, all while neglecting the positive aspects of culture that remain a source of identity and pride to many women. As noted by Xanthaki, "cultural rights and women's rights are interwoven in some women's experiences and cannot be separated".[151] As an example, Xanthaki states that the prevalence of, and increase in ethnocide is routinely followed by an increase in domestic violence towards indigenous women.[152]

A more balanced approach is one posited by Coomaraswamy, who suggests that, "[i]f women's rights are placed in the greater context of the struggle for equality and social justice at the global level, one cannot underestimate the importance of local traditions".[153] This approach, however, requires balancing and is premised on an acceptance of the "validity and importance of international human rights but realizes that local traditions are important for their interpretation and implementation".[154] Donnelly reiterates this point by suggesting that "it would seem inappropriate to adopt a theory that is inconsistent with the moral experience of almost all people – especially in the name of cultural sensitivity and diversity".[155] Furthermore, Xanthaki states,

> When the majority of powerful, European states have repeatedly shunned collective notions of cultural rights, which seriously affects the identity of millions of persons belonging to minority and indigenous groups, recommendations to states to support universalism must be followed by equally strong messages for collective cultural rights. Otherwise, the quest for universalism may be used as a smokescreen for the denial of cultural rights to non-state groups.[156]

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[151] Tamale (n 123) 51.

[152] Alexandra Xanthaki, "When Universalism Becomes a Bully: Revisiting the Interplay Between Cultural Rights and Women's Rights" (2019) 41 Human Rights Quarterly 701, 715.

[153] Coomaraswamy (n 19) 11–12.

[154] Coomaraswamy (n 19) 12.

[155] Jack Donnelly, "The Relative Universality of Human Rights" (2007) 29 Hum Rts Q 281, 295.

[156] Xanthaki (n 152) 711.

This tension between the rights of women and cultural rights is not new. It is a prominent feature of the discourse on the rights of women that appeals are made to culture in justifying discriminatory behaviour.

3 7 The identification of harms

In General Recommendation 25, the CEDAW Committee characterises articles 1-5 of CEDAW as the "general interpretive framework for all of the Conventions substantive articles".[157] Thus, as noted by Sepper, compliance under article 5 dictates that states identify and eliminate negative cultural patterns and stereotyping in all areas that prevent the realisation of the substantive provisions of CEDAW.[158] When considering how culture might impede the realisation of the rights of women, most will accept that harmful culture includes those on the most extreme side of the spectrum of harm, such as honour killings, FGM, child marriages and the like. What most often escapes scrutiny are those harms deemed minor in comparison and which are not routinely identified as discriminatory, despite such harms forming part of the root causes of discrimination.[159] Such dismissal often elevates one culture above another, with the effect that those behaviours and practices remain part of the dominant discourse, unquestioned and intact. Harmful culture includes current "Western" practices underlying discrimination against women and functions as "the primary impediment to women's substantive equality".[160] As Xanthaki states, "[t]hose with power appear to have no culture".[161]

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[157] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 25: Article 4, paragraph 1 of the Convention (Temporary Special Measures)" (2004) UN Doc HRI/GEN/1/Rev.7 para 6.

[158] Elizabeth Sepper, "Confronting The 'Sacred and Unchangeable': The Obligation to Modify Cultural Patterns Under The Women's Discrimination Treaty" (2008) 30 UPa JIntIL 585, 601.

[159] Examples of "minor" forms of discrimination escaping scrutiny as cultural manifestations of inequality include, amongst others, gendered stereotypes, mansplaining, men speaking over and interrupting women, the gender-pay gap and the invisibility of women in the development of solutions to global challenges.

[160] Sepper (n 158) 587. For example, a "woman who pursues her career may be perceived as 'selfish' and 'a bad mother'". Further, at 587–588, women "continue to be underpaid and grossly underrepresented in the most powerful and profitable occupations". See further below for more examples.

[161] Xanthaki (n 152) 707.

Thus, it is important to avoid singling out cultural norms and practices as egregious enough to elicit modification without considering others, simply based on where they originate from. This is especially crucial within the African context where engagement with "foreign-imported" concepts such as feminism, as discussed in Chapter 2, are already met with great circumspection. Singling out African cultural patterns and behaviours to the exclusion of others reinforces existing perceptions of an imperialist agenda, and itself creates harm. As noted by Cook, "[t]hose in the West must guard against the idea that the West is progressive on women's rights and the East is backward and barbaric".[162] Though Cook references the East, the same rings true of other non-Western states. Thus, the modification provisions contained in international law require practical application in all states globally, and for states to assume that cultural harms are confined to particular pockets of the world only, to the exclusion of their own, is not only fallacious but also serves as justification to overlook this crucial provision. Similarly, given that the focus of this research is on the potential for the African regional system to lead the way in implementing resocialisation across the continent, it is crucial that this focus not be misconstrued as an attempt to single out the harmful cultural norms and practices on the continent, to the exclusion of others.

The CEDAW Committee, together with the CRC Committee, issued a Joint General Recommendation that speaks exclusively to the obligation on states to resocialise people on the harms that continue to justify discrimination.[163] The Joint General Recommendation defines harmful practices as:

> Harmful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that such practices cause to the victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children. There is also a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status.[164]

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[162] Cook (n 87) 7.

[163] UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Rights of the Child, "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices" (8 May 2019) UN Doc CEDAW/C/GC31/Rev.1=CRC/C/GC/18/Rev.1.

[164] Joint General Recommendation 31 (n 163) para 15.

In addition to the above, the Committees cite criteria for practices to meet the harmful threshold. These include a denial of individual's dignity and integrity; violate CEDAW and the Convention on the Rights of the Child provisions;[165] constitute discrimination in that they result in negative consequences for women and children; are traditional, re-emerging or emerging practices underpinned by male dominance and gender inequality; and are imposed on women regardless of their ability to provide full, free and informed consent.[166]

While an in-depth analysis of CEDAW's modification obligation, and its role and function, is dealt with under Chapter 4, it is helpful to consider what constitutes harmful culture for the purposes of demonstrating that this obligation remains a relevant concern in every state. Considering the above criterion, harmful cultures and behaviours implicate not only egregious harms such as child marriage and FGM but also the types of cultural norms and behaviours ordinarily viewed as harmless, operating within "Western" nations. Thus, cultural barriers such as narratives that women who choose professional careers are selfish, impediments such as toxic masculine workplace culture and persistent negative stereotypes holding women back, are also harms that require modification because they are grounded in discrimination against women, they deny individual dignity and integrity, and have negative consequences on women.

Given that the prohibition of discrimination against women is not a *jus cogens* norm, as demonstrated under 3 2, women's rights are expected to compete against other rights, including cultural rights. How rights fare is ultimately a question of fact. A blanket rule, therefore, cannot exist and to suggest that the universality of women's rights translates to an elevation of those rights above others is legally inaccurate. Similarly, cultural rights, as elaborated under 3 6, may not be employed as a shield against the realisation of the rights of women. As suggested above, the role of women in determining such a balance, assuming those voices are heard, remains crucial. Xanthaki notes that "[h]uman beings flourish when they actively participate in realizing their own good, not when they are treated as mere observers of the decision-making

[165] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

[166] Joint General Recommendation 31 (n 163) para 16.

processes without involvement".[167] Thus, insofar as the determination of harms requiring elimination is concerned, caution ought to be exercised to avoid an outsider-in approach where cultural norms are identified as those emanating from specific parts of the world only, thereby demonising some cultures while implicitly categorising Western behaviour as the norm and un-cultural. Engaging with women in communities through consciousness-raising while mindful of the theoretical framework posited in Chapter 2, is crucial to accurately extracting the realities women face to ascertain the harms that require elimination and the methods employed to do so.

This practice of reverting to individuals who bear the brunt of the harms in making such determinations is simply an act of deference.[168] While it remains true that women themselves may exhibit and perpetuate harmful practices within any given community, this cannot be the reason for the imposition of solutions which remain bereft of an understanding of the complexities of any given community and of the input of the women in the community, for where there are those who perpetuate harms, there are those who resist them. Guidelines provided by the CEDAW Committee in General Recommendations and Concluding Observations, for example, also assist with determining what constitutes harm. As noted by Coomaraswamy, the cultural acceptance of norms is likely to have a greater impact on a community's internalisation of said norms, though the validity of such acceptance or denial will always be contingent upon its alignment with international human rights standards.[169]

3 8 Concluding remarks

This chapter has demonstrated that systemic patriarchy prevents women's rights from being realised. For instance, the exclusion of gendered discrimination as a *jus cogens* norm confirms that women's rights are peripheral considerations, while the freedom of states to enter reservations to treaties, despite its invalidity in the eyes of monitoring bodies, allow states to disregard core provisions relating to women's rights. These naturally impact the discourse on the universality of women's rights, as do those regarding the complexities around balancing cultural rights. Whereas rights require

[167] Xanthaki (n 152) 719.

[168] Xanthaki (n 152) 719. As noted by Xanthaki, this act of deference needs to be real. Where women's voices are encouraged, they need to be heard and acted on.

[169] Coomaraswamy (n 19) 12.

balancing, culture – a naturally fluid concept permitting and encouraging change over time – is elevated over the rights of the women in most communities.

Resocialisation encourages the nurturing of a positive culture that includes women as active participants and contributors. It has the potential to facilitate the necessary changes needed to ensure that negatively held conceptions and perceptions of women are modified in accordance with the inherent dignity and value that human rights law seeks to protect and promote. This overcomes the tensions that exist regarding the culture vs women's rights discourses and has the potential to impact the withdrawal of reservations to CEDAW. In time, as resocialisation takes hold and affronts to the rights of women begin resulting in the same levels of abhorrence as those relating to *jus cogens* norms, the prohibition on discrimination against women might succeed in being elevated to the ranks of "compelling" law.

Chapter 4 explores the international jurisprudence on resocialisation, including those emanating from both Charter and Treaty-based mechanisms. It includes an analysis of resocialisation as a right, obligation and remedy and its characterisation as a core obligation in CEDAW.

4 Resocialisation in CEDAW

4 1 Introduction

CEDAW[1] was adopted in 1979. Article 5 of CEDAW, which is the focus of this research, places women's humanity front and centre by emphasising the need to eliminate the root causes of the inequality of women. While CEDAW has been widely ratified, its inadequate implementation, together with extensive reservations entered by states, exemplifies the influence of stereotypes, assumptions, culture, and societal norms. Article 5 and its regional equivalents seek to overcome this by requiring state parties to modify harmful cultural and societal practices and attitudes, which underpin the various forms of discrimination against women.

The purpose of this chapter is to interrogate how article 5(a) is defined, interpreted, and applied within the international legal framework. By analysing the jurisprudence of the CEDAW Committee, the emphasis given to this provision becomes evident. Such an understanding has necessary implications for how state parties and women's rights defenders interact with article 5, the due regard given to the value of its implementation, and the potential it holds for a greater, accelerated elimination of the discrimination against women. It also provides an opportunity to determine how the application of resocialisation could benefit from improvement. Furthermore, the way international law interacts with article 5 has the potential to influence regional mechanisms' interactions and application, too. Thus, this chapter provides a starting point from which a comparative analysis of the application and interpretation of resocialisation is possible. It demonstrates that despite frequent appeals to article 5, it remains a provision of lesser priority relative to other provisions. This, despite the essential nature of this provision in the protection of the human rights of women. The obligations to respect, protect and fulfil gender equality remains subject to the modification of existing dominant and harmful attitudes, stereotypes, and culture. Thus, to give effect to the realisation of women's rights, resocialisation requires greater emphasis and application. A further objective of Chapter 4 is to determine the role resocialisation plays as an obligation, right and remedy in informing what measures are taken, how they are implemented and whom they target in fulfilment of article 5.

[1] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

First, Chapter 4 briefly examines the purpose of CEDAW. Thereafter, it explores the concept of transformative equality before delving into the modification obligation in greater depth. Thereafter, this chapter discusses gender stereotyping as a human rights violation, followed by a brief overview of the importance of acknowledging the need to modify the fixed parental roles that exist in society. Finally, this chapter considers the triple approach to resocialisation in the form of resocialisation as a right, remedy, and obligation while also examining the role of the due diligence obligation.

4 2 The purpose of CEDAW

Despite the guarantees of freedom and human rights contained in the UDHR[2] and the ICCPR,[3] women's rights had largely been overlooked when CEDAW was conceptualised. The UDHR, foundational to the emanation of future human rights conventions, including the CEDAW, codifies and gives credence to the inherent humanity and dignity of all. The inalienability of human rights, as contained in the UDHR, is the cornerstone of all human rights conventions and solidifies the inherent value, dignity and equality of all as the basis for peace, justice and freedom and the formation of society as one human family.[4] However, as Holtmaat notes, freedom and autonomy are features of the UDHR that remain elusive to women.[5] The pervasiveness of gendered discrimination remains well known and is what prompted the drafting of CEDAW, as enumerated in its preamble.

In 1974, the Commission on the Status of Women began drafting a binding instrument obliging states to eliminate all forms of discrimination against women.[6] It became clear to the drafters that the needs of women were not adequately considered in the UDHR and ICCPR because of their gender-neutral approach. Thus, a "convention and treaty body with an asymmetric and gender-specific approach was

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[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

[3] International Covenant on Civil and Political Rights (16 December 1966 entered into force 3 January 1976) 999 UNTS 171.

[4] UDHR (n 2) Preamble.

[5] Rikki Holtmaat, "The CEDAW: A Holistic Approach to Women's Equality and Freedom" in Anne Hellum and Henriette Sinding-Assen (eds), *Women's Human Rights: CEDAW in International Regional and National Law* (Cambridge University Press 2013) 95.

[6] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers 1993) 9.

needed".[7] The autonomy and freedom of women as human beings grounded in the UDHR, are given the necessary amplification with the drafting and ratification of CEDAW.[8] As Holtmaat notes, "the Convention is not only dedicated to the fundamental principle of human equality, but also to the idea(l)s of human autonomy, freedom and diversity".[9]

The goal of CEDAW is to eliminate all forms of discrimination based on sex and gender.[10] Therefore, identifying what constitutes discrimination is key.[11] As noted by Cook and Cusack,

> [t]he ability to eliminate a wrong is contingent on it first being "named", by which is meant that a particular experience has been identified and publicly acknowledged as a wrong in need of legal and other forms of redress and subsequent preservation. Naming is an important tool for revealing an otherwise hidden harm, explaining its implications, and labelling it as a human rights concern, grievance, or possible human rights violation.[12]

While the text itself does not contain an exhaustive list of the different forms of discrimination, it provides the necessary framework within which to ascertain when actions and behaviours constitute discrimination. Additionally, the CEDAW Committee provides guidance by way of General Recommendations and Concluding Observations in response to individual state party reports.[13]

Article 1 defines discrimination against women as:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital states, on a basis of equality of men and women, of human

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[7] Anne Hellum and Henriette Sinding Aasen (eds), "Introduction", *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013) 2.

[8] The sheer number of reservations, as discussed in Chapter 3, notwithstanding.

[9] Holtmaat (n 5) 97.

[10] Christine Chinkin and Keina Yoshida, "40 Years of the Convention on the Elimination of All Forms of Discrimination Against Women" (2020) Centre for Women, Peace and Security 4. See also UN Committee on the Elimination of Discrimination Against Women, "General Recommendation No 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28 paras 4 and 5.

[11] See Chapter 3 for more on the identification of harms.

[12] Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 39.

[13] Chinkin and Yoshida (n 10) 5.

> rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field.

At the outset, it is significant to note that article 1 forbids *all* forms of discrimination by casting a wide net in its definition of discrimination to include *any* distinction, exclusion or restriction on the basis of sex.[14] While CEDAW only refers to sex-based discrimination, the CEDAW Committee indicates in General Recommendation 28 that gender-based discrimination, crucially, also falls under the purview of the convention.[15] Holtmaat observes that within the framework of international human rights, sex discrimination has evolved to include discrimination on the ground of gender.[16] In the same vein, the UN Committee on Economic, Social and Cultural Rights has issued a General Comment which affirms that:

> [g]ender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and be recognized as autonomous, fully capable adults, to participate fully in economic, social and political development, and to make decisions concerning their circumstances and conditions.[17]

This is a significant inclusion in the context of this research since the discrimination women face is not only sex-based, but also gender-based. Socially constructed differences and characteristics, steeped in stereotypes and assumptions, similarly form the basis of discrimination as with sex-based discrimination, and the CEDAW Committee's statement in General Recommendation 28 is crucial to ensuring that the modification obligation, as well as other provisions, tackle gender-based in addition to sex-based discrimination.

Article 2 of CEDAW is considered a core obligation and "crucial to the full implementation of the Convention since it identifies the nature of general legal

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[14] Emphasis added.

[15] General Recommendation 28 (n 10) para 5.

[16] Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Intersentia Publishers 2011) 56. General Recommendation 28 (n 10) para 5 notes that gender "refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women".

[17] UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Art. 3 of the Covenant)" (11 August 2005) UN Doc E/C. 12/2005/4 para 14.

obligations of State parties".[18] The CEDAW Committee describes the legal obligations contained in article 2 as obligations to respect, protect and fulfil women's rights to non-discrimination, enumerating the obligation to respect as refraining from making laws and policies that would amount to a denial of the rights of women. The obligation to protect requires that state parties protect women from the actions of private actors, while taking steps to modify harmful behavioural and societal patterns of conduct, including those shaped by stereotypes and conceptions relating to the inferiority or superiority of either women or men. Finally, the obligation to fulfil requires that state parties take the necessary steps to ensure both *de jure* and *de facto* equality.[19] Thus, not only is CEDAW concerned with formal equality, but also with substantive equality. As further discussed under 4 3, in addition to *de jure* and *de facto* equality, the CEDAW Committee provides for a third type of equality: transformative equality. While the CEDAW Committee does not employ the term "transformative equality" directly, it nonetheless refers to social transformation within its discussions on *de facto* equality. Transformative equality, nonetheless, has its origins in article 5.[20]

4 3 Transformative equality

The CEDAW Committee's General Recommendation 25[21] confirms the nature of articles 1 to 5 as forming the general interpretative framework for all substantive articles, with three central obligations arising from a joint reading of those articles. The first dictates that there be no discrimination against women in laws (formal or *de jure* equality), and the second requires that the position of women be improved in real terms (substantive or *de facto* equality). The third of those obligations, transformative equality, which remains central to this research, involves addressing "prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions".[22] General Recommendation 25 further stipulates that what

[18] General Recommendation 28 (n 10) para 6.

[19] General Recommendation 28 (n 10) para 9.

[20] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 25: Article 4, paragraph 1 on the Convention (Temporary Special Measures)' (2004) UN Doc HRI/GEN/1/Rev.1 paras 7–10. See also Holtmaat (n 5) 111.

[21] General Recommendation 25 (n 20) para 6.

[22] General Recommendation 25 (n 20) paras 6–7.

is required of states is no less than a wholesale transformation of "opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns".[23] As alluded to earlier and noted by Naber and Holtmaat, this provision "calls for transformative equality",[24] a process that comes to fruition through the implementation of resocialisation.

In reference to transformative equality Fredman notes,

> It requires a dismantling of the private-public divide, and a reconstruction of the public world so that child-care and parenting are seen and valued as common responsibilities of both parents and the community. It aims to facilitate the full expression of women's capabilities and choices, and the full participation of women in society.[25]

The dismantling that Fredman refers to, as well as the complete overhaul of systems and structures, is contingent upon the modification of existing behavioural and cultural practices and stereotypes. Without the necessary behavioural and cultural modifications underlying beliefs in the inferiority of women, the risk that efforts at formal and substantive equality will be undermined by existing patriarchal domination looms. It remains the responsibility of state parties to CEDAW to implement resocialisation measures that speak to this and achieve such results.

While transformative equality could be seen as the process by which substantive equality comes to fruition, this research positions transformative equality as a distinct form of equality requiring, as referred to above, "changing society in such a way that those features of existing culture and of legal, social and economic structures that obstruct equality and human dignity of women are subjected to fundamental change".[26] Further, as Naber and Holtmaat argue, transformative equality finds its roots in article 5 of CEDAW. Thus, resocialisation plays a key role in transformative equality, which lends itself to the realisation of substantive equality.[27]

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[23] General Recommendation 25 (n 20) para 10.

[24] Holtmaat and Naber (n 16) 26.

[25] Sandra Fredman, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights", in Boerefijn I. *et al.* (ed.), *Temporary Special Measures: Accelerating de Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia Publishers 2003) 115.

[26] Holtmaat and Naber (n 16) 26.

[27] See also Annika Rudman, "Access to Justice and Equal Protection Before the Law", in Rudman, Musembi and Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 185.

4 4 The modification obligation

The elimination of all forms of discrimination against women requires, *inter alia,* that state parties ensure a change in the traditional role of men and women in society and in the family to achieve full equality.[28] General Recommendation 25 stipulates that states are required to adopt temporary special measures to accelerate the modification of cultural practices and stereotypes underlying discrimination against women.[29] Article 5 of CEDAW requires that state parties:

> (a) modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypes roles for men and women;
> (b) ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the best interest of the children is primordial consideration in all cases.[30]

This provision suggests an understanding that harmful social and cultural patterns of conduct, stereotypes and fixed parental roles are known to greatly hinder real equality reform.[31] As Holtmaat and Naber note, the provisions in articles 2 to 5 "contain norms to be regarded on their own merits".[32] Thus, they deserve recognition and emphasis on their own terms and not as subsumed under other provisions.

Article 5 must be read in conjunction with article 2(f), which obligates states to take all appropriate measures to modify or abolish existing laws, regulations, customs, and practices constituting discrimination against women.[33] Cook notes that,

> By Article 2(f) taken together with Article 5(a), state parties agree to reform personal status laws and to confront practices, for instance of religious institutions, that, while perhaps claiming to regard the sexes as different but equal, in effect preclude women from senior levels of authority and influence. These articles strongly reinforce the commitment to eliminate all forms of discrimination, since many pervasive forms of discrimination against

[28] CEDAW (n 1) Preamble.

[29] General Recommendation 28 (n 10) para 38.

[30] CEDAW (n 1) art 5.

[31] Holtmaat and Naber (n 16) 28.

[32] Holtmaat and Naber (n 16) 25.

[33] CEDAW (n 1) art 2(f).

> women rest not on law as such but on legally tolerated customs and practices of national institutions.[34]

Article 5 acknowledges human autonomy and women's freedom to make their own choices.[35] Accepting behaviours and stereotypes, which harm women, is akin to asserting that women lack autonomy and freedom to make choices simply because they are women. As Holtmaat notes, such attitudes and behaviours,

> [D]eny the individual woman the possibility to be a person in her own right and to utilise all of her human capacities and capabilities in order to lead a meaningful life according to her own interests and convictions. In clearly elucidating the negative consequences associated with stereotyping and harmful attitudes and practices, the magnitude of its influence on perpetuating discrimination against women becomes all the more apparent. For instance, not only are women denied their autonomy and humanity, the essence of every human, it also has implications for the "denial of the fair allocation of public goods".[36]

For instance, in its Concluding Observation of 2020 to Bulgaria, the CEDAW Committee noted the limited commitment of the state in addressing and combating gender stereotypes affecting the educational and career choices of women and girls.[37] Additionally, it noted problems relating to the promotion of the traditional family and its concomitant relegation of women to roles of motherhood and domesticity, child/forced marriages and the prevalence of sexism in the media.[38] It suggested implementing strategies that reaffirm gender equality and promote positive images of women in society, targeted at women and men at all levels of society, both in the public and private sphere.[39] Further, it recommended that the state monitor the use of misogynistic language by politicians and media. While recommendations were made

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[34] Rebecca J Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 239–240.

[35] Holtmaat and Naber (n 16) 31; Holtmaat (n 5) 96. At 98, the author states that equality and dignity "means that neither destiny nor fate, neither cultural inheritance nor religious prescriptions, but the autonomy and capacity of each human being to make one's own life plan come true is the foundational idea(l) behind human rights". Note further the UDHR wherein the primary value of the inherent human dignity of every human remains at its heart.

[36] Holtmaat (n 5) 113.

[37] Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Eighth Periodic Report of Bulgaria" (2020) UN Doc CEDAW/C/BGR/CO/8 para 21.

[38] Concluding Observations Bulgaria (n 37) para 21.

[39] Concluding Observations Bulgaria (n 37) para 22.

to train the media on gender equality and appropriate reporting, no remedies were suggested to combat misogynistic language and to enforce compliance. Finally, it recommended that cases of child marriage are investigated and that perpetrators are prosecuted and punished accordingly.[40]

Similarly, in its Concluding Observation of 2022 to Uganda, the CEDAW Committee highlights the problematic nature of persistent "patriarchal attitudes, discriminatory stereotypes and harmful practices, such as polygamy, child marriage and accusations of witchcraft".[41] In this regard, it recommends the adoption a strategy to eliminate stereotypes concerning the roles and responsibilities of both women and men in the family and to implement measures aimed at eradicating harmful and discriminatory "expressions and stereotypical portrayals of women in the media".[42] Further, the CEDAW Committee notes the continued prevalence of FGM in the country and recommends awareness-raising campaigns targeted at eradicating the practice of FGM as well as the "underlying cultural justifications".[43] Within the context of the right to education, the CEDAW Committee notes the low literacy rates of women and girls, as well as the increase in pregnancies during the pandemic, recommending awareness-raising to underscore the importance of "girls and women's education for their economic empowerment, personal development and autonomy".[44]

4 4 1 Gender stereotyping as a human rights violation

[40] Concluding Observations Bulgaria (n 37) para 22.
[41] Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Eighth and Ninth Periodic Reports of Uganda" (2022) UN Doc CEDAW/C/UGA/CO/8-9 para 21. See also Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Sixth Periodic Report of Namibia" (2022) UN Doc CEDAW/C/NAM/CO/6 para 25 where the Committee highlights its concern regarding discriminatory gender stereotypes and harmful practices and recommends awareness-raising programmes to address and prevent such. See also, Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Sixth Periodic Report of the Gambia" (2022) UN Doc CEDAW/C/GMB/CO/6 para 20(a) where the CEDAW Committee notes the importance of addressing, through education, "the cultural beliefs underlying the harmful practice of female genital mutilation". At para 26(d), the CEDAW Committees recommends resocialisation measures aimed at enhancing the understanding that the achievement of political stability and economic development of the state remains contingent upon the "full, equal, free and democratic participation of women on an equal basis with men".
[42] Concluding Observations Uganda (n 41) para 22(b).
[43] Concluding Observations Uganda (n 41) para 24(a).
[44] Concluding Observations Uganda (n 41) para 38(c).

Holtmaat and Naber describe article 5 as the obligation to, on the one hand, eliminate gender stereotyping and, on the other, eliminate fixed parental gender roles in pursuit of *de facto* equality.[45] This and the following section elaborate on these in turn.

Barriers to gender equality come in many forms, including unquestioned and perpetuated stereotyping. A stereotype is a "generalised view or preconception about attributes or characteristics that are or ought to be possessed by or the roles that are or should be performed by members of a particular social group".[46] Stereotyping refers to the application of those beliefs in practice. Article 5 provides for the modification of patterns of conduct to eliminate discrimination based on the inferiority of women or on stereotyped roles for women and men, while article 10(c) refers to the elimination of "any stereotyped concept of the role of men and women at all levels and in all forms of education".[47] In discussing harmful practices requiring modification in terms of article 5, the CEDAW and CRC Committees, in their Joint General Recommendation, note the multidimensional nature of harmful practices, which includes stereotyped sex and gendered roles.[48]

The CEDAW Committee notes that stereotyping "distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts".[49] It

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[45] Holtmaat and Naber (n 16) 29.

[46] United Nations Office of the High Commissioner of Human Rights (OHCHR), "Gender Stereotyping as a Human Rights Violation" (October 2013) <https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx> accessed 16 October 2021, 7 citing Cook and Cusack (n 12).

[47] CEDAW (n 1) art 10(c). As noted in chapter 2 under 2 2 1, the Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 art 8, is the only other international law treaty that speaks to obligations to modify harmful stereotypes. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965) UNGA Res 2106 (XX) article 7, also noted in chapter 2 under 2 2 1 refers to education for the purposes of eliminating racial discrimination.

[48] Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the UN Committee on the Rights of the Child (CRC Committee), "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices" (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 para 17.

[49] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 33 on Women's Access to Justice" (3 August 2015) UN Doc CEDAW/C/GC/33 para 26. See also UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 35 on

impacts the lives of women in several ways, *inter alia*, in relation to access to justice generally and specifically on the impartiality of legal and quasi-legal procedures and on the probative value given to women's voices as witnesses. As an example, in a recent rape case in South Africa, acting judge Ngcukaitobi (Gqamana J concurring) held that while the complainant had given consent for sexual acts prior to intercourse, and despite expressing that she did not consent to penetrative intercourse, consent was tacit due to the fact that no threats were used to coerce the complainant and that the complainant was an active participant in the events leading up to the rape.[50] By the court's own admission, she "mentioned that she [did] not want to have sex with the Appellant as he was undressing her".[51] The fact that the complainant did not repeat her desire not to engage in penetrative sex after other sexual acts and that no force was used was, according to the court, implicit consent. This case demonstrates the stereotype that consent to one aspect of a sexual encounter is consent to sexual intercourse, that consent cannot be revoked, and that rape is characterised only by force and coercion. Aside from the error in law, this case demonstrates the pervasiveness of stereotypes in societal functioning.

Stereotyping is present in every facet of societal functioning, for example, in relation to women's participation in public life, where the CEDAW Committee notes that stereotypes relating to the responsibility of women for childcare and those of a general discriminatory nature present barriers to women's participation in political and public life.[52] In its Joint General Recommendation, the CEDAW and CRC Committees note the prevalence of crimes committed in the name of so-called honour, which heavily relies on the stereotyped gender roles and expectations of girls and women in communities where such occur.[53] Stereotyping hinders discussions on the value of women and girls by focusing exclusively on societal expectations of women and girls

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Gender-based Violence against Women, Updating General Recommendation No 19" (26 July 2017) UN Doc CEDAW/C/GC/35.

[50] *Loyiso Coko v S* 2022 (1) SACR 24 (ECG) para 91.

[51] *Loyiso Coko* (n 50) para 94.

[52] UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Sixth Periodic Report of the Republic of Moldova" (10 March 2020) UN Doc CEDAW/C/MDA/CO/6 para 26. See also UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Ninth Periodic Report of Austria" (30 July 2019) UN Doc CEDAW/C/AUT/CO.9 para 20.

[53] Joint General Recommendation 31 (n 48) para 29.

rather than criminal acts.[54] Another such example is the case of women journalists who remain targets of violence and who are "disproportionately targeted by gender-based violence and sexual harassment, both within the workplace and online".[55] Harmful conceptions of women and stereotypes play a dominant role in such violence and harassment because, as the SR on Violence against Women notes, women journalists are "expected to fit into stereotyped roles and sexualised images of women".[56]

Gender-based violence is another area that is laden with stereotypes, further entrenching existing inequalities.[57] General Recommendation 19 on violence against women notes that states should take "[p]reventative measures, including public information and education programmes to change attitudes concerning the roles and status of men and women".[58] General Recommendation 35, which updates General Recommendation 19, similarly notes that states ought to "address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes".[59]

It bears brief mention that stereotypes can take differing forms, often disguised as a compliment on the surface, though inherently sexist and harmful. In many instances, the approach taken in response to women's rights is a protectionist one, where women are deprived of equal opportunities and rights based on their perceived vulnerability. Termed benevolent sexism, the notions that women are in need of the care and protection of men, that women possess superior domestic skills and qualities to men, and the role that women play in the sexual and romantic gratification of men as praiseworthy and womanly characteristics, are thus founded on the same notions of

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[54] Joint General Recommendation 31 (n 48) para 29.

[55] UNGA, "Combating Violence against Women Journalists: Report of the Special Rapporteur on Violence against Women, its causes and consequences" (6 May 2020) UN Doc A/HRC/44/52 para 17.

[56] Report of the Special Rapporteur on Violence against Women (n 55) para 18.

[57] See for example, Communication 2/2003, *A.T. v Hungary* CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005); Communication 5/2005, *Şahide Goekce v Austria* CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007); Communication 6/2005, *Fatma Yildirim v Austria* CEDAW Committee (1 October 2007) UN Doc CEDAW/C/39/D/6/2005 (2007).

[58] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 19 on Violence against Women" in "Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies" (29 July 1994) UN Doc HRI/Gen/1/Rev.1. para 24(t).

[59] General Recommendation 35 (n 49) para 24.

the inferiority of women, though framed in a way that often escapes scrutiny.[60] Compared to those termed hostile, benevolent sexism is insidious and is often used as a justification for domestic violence.[61] As noted by Barreto and Ellemers, "benevolent sexism contributes to the maintenance of social inequalities because it passes unnoticed as a form of prejudice".[62]

A UN study showed that existing international law mechanisms are themselves unclear about the terms "stereotype" and "stereotyping", which compounds the challenges of addressing and combating the prevalence of stereotypes.[63] This is perhaps unsurprising given that no definition of either term exists in international law.[64] For instance, the study suggests that the CEDAW Committee's reference to a particular stereotype in *L.C. v Peru (L.C.)*[65] – "that protection of the foetus should prevail over the health of the mother"[66] – is, in fact, an underlying assumption underpinned by the stereotype that "women should be mothers".[67] This lack of clarity and uniformity naturally has implications for the way in which regional mechanisms interact with this concept too.

Stereotypes bear many consequences, and the ability to identify a harm directly correlates with the harm's ability to attach blame to the wrongdoer and request remedies.[68] Such harms resulting from stereotyping include the denial of benefits to women, the imposition of burdens and the degradation and marginalisation of women.[69]

4 4 2 Fixed parental gender roles

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[60] Manuela Barreto and Naomi Ellemers, "The Burden of Benevolent Sexism: How It Contributes to the Maintenance of Gender Inequalities" (2005) 35 Eur J Soc Psychol 633, 634.

[61] Barreto and Ellemers (n 60) 634.

[62] Barreto and Ellemers (n 60) 634.

[63] OHCHR (n 46) 60.

[64] OHCHR (n 46) 61.

[65] Communication 22/2009, *L.C. v Peru* CEDAW Committee (17 October 2011) UN Doc CEDAW/C/50/D/22/2009 (2011) para 8.15.

[66] *L.C.* (n 65) para 8.15.

[67] OHCHR (n 46) 60.

[68] Note under 4 5 the discussion regarding the triple approach to resocialisation as an obligation, right and remedy and the due diligence obligation.

[69] Cook and Cusack (n 12) 61–70.

Article 5(b) enjoins state parties to engage in educational initiatives that advance notions of equality within the family, which involves viewing maternity as a key social function that incurs equal responsibility in women and men in relation to the upbringing and development of children. This subsection is premised on the understanding that society overwhelmingly regards women's primary function as reproductive in nature. This singular view has, for instance, resulted in male entitlement over the bodies of women, expressed through oppressive pushbacks against sexual and reproductive health rights. As Holtmaat notes, this perceived inferiority of women is rooted in her societally constructed role as mother, caregiver, nurturer, sexual satisfier, and subordinate to men.[70]

The *Travaux Préparatoires* of CEDAW provides insights into the reasoning and negotiations that went into the final version of article 5(b). While initial drafts referred to "motherhood as a social function", the final version incorporated "maternity as a social function" instead. As Morocco noted, motherhood is not a social function as much as maternity is, while Mali, the Syrian Arab Republic, the United States and the USSR together submitted a version of the text recognising maternity as a social function.[71] Given that the provision in question requires a re-education of society around fixed parental roles, reference to maternity as a social function rather than motherhood as a social function ensures that the fixed roles that the provision aims at altering are not further entrenched.

4 5 The triple approach to resocialisation

Resocialisation acts not only as an obligation on state parties but also as a right of women. It may also be utilised as a remedy to redress the harm caused by the failure of a state to act in accordance with its obligations. This triple approach to resocialisation, as discussed below and traced through the decisions and recommendations of the CEDAW Committee, extends the reach of resocialisation beyond only obligations on the state.

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[70] Rickki Holtmaat, "Article 5" in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All forms of Discrimination against Women: A Commentary* (Oxford University Press 2011) 147–148.

[71] Rehof (n 6) 86.

Analysing its General Recommendations and decisions on individual complaints provides insight into the extent to which the CEDAW Committee views socio-cultural assumptions and behaviours, stereotyping and fixed parental gender roles as significant barriers to the realisation of the rights of women. The foundational aims of article 5 are repeated in many of their decisions and recommendations, not in passing but as crucial elements to the acceleration of the realisation of women's rights. Considering how prominent the CEDAW Committee's view is on article 5, it remains surprising that this provision is given comparatively limited attention as compared to other CEDAW provisions.[72]

Of the many decisions by the CEDAW Committee under the Optional Protocol, 30 admissible complaints allege, amongst others, a violation of article 5. An analysis of these decisions demonstrates the import attached to resocialisation, both in terms of the emphasis the CEDAW Committee places on article 5, and its consideration of resocialisation as an obligation, right and remedy.

4 5 1 Resocialisation as an obligation

4 5 1 1 Obligation to respect

As noted above, article 2 of CEDAW enjoins states to respect, protect and fulfil women's rights. This is enumerated in greater detail in General Recommendation 28, where the CEDAW Committee notes that the obligation to respect entails states refraining from making laws, policies, regulations, programmes, and the like, which would directly or indirectly result in the denial of rights.[73] Further, the CEDAW Committee clarifies this obligation to respect as abstaining "from performing, sponsoring or condoning any practice, policy or measure that violates the Convention".[74]

States are to refrain from promulgating laws, policies, practices, and the like that seek to prioritise cultural rights over and to the detriment of women's rights, as well as those that entrench, directly or indirectly, harmful attitudes, assumptions, practices, and gender stereotypes relating to the value and role of women in society. For

[72] Simone Cusack, "The CEDAW as a Legal Framework for Transnational Discourses on Gender Stereotyping", *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013) 125.

[73] General Recommendation 28 (n 10) para 9.

[74] General Recommendation 28 (n 10) para 37(a).

instance, in *Vertido v Philippines* (*Vertido)*,[75] the CEDAW Committee addressed the state's obligation to refrain from entrenching stereotyped norms regarding the way women ought to behave in situations of rape. It notes that insofar as the right to a fair trial is concerned,

> [T]he judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence in general.[76]

This was the first time the CEDAW Committee expressed concern about the influence of stereotypes on the judiciary's perception and expectations of victims of gender-based violence. This case turns on the detrimental impact that stereotyping had on the author's right to a fair trial, in direct contravention of the state's obligation to respect the rights of women. As noted by the SR on Violence against Women, this case "concluded that myths and stereotypes regarding rape had affected the victims right to a fair trial".[77] In *V.K. v Bulgaria (V.K.)*[78] *Carreño v Spain* (*Carreño*)[79] and *R.P.B. v Philippines (R.P.B.)*,[80] the CEDAW Committee drives this point even further by stating that state responsibility could be triggered where judicial authorities based their decisions on the inflexible standards placed on women's behaviour.

In 2015, the CEDAW Committee issued General Recommendation 33 on women's access to justice, stating that judges often "adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not

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[75] Communication 18/2008, *K.T. Vertido v the Philippines* CEDAW Committee (22 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010).

[76] *Vertido* (n 75) para 8.4.

[77] UNGA, "Rape as a Grave, Systematic and Widespread Human Rights Violation, a Crime and a Manifestation of Gender-based violence against Women and Girls, and its Prevention: report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović" (19 April 2021) UN Doc A/HRC/47/46 para 33.

[78] Communication 20/2008, *V.K. v Bulgaria* CEDAW Committee (21 September 2011) UN Doc CEDAW/C/49/D/20/2008 (2011) para 9.11.

[79] Communication 47/2012, *Angela González Carreño v Spain* CEDAW Committee (15 August 2014) UN Doc CEDAW/C/58/D/47/2012 (2014) para 9.7.

[80] Communication 34/2011, *R.P.B. v The Philippines Communication* CEDAW Committee (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014) para 8.8.

conform to those stereotypes".[81] The CEDAW Committee recommends that state parties implement resocialisation to eliminate gender stereotyping and ensure that capacity-building programmes specifically address these inflexible standards imposed on women by judges and prosecutors.[82] The inflexible judicial standards pronounced upon by the CEDAW Committee in *Vertido* is expanded in General Recommendation 33 to include standards placed on women in relation to any and all type of behaviour exhibited in response to any form of gendered discrimination.

In further expanding its reach, the CEDAW Committee in 2017 reiterated its position regarding inflexible standards, only this time in relation to "preconceived notions of what constitutes domestic or gender-based violence, as noted in general recommendation No. 33".[83] This expands the scope of this theme to not only include inferences drawn on whether discrimination occurred based on the behaviour of women in the circumstances but also include biased conceptions of what the judiciary might categorise as acts of domestic violence or gender-based violence generally. This position is reaffirmed in subsequent cases of the CEDAW Committee.[84]

The development of the CEDAW Committee's jurisprudence in this regard is well noted over the course of time. Where the state, through its judiciary, encounters laws that reinforce stereotypes, they are duty bound, according to the obligation to respect, to not only refrain from reinforcing said stereotypes but to also invalidate and repeal

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[81] General Recommendation 35 (n 49) para 26. This General Recommendation is cited in Communication 103/2016, *J.I. v Finland* CEDAW Committee (25 April 2018) UN Doc CEDAW/C/69/D/103/2016 (2016) para 8.6.

[82] *J.I.* (n 81) para 29(b)(ii).

[83] Communication 58/2013, *L.R. v Moldova* CEDAW Committee (21 March 2017) UN Doc CEDAW/C/66/D/58/2013 (2013) para 13.6. See also Communication 91/2015, *O.G. v Russian Federation* CEDAW Committee (20 November 2017) UN Doc CEDAW/C/68/D/91/2015 (2015) para 7.5.

[84] See Communication 88/2015, *X v Timor Leste* CEDAW Committee (25 April 2018) UN Doc CEDAW/C/69/D/88/2015 (2015) para 6.6; *J.I.* (n 81) para 6.15; Communication 65/2014, *S.T. v Russia* CEDAW Committee (8 April 2019) UN Doc CEDAW/C/72/D/65/2014 (2014), para 9.5; Communication 99/2016, *S.L. v Bulgaria* CEDAW Committee (10 September 2019) UN Doc CEDAW/C/73/D/99/2016 (2016) para 7.5; Communication 100/2016, *X and Y v Russia* (9 August 2019) UN Doc CEDAW/C/73/D/100/2016 (2016) para 9.9; Communication 119/2017, *ON & DP v Russian Federation* CEDAWW Committee (3 April 2020) UN Doc CEDAW/C/75/D/119/2017 (2017) para 7.6.

the offending laws. In *E.S. and S.C. v Tanzania (E.S.)*,[85] the CEDAW Committee notes this obligation and emphasises the duty of states to comply even where multiple legal systems exist.[86] Here the authors were subject to discriminatory inheritance laws codified within customary law, depriving them of the right to administer their husbands' estates and to inherit any property. The CEDAW Committee implicates the trial court for its failure to question the offending provisions, justified on the basis that "it was impossible to effect customary change by judicial pronouncement and that doing so would be opening a Pandora's Box".[87] The inaction and unwillingness of the state by way of its judiciary to repeal legal restraints on the inheritance rights of women, as well as the condoning of societally accepted norms and stereotypes depriving women of inheritance on equal terms, led to a violation of the obligation to respect, and in particular a violation of article 5.

In *S.F.M v Spain (S.F.M)*,[88] a landmark case on obstetric violence where the author was forced to undergo unnecessary medical intervention causing physical and mental trauma, the author notes that the discrimination experienced was entirely based on the perpetuation of stereotypes aimed to stigmatise women's bodies and women's traditional roles in society regarding sexuality and reproduction. Such perpetuation of stereotypes is seen in both the behaviour and actions of the medical personnel and in the administration of justice, where the trial court upheld the view of the relevant health professionals that women should follow the order of doctors because they are incapable of making their own decisions.[89] In this case, the judge relied solely on the report of the head of the hospital's obstetrics and gynaecology service, the individual who "had a direct interest in the outcome of the dispute without taking into account the absence of documents related to informed consent".[90] By ignoring the author's account and those of three expert witnesses attesting to the unnecessary interventions

[85] Communication 48/ 2013, *E.S. and S.C. v United Republic of Tanzania* CEDAW Committee UN Doc CEDAW/C/60/D/48/2013 (2013).

[86] *E.S.* (n 85) para 7.2.

[87] *E.S.* (n 85) para 7.7.

[88] Communication 138/2018, *S.F.M. v Spain* CEDAW Committee (28 February 2020) UN Doc CEDAW/C/75/D/138/2018.

[89] *S.F.M.* (n 88) para 3.7.

[90] *S.F.M.* (n 88) para 3.7.

the author experienced, the judge presented "a gender-stereotyped depiction of women as hysterical, mad and prone to exaggeration and whining".[91]

The perpetuation of stereotypes and harmful norms, as demonstrated in this case, did not end with the judge's ill-conceived dismissal of the case. The trial court judge showed a great deal of empathy towards the husband of the author, who had, because of the physical and mental trauma the author experience, been deprived of sexual relations with the author for two years.[92] Despite the obligation on the state, the court deemed it appropriate to suggest that the harm caused by the husband's deprivation was more significant than that of the authors, a suggestion that reinforces notions of women as passive sexual objects for the benefit of men. The CEDAW Committee held that the health officials were under an obligation to refrain from reproducing stereotypes and that the administrative and judicial authorities applied stereotypical views in direct contravention of CEDAW.

4 5 1 2 Obligation to fulfil

The obligation to fulfil requires implementing steps, including temporary special measures where appropriate, to ensure both *de jure* and *de facto* equality.[93] The CEDAW Committee notes that states,

> fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.[94]

Within the framework of resocialisation, this obligation to fulfil requires the adoption of measures guaranteeing women's freedom from discrimination based on harmful social and cultural norms, attitudes, and practices, including stereotypes underpinning gendered discrimination.[95] It requires that states take steps to implement resocialisation methods aimed at eliminating the root cause of gendered discrimination. In its Concluding Observation on the Russian Federation, the CEDAW

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[91] *S.F.M.* (n 88) para 3.7.

[92] *S.F.M.* (n 88) para 3.8.

[93] General Recommendation 28 (n 10) para 9.

[94] General Recommendation 28 (n 10) para 9.

[95] Cusack (n 72) 130–131.

Committee noted that such methods include training judges and law enforcement agencies on the need to eliminate gender stereotypes.[96] In a similar vein, in the Concluding Observation on South Africa the Committee suggested that they also include the provision of gender-sensitive investigation and interrogation, as well as the adoption and implementation of comprehensive strategies to eliminate culturally specific harmful practices such as virginity testing, *ukuthwala*, FGM, and child and forced marriages in South Africa.[97] The CEDAW Committee's Concluding Observations to Indonesia notes measures such as the adoption of comprehensive strategies targeting all levels of society, including religious leaders, to eliminate stereotypes and patriarchal attitudes about the role and value of women in society.[98] In its Concluding Observations on Egypt, measures suggested included reviewing school curricula and developing public awareness on eliminating harmful stereotypes.[99] The CEDAW Committee's Concluding Observations on the Republic of Moldova notes measures such as capacity building and training for the media and public officials on the use of gender-sensitive language and capacity building for teachers to ensure that they do not perpetuate or tolerate harmful stereotypes.[100]

In *Belousova v Kazakhstan (Belousova)*,[101] the CEDAW Committee notes that the realisation of women's rights is contingent upon states taking steps to eliminate direct and indirect forms of discrimination with a view to improving the *de facto* position of women.[102] As the CEDAW Committee emphasises, this includes a duty to "modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root

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[96] See for example, UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the ninth periodic report of the Russian Federation" UN Doc CEDAW/C/RUS/CO/9 (2021) para 23.

[97] UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Fifth Periodic Report of South Africa" UN Doc CEDAW/C/ZAF/CO/5 (2021) para 10 and 34(c).

[98] UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Eighth Periodic report of Indonesia" UN Doc CEDAW/C/IND/CO/8 (2021) para 22.

[99] UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Combined Eighth to Tenth Periodic Reports of Egypt" UN Doc CEDAW/C/EGY/CO/8–10 (2021) para 22(b).

[100] Concluding Observations Moldova (n 52) para 21(d).

[101] Communication 45/2012, *Belousova v Kazakhstan* CEDAW Committee (25 August 2015) UN Doc CEDAW/C/61/D/45/2012.

[102] *Belousova* (n 101) para 10.10. See also *Vertido* (n 75) para 8.4.

cause and a consequence of discrimination against women".[103] This is was furthermore confirmed in *O.G. v Russian Federation (O.G.)*.[104] As the CEDAW Committee also notes in *S.T. v Russian Federation (S.T.)*,[105] *S.L. v Bulgaria (S.L.)*,[106] *J.I. v Finland (J.I.)*,[107] *Jallow v Bulgaria (Jallow)*,[108] *Goekce v Austria (Goekce)*,[109] *Yildirim v Austria (Yildirim)*,[110] and *A.T. v Hungary (A.T.)*,[111] a direct link exists between traditional attitudes which view women as subordinate to men and incidences of domestic violence, demonstrating the value and import of resocialisation as necessary to improve the *de facto* position of women.[112]

4 5 1 3 Obligation to protect

The obligation to protect calls on states to protect women from discrimination by private actors and to take steps to resocialise them.[113] General Recommendation 28 expands on this, stating that a state party is required to take "steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations".[114] Thus,

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[103] *Belousova* (n 101) para 10.10.

[104] *O.G.* (n 83) para 7.2.

[105] *S.T.* (n 84).

[106] *S.L.* (n 84).

[107] *J.I.* (n 81). At para 6.9, the Committee notes the author's assertion that "[t]he position of the State party in this matter, strongly opposing the rights of a natural mother who is a victim of domestic violence and trying to protect her son, clearly reflects the traditional attitudes in Finland that discriminate heavily against women, and whereby domestic violence is not recognized as a problem and the rights of domestic violence victims are not protected".

[108] Communication 32/2011, *Jallow v Bulgaria* CEDAW Committee (23 July 2012) UN Doc CEDAW/XC/52/D/32/2011 (2011).

[109] *Goekce* (n 57) para 12.2.

[110] *Yildirim* (n 57) para 12.2.

[111] *A.T.* (n 57) para 9.4.

[112] Notwithstanding this, however, the Committee takes the view in both *Goekce* and *Yildirim* that despite such linkages, "the submissions of the authors of the communication and the State party do not warrant further findings". See *Goekce* (n 57) para 12.2.

[113] General Recommendation 28 (n 10) para 9.

[114] General Recommendation 28 (n 10) para 37(b).

the obligation to protect includes the due diligence obligation, discussed under 4 5 1 4 below.[115]

In relation to women's access to justice, the CEDAW Committee stresses the importance of states ensuring that decisions are not grounded in gender myths and misconceptions, thereby preventing a failure to protect women. For instance, in *Vertido*, the author notes several stereotypes impeding access to justice.[116] This case and the way the CEDAW Committee dealt with stereotypes formed part of a seminal report issued by the SR on Violence against Women.[117] Here, the SR recommends repealing laws that directly or indirectly contribute to stereotypes in the prosecution of rape, and recommends resocialisation aimed at the judiciary and law enforcement professionals.[118]

In a subsequent case, *R.P.B.*,[119] the CEDAW Committee notes allegations of systemic discrimination against victims of sexual violence by the state.[120] Stereotypes and myths impact the credibility and probative value of the voice of women, imposing evidentiary burdens on women in rape trials.[121] As the CEDAW Committee concludes:

> [t]he credibility of the complainant in a rape case is mostly based on a standard of behavior that courts believe a rape victim should exhibit. Those who satisfy the stereotypes are considered credible, while the others are met with suspicion and disbelief, leading to the acquittal of the accused.[122]

The CEDAW Committee draws attention to the unreasonable behavioural expectations placed on the author, a standard she was unable to meet, and which

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[115] Andrew C Byrnes, Maria Herminia Graterol and Renee Chartres, "State Obligation and the Convention on the Elimination of All Forms of Discrimination against Women" [2007] SSRN Electronic Journal 52 <http://www.ssrn.com/abstract=1001553> accessed 8 February 2022.

[116] *Vertido* (n 75) paras 3.5.1–3.5.7. See also *S.F.M.* (n 88) para 3.9 and *A.T.* (n 57), where the author states at para 6.2 that "[r]esistance to change is said to be strong and decision–makers allegedly still do not fully understand why they should interfere in what they consider to be the private affairs of families".

[117] UNGA (n 77).

[118] UNGA (n 77) paras 114 and 116.

[119] *R.P.B.* (n 80).

[120] *R.P.B.* (n 80) para 3.3.

[121] *R.P.B.* (n 80) para 3.3. See also Communication 24/2009, *X & Y v Georgia* CEDAW Committee (25 August 2015) UN Doc CEDAW/C/61/D/24/2009 (2009) para 8.7.

[122] *R.P.B.* (n 80) para 3.3.

ultimately led the court to dismiss her complaint. It, thus, confirms that the prevalence of gender stereotyping utilised by the trial court amounts to sex and gender-based discrimination and a failure by the state to protect the author.[123]

In *Carreño*, the CEDAW Committee notes that stereotypes and myths formed the basis upon which the authorities questioned the credibility of women victims of domestic violence, in particular the author and her daughter in this case.[124] This is similarly noted in *X & Y v Georgia (X & Y).*[125] In *S.V.P v Bulgaria (S.V.P.)*,[126] the author alleged that,

> the whole attitude of the State towards the severe violations of women's rights that sexual violence represents, is conditioned by the deep ideological stereotyping of sexual acts as acts of "debauchery", as crimes against honour. That stereotyping approach also marks the mild punishment for the perpetrator.[127]

The capacity and willingness of officials to adequately gauge the severity of any given situation and to respond accordingly is similarly implicated insofar as access to justice is concerned.[128] In a more recent complaint, *L.R. v Moldova (L.R.)*, the author notes that women face unresponsive attitudes from law enforcement and that prosecutors often choose not to prosecute cases of domestic violence against women "unless they involve medium to severe injuries, attempted murder or murder".[129] Indeed, as highlighted in *V.K.*, courts often overlook other dynamics at play. Such include the physical strength of men over women, the power relations between an employer and

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[123] *R.P.B.* (n 80) para 8.9. See also *Vertido* (n 75) para 2.9 where to author notes the trial courts position that rape was implausible given that the author did not escape despite having many opportunities to do so. It states further that "[g]uided by a Supreme Court ruling, the Court concluded that should the author really have fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties".

[124] *Carreño* (n 79) para 3.10. See also *Jallow* (n 108) para 8.6 where the Committee "observes that the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally effects women considerably more than men".

[125] *X & Y* (n 121) para 8.7. See also *X v Timor Leste* (n 84) para 2.18.

[126] Communication 31/2011, *S.V.P. v Bulgaria* CEDAW Committee (27 November 2012) UN Doc CEDAW/C/53/D/31/2011 (2011).

[127] *S.V.P.* (n 126) para 3.7.

[128] *Carreño* (n 79) paras 3.5 and 3.8 and *Yildirim* (n 57) para 3.6.

[129] *L.R.* (n 83) para 3.2.

employee, the impact of sexual violence on the victim and societal and cultural influences, all of which act as obstacles to women's rights to a fair trial.[130] In *X & Y,* the CEDAW Committee expresses, more generally, that obstacles preventing women from a right of access to justice are violations of rights as contained in CEDAW, particularly those such as "gender stereotyping, discriminatory law, procedural or evidentiary requirements and practices".[131]

The right to a fair trial is similarly impeded where specialised forces fail to undertake investigations and preliminary inquiries. This was noted in *Reyes and Morales v Mexico (Reyes)*,[132] where the authors alleged violations of CEDAW insofar as the investigation into the death of their daughter was concerned. The authors alleged "the prevalence of a patriarchal culture among judicial staff, who stigmatized victims by repeatedly discrediting their statements, even going as far as to accuse women of having provoked the violence which they have suffered and which they may have reported".[133] As confirmed in *J.I.*, complicity in undermining the rights of women is not confined to judges and adjudicators alone. Other actors in the justice system, such as prosecutors and law enforcement officials also play a role allowing "stereotypes to influence investigations and trials".[134] As the CEDAW Committee concludes, stereotyping can impact both the investigation and trial, altering the outcome.

Two further decisions illustrate the impact on women where states fail to protect them from wrongful stereotypes. *R.K.B. v Turkey (R.K.B.)*[135] deals with the termination of an employment contract without reasons. The employer claimed to have terminated the contract on the grounds that the author engaged in behaviour with members of the opposite sex beyond the bounds of those deemed appropriate, despite repeated

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[130] *V.K.* (n 78) para 3.7.

[131] *X & Y* (n 121) para 3.2. At 3.7 the author notes that "a police officer openly voiced a stereotypical opinion in court … to the effect that the office was aware that Y's husband was a high earning businessman who was buying apartments and cars while the author sat at home. On 20 May 2015, the officer stated in court that it was unclear why the author did not go to stay with her parents".

[132] Communication 75/2014, *Reyes and Morales v Mexico* CEDAW Committee (29 August 2017) UN Doc CEDAW/C/67/D/75/2014 (2014).

[133] *Reyes* (n 132) para 2.9.

[134] *J.I.* (n 81) para 8.6, quoting the CEDAW Committee General Recommendation 33 (n 49) para 27. See also *X v Timor Leste* (n 84) para 6.6, which also draws on General Recommendation 33 (n 49).

[135] Communication 28/2010, *R.K.B. v Turkey* CEDAW Committee (13 April 2012) UN Doc CEDAW/C/51/D/28/2010 (2010).

verbal warnings to discontinue such “offence against morality”.[136] The author’s claim related to the court overlooking the illegitimate actions of male employees who engaged in similar behaviour, including engaging in extra-marital affairs, without consequences.[137] Thus, the court allowed stereotypes to influence the imposition of a double standard as between female and male employees, failing to protect the author against wrongful stereotypes that not only led to the termination of her employment but to violating her access to justice through judicial proceedings. In *Belousova* the CEDAW Committee was tasked with determining whether the state had taken all appropriate steps to ensure effective protection of the author’s rights in terms of article 5, as it failed to take appropriate action to eliminate discriminatory treatment in the workplace.[138] Specifically, it notes the lack of legal provisions in the state prohibiting sexual harassment in the workplace, which directly violates the obligation to protect the rights of women through the modification of harmful practices and stereotypes, in this case through the promulgation of legislative mandates to that effect.[139]

4 5 1 4 The due diligence obligation

Incorporated into the obligation to protect is the due diligence obligation. Human rights law is concerned with the vertical relationship between state and individuals within its jurisdiction. Under CEDAW, state parties are duty bound to protect, respect, and fulfil the rights contained therein for the benefit of women and girls. The due diligence obligation, however, takes this duty and its associated state responsibility one step further by implicating the state for the actions of private, non-state actors who have violated women’s rights. As Holtmaat and Naber note, this stems from a state’s international law obligation to protect individuals from human rights violations perpetrated by others.[140] The responsibility of the state is triggered when it fails to fulfil

[136] *R.K.B.* (n 135) para 2.3.

[137] *R.K.B.* (n 135) para 3.3.

[138] *Belousova* (n 101) para 3.2.

[139] *Belousova* (n 101) para 9.4.

[140] Holtmaat and Naber (n 16) 16.

its due diligence obligations. This is important for providing women redress for harms incurred and preventing similar failures in the future.[141]

The due diligence principle was established in *Velásquez Rodriques v Honduras* (*Velásquez)*.[142] In *Velásquez* the IACtHR held that states could be held responsible for failures in exercising due diligence to prevent and respond to violations occurring at the hands of non-state actors.[143] As Chirwa notes, "[d]ue diligence requires positive steps on the part of the state to prevent the violations, control and regulate private actors, investigate and, where applicable, prosecute and punish occurrences of violations, and provide effective remedies to victims".[144] In the report of the former SR on Violence against Women, Yakin Ertürk establishes that the,

> due diligence standard has been crucial in developing State responsibility for violence perpetrated by private actors in the public and private arenas. It imposes upon the State the responsibility for illegal acts that are not directly committed by the State or its agents, but by private actors on account of State failure to take sufficient steps to prevent the illegal acts from occurring. Likewise, once an illegal act has occurred, the State's inaction and failure to investigate, prosecute or punish the act perpetrated by a private actor amounts to neglect of the State obligation to be duly diligent. The due diligence standard has long been part of international law.[145]

The Joint General Recommendation issued by the CEDAW and CRC Committees similarly confirms the duty of state parties to prevent acts "that impair the recognition, enjoyment or exercise of rights by women and children and ensure that private actors do not engage in discrimination against women and girls".[146] Given that many violations take place in the "private sphere", this due diligence obligation is necessary to hold states accountable for all violations of rights, even those at the hands of private

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[141] See *Belousova* (n 101) para 10.4 where the Committee confirms that "States parties may also be responsible for private acts should they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

[142] *Velásquez Rodriquez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 *(*29 July 1988).

[143] *Velásquez* (n 142) para 172.

[144] Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 Melbourne Journal of International Law 1, 18.

[145] Special Rapporteur on Violence Against Women, its Causes and Consequences, "15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (1994–2009): A Critical Review" (27 May 2009) 66 UN Doc A/HRC/11/6/Add.5 para 66.

[146] Joint General Recommendation 31 (n 48) para 11.

actors. Indeed, the CEDAW Committee confirms the nature of due diligence as comprising active measures to combat harmful practices.[147]

Within the context of this research, it is necessary to consider whether situations where private actors contribute to acts resulting in discrimination against women by condoning, fostering and/or perpetuating harmful cultural and societal practices would trigger the due diligence obligation and state responsibility. The literature on this question is minimal insofar as it relates to a due diligence obligation to implement resocialisation, and how it might operate specifically in relation to a state obligation to ensure that private actors are held accountable for entrenching such harms remains unclear. However, at a conceptual level, the due diligence obligation relating to article 5 requires states to "stop using culture as an excuse to deny women the full enjoyment of their human rights".[148] At issue here is whether state responsibility is triggered if the state fails to comply with resocialisation where it is difficult to establish a causal link between the harm sustained and the failure of the state to implement resocialisation. This is a challenging question, particularly insofar as "lesser infringements" are concerned precisely because its normalised nature lends itself to a perceived disconnect between the harm caused and the inaction of the state in modifying the underlying practices. For instance, could responsibility be imputable to the state where actions result in infringements such as the gender pay gap, the inability of women to pursue educational and employment opportunities due to the unequal care load, or even when women are overlooked for promotions because stereotypes preclude women from holding leadership positions? Are states only implicated when more egregious manifestations of discrimination occur, such as child marriage, FGM, violence against women and the like, and where the state's failure to modify underlying harms is causally linked to the violation of rights?

In *Carreño*, the CEDAW Committee faced questions relating to Spain's failure to protect the rights of the author as contained in CEDAW. The causal link was readily visible and confirmed by the CEDAW Committee. Amongst other violations, the author notes a violation of article 5(a) because, despite her repeated complaints to domestic

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[147] Joint General Recommendation 31 (n 48) para 41. See also, *J.I.* (n 81) para 6.13, where the Committee notes that "it is not enough for the State to adopt legislation in order to discharge its duty of due diligence; the legislation must be applied.

[148] Holtmaat and Naber (n 16) 16.

courts, together with a psychological examination painting the abusive ex-husband (F.R.C.) as mentally unstable, he was convicted only once and was granted unsupervised visitations with their daughter. This is despite the author's appeal of court decisions and repeated assertions that she feared for her own and her daughter's lives at the hands of F.R.C. As she feared, he killed her daughter and committed suicide thereafter.[149]

The author claimed that the state failed to act with due diligence by not investigating, prosecuting, and punishing the violence perpetrated against the author and her daughter at the hands of F.R.C. and that this failure had direct implications for her right to live a life free from discrimination.[150] The author, furthermore, asserted that her article 5 rights were violated due to the state's inaction over investigating the exact conditions under which she was forced to live as a survivor of domestic violence and those of her daughter who, similarly, lived in an atmosphere of violence.[151] As the CEDAW Committee noted, "the authorities responsible for providing protection chose to follow the stereotypical view that even the most abusive should enjoy visitation rights and that it is always better for a child to be raised by its father and mother".[152] As a result of its failure to investigate and prosecute, the state failed to discharge its due diligence duty, thereby violating article 5(a).[153] In *Vertido*, the CEDAW Committee notes that "the compliance of the state party's due diligence obligation to banish gender stereotypes on the grounds of Articles 2(f) and 5(a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case".[154]

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[149] *Carreño* (n 79).

[150] *Carreño* (n 79) para 3.2. In this regard, the author relied on article 2(a–f) to allege the state's failure to exercise due diligence to prevent discrimination.

[151] *Carreño* (n 79) para 3.8.

[152] *Carreño* (n 79) para 3.8.

[153] *Carreño* (n 79) para 3.10.

[154] *Vertido* (n 75) para 8.4. See also *V.K.* (n 78) para 9.11 where the Committee "reaffirms that the Convention places obligations on all State organs and that State parties can be responsible for judicial decisions which violate the provisions of the Convention". Similarly, in *S.L.* (n 84) para 7.6, the "Committee reaffirms that the Convention places due diligence obligations on all State institutions and that State parties can be held responsible for judicial decisions that violate provisions of the Convention".

Thus, in instances where women's rights are violated, the duty of due diligence is triggered where states allow harmful, stereotypical practices and attitudes to influence the way violations are dealt with, particularly where state actors are implicated. A direct correlation between the harm caused (outcome) and a failure to exercise a due diligence obligation to resocialise is clear, because the state failed to implement resocialisation measures to address harmful behavioural attitudes, norms, and stereotypes. Those attitudes are what led the authorities to dismiss and undermine the seriousness of the allegations. As noted by the CEDAW Committee, "[t]he State's duty of diligence requires the adoption of legal and other measures to protect victims effectively".[155] Such measures include the modification of harms.

What is less clear, however, is what of instances where the causal link is more challenging to prove given the systemic nature of sexism and normalised outcomes of such and where the actors are non-state actors. Much of the existing literature relating to women's rights speaks to the triggering of state responsibility for a failure to exercise due diligence in relation to violence against women.[156] This is understandable given that violence against women has historically been overlooked as falling within the private domain and outside of the state's influence. However, if all forms of discrimination are deeply embedded in harmful cultural and societal perceptions of women, as this research avers, it follows that regardless of the severity of discrimination at the hands of non-state actors, state responsibility is always triggered where women experience harm that could otherwise have been prevented had the state taken reasonable or serious steps to prevent its occurrence by implementing

[155] *Carreño* (n 79) para 3.7.

[156] Rikki Holtmaat, "Preventing Violence Against Women: The Due Diligence Standard and Article 5(a) of the CEDAW Convention" in Carin Benninger (ed) *Due Diligence and its Application to Protect Women From Violence* (Martinus Nijhoff Publishers 2008); A Byrnes and E Bath, "Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments" (2008) 8 Human Rights Law Review 517; Simone Cusack and Lisa Pusey, "CEDAW and the Rights to Non-Discrimination and Equality" (2013) 14 Melbourne Journal of International Law 1; Maame Efua Addadzi-Koom, '"He Beat Me, and the State Did Nothing About It": An African Perspective on the Due Diligence Standard and State Responsibility for Domestic Violence in International Law" (2019) 19 Afr Hum Rts LJ 624; Special Rapporteur on Violence Against Women, its Causes and Consequences (n 139).

resocialisation methods.[157] As the CEDAW Committee notes in *Yildirim*, "there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence".[158] Similar linkages exist between traditional and harmful perceptions of women and "lesser infringements" such as, for instance, the gender pay gap and motherhood penalty.[159] This could pave the way for the CEDAW Committee to similarly hold states in violation of other forms of discrimination beyond violence against women, where such violations are a result of a failure to exercise a due diligence obligation to resocialise. As Cook and Cusack note in the context of gender stereotyping:

> attributing legal responsibility to a State Party depends on the existence of a legal link between that State Party's acts and/or failures to act and the imposition of a discriminatory form of gender stereotype by a non-state actor. A legal link could arrive through positive facilitation of the stereotyping action, for instance by accommodating it, or by failure of due diligence to identify and redress that stereotype or stereotypes of that nature.[160]

While the literature on due diligence in discriminatory manifestations outside of violence against women is minimal, the principal applied in egregious discriminatory cases such as violence against women is arguably equally applicable to instances where "lesser infringements" take place. State parties have a due diligence obligation to ensure that resocialisation measures are actively implemented and pursued within

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[157] Chirwa (n 144) 15; Simone Cusack and H Timmer, "Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v The Philippines" (2011) Hum. Rights Law Rev. 329, 339. Here the authors note that the Committee's pronouncement on the due diligence standard to address wrongful stereotypes "signals a willingness on the part of the CEDAW Committee to broaden the application of the due diligence standard beyond gender-based violence against women – something feminist legal scholars have encouraged". See also Byrnes, Graterol and Chartres (n 109), 53.

[158] *Yildirim* (n 57) para 12.2. See also *Jallow* (n 108) para 8.6.

[159] The motherhood penalty refers to the phenomenon where mothers' capacities and expertise are questioned, as are their career commitments and dependability, simply because they have children. See also UNDP, "United Nations Development Programme, "Breaking Down Gender Biases: Shifting Social Norms Towards Gender Equality'" (June 2023) <https://hdr.undp.org/system/files/documents/hdp-document/gsni202303pdf.pdf> accessed 26 June 2023, 9. Here the report notes the income gaps are linked to deep-rooted social norms and gender stereotype such as the "child penalty", a concept "arising from social expectations that women devote more time to childcare than men".

[160] Cook and Cusack (n 12) 84.

their respective jurisdictions to prevent, investigate, and punish acts of discrimination against women as well as to provide compensatory redress.[161]

4 5 2 Resocialisation as a right

As Cusack and Pusey note, the "rights to non-discrimination and equality are the backbone of CEDAW".[162] However, non-discrimination and equality are impossible without the realisation of the right to resocialisation. State accountability for the realisation of this right relies upon the assertion, by women harmed, of this right. This bottom-up approach is institutionalised with the inception of the Optional Protocol[163] and the justiciability of CEDAW violations, providing individuals with opportunities to assert this right. As Holtmaat explains, "within the framework of the individual complaint's procedure, Article 5 is conceived of as a right that an individual can invoke against her own government".[164]

While an obligation exists on the state to implement measures in this regard, it is concomitantly a right bestowed on and owed to women. For example, fixed parental gender roles have resulted in demands on women to the detriment of their professional development.[165] Sepper states that the CEDAW Committee, through its jurisprudence, demonstrates an awareness "that, even today, women's underrepresentation in highly competitive and prominent professional careers is often touted as 'innate' or 'natural', based on women's supposed lower capacity for 'abstract' thought or preference for motherhood".[166] Thus, the assumptions developed and perpetuated over generations are that men embody specific traits such as "tenacity, aggression, curiosity, ambition, responsibility and competition".[167] Women, on the other hand, are "passive,

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[161] Cusack (n 72) 130. Here the author states that "[f]ailure to take reasonable steps to protect women against wrongful gender stereotyping by private actors (for example, employers, religious organisations, media) makes States complicit in the resultant harms to women and the perpetuation of this harmful practice, more generally".

[162] Cusack and Pusey (n 156) 4.

[163] UN General Assembly, "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women" (15 October 1999) UN Doc A/RES/54/4.

[164] Holtmaat (n 5) 167.

[165] Elizabeth Sepper, "Confronting The 'Sacred and Unchangeable': The Obligation To Modify Cultural Patterns Under The Women's Discrimination Treaty" (2008) 30 UPa JIntlL 585, 603.

[166] Sepper (n 165) 604.

[167] Sepper (n 165) 604–605.

affectionate, emotional, obedient, and responsive to approval".[168] Resocialisation as a right, therefore, is supported by the very notion that women deserve a life of freedom, possible only through the implementation of this right by the state. Women have the right to be freed from negative stereotyping, such as,

> traditional roles, depictions of women as subordinate to men, portrayals of women as only suited to the role of wife or mother, stereotyping women as relegated to the home or other historically female employment areas, the idea of an exclusively male head of household, the role the [the] man as the breadwinner, and depictions of women as sexual objects rather than individuals.[169]

This right to resocialisation attaches itself to the public and private spheres of society through the due diligence obligation as discussed under 4 5 1 4 above. As General Recommendation 25 notes, states have an obligation to address prevailing gender relations and stereotypes that "affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions".[170] This obligation on states, thus, becomes a right of women to resocialisation.

In the cases discussed above, the complainants asserted a violation of rights in terms of, amongst others, article 5. As far back as 2007, the CEDAW Committee noted the author's complaint regarding the murder of Fatma Yildirim as being a "tragic example of the prevailing lack of seriousness with which violence against women is viewed by the public and by the Austrian authorities".[171] In essence, the author's right to resocialisation was violated because the criminal justice system did not view the violence as dangerous, basing its decisions of inaction on harmful conceptions and stereotypes. In *Vertido*, the author alleged a violation of positive obligations to, amongst others, implement resocialisation methods within the state, methods that might have prevented violations.[172] In *S.F.M.*, the author claimed a violation of her right to resocialisation in that the state failed to modify prevalent social attitudes and stereotypes relating to motherhood and childbirth. As the CEDAW Committee notes,

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[168] Sepper (n 165) 604–605.

[169] Sepper (n 165) 608–609.

[170] General Recommendation 25 (n 20) para 7.

[171] *Yildirim* (n 57) para. 3.6. See *Goekce* (n 57) para 3.6 where similar averments are made by the author.

[172] *Vertido* (n 75) para 3.2.

"first the health personnel and then the judges took the view that women should follow doctors' orders because they are incapable of making their own decisions".[173]

Sepper lists several measures that states can implement in its duty to give effect to the right to resocialisation. Such measures have a direct correlation with the rights of women to resocialisation. For instance, media and education initiatives and legislative review and revision, to name a few, are not only examples of measures states ought to implement to give effect to their resocialisation obligation, but they serve as examples of the rights women possess in terms of resocialisation, owed to them by the state.[174]

Finally, it is worth noting that while the CEDAW is not explicit in this regard, resocialisation, as a right, implies the right to a positive cultural context, as provided for in the Maputo Protocol.[175] Explored in further depth in Chapter 6, this right expects states to implement resocialisation in a manner that gives effect to the right to live free from discrimination. Viewed within the context of *E.S.*, the value of a positive cultural context is amplified. The fact that customary law placed daughters at the lowest rank not only denied women rights to inheritance but also created and perpetuated negative cultural contexts. The high court was given an opportunity to effect change and begin the process of positive cultural creation, preferring rather to refrain from doing so because, in its opinion, "it was impossible to effect customary change by judicial pronouncements".[176]

4 5 3 Resocialisation as a remedy

In *L.C.*, the CEDAW Committee notes that while CEDAW does not specifically refer to the right to a remedy, this right is implicit in article 2(c).[177] This provision provides that states are duty bound to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals, and other public institutions the effective protection of women against any act of discrimination".[178] The

[173] *S.F.M.* (n 88) para 3.7.

[174] Sepper (n 165) 613.

[175] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 art 17.

[176] *E.S.* (n 85) para 2.8.

[177] *L.C.* (n 65) para 8.16.

[178] CEDAW (n 1) art 2(c).

CEDAW Committee in General Recommendation 28 notes that "without reparation, the obligation to provide an appropriate remedy is not discharged".[179] They further elaborate on the types of remedies, which include "monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such a public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women".[180]

In many of the decisions of the CEDAW Committee, authors of the complaints frequently request the CEDAW Committee to recommend a remedy of resocialisation. In one of its earlier cases, *A.T.*, the CEDAW Committee confirmed that the rights of the author under article 5 were violated by the state's failure to protect the complainant from her common-law husband.[181] In seeking intervention from the CEDAW Committee, the author requested the provision of training programmes on gender sensitivity, CEDAW and the Optional Protocol directed at judges, prosecutors, police and practising lawyers.[182] The CEDAW Committee, however, provided general remedies instead of directing the state to implement a national strategy for the prevention of violence in the family.[183] It is unclear why it decided to leave the remedy so vague and without applying article 5 directly. This was a missed opportunity to utilise resocialisation as a remedy.

Two years later, in *Goekce,* the CEDAW Committee, on similar facts, made no recommendations to the state to undertake resocialisation as a remedy. While it referred to the strengthening of training programmes for judicial officers on CEDAW, General Recommendation 19 on violence against women and the Optional Protocol, it omitted any reference to modifying harmful stereotypes and behaviours that risk diluting the implementation of CEDAW.[184] In *Vertido*, the CEDAW Committee considered more detailed requests from the author. In contrast to *A.T.* the recommendations of the CEDAW Committee were more detailed on the issue of remedies. The CEDAW Committee directed the state to:

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[179] General Recommendation 28 (n 10) para 32.

[180] General Recommendation 28 (n 10) para 32.

[181] *A.T.* (n 57) para 3.1.

[182] *A.T.* (n 57) para 3.4.

[183] *A.T.* (n 57) para II (c).

[184] *Goekce* (n 57) para 12.3 (d).

> Ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include: … (iv) Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape case and to ensure that personal more and values do not affect decision-making.[185]

Given the detailed nature of the information provided by the author and the extensive resocialisation pleas made, it makes sense for the CEDAW Committee to make such detailed recommendations to the state to resocialise. Unlike many subsequent cases where pleas were made with seemingly less understanding of the value of resocialisation as a remedy, the author in *Vertido* requested the CEDAW Committee to recommend an investigation into the trial judge's irregular handling of the case, which led to an acquittal, and to implement training programmes aimed at developing the capacity of the judiciary to "understand sexuality issues and the psychosocial effects of sexual violence … and rid them of myths and misconceptions about sexual violence and its victims".[186]

In *V.K.*, the author made several requests, none of which spoke to resocialisation as a remedy. In reflecting this, the CEDAW Committee provides no resocialisation remedies. Similarly, in *S.L.*, while the author made direct reference to the lack of state-sanctioned and adopted methods aimed at overcoming pervasive, wrongful stereotyping, the author did not include resocialisation as a remedy in its pleas.[187]

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[185] *Vertido* (n 75) para 8.9 (b)(iv).

[186] *Vertido* (n 75) para 3.15. Here the author goes on to request the Committee to ensure that programmes include "a system to monitor and evaluate the effectiveness of such education and training on the judges and prosecutors concerned; undertake a serious review of jurisprudential doctrines on rape and other forms of sexual violence with a view to abandoning those that are discriminatory or that violate the rights guaranteed by the Convention and other human rights conventions; establish monitoring of trial court decisions in cases of rape and other sexual offences to ensure their compliance with the proper standards in deciding cases and their consistency with the provisions of the Convention and other human rights conventions; compile and analyse data on the number of sexual violence cases field in the prosecution offices and in the courts, the number of dismissals and the reasons for such dismissals; and provide the for the right to appeal for rape victims when the perpetrator has been acquitted owing to discrimination against the victim on the grounds of her sex".

[187] *S.L.* (n 84) paras 3.14–3.15.

Notwithstanding this the CEDAW Committee nonetheless recommended resocialisation as a remedy to the state.[188]

It appears that as the CEDAW Committee's jurisprudence evolves, so does its emphasis on resocialisation as a remedy, with the CEDAW Committee adapting its recommendations to suit the facts of the case.[189] However, no established pattern is discernible. As noted in the Optional Protocol, the state party concerned has six months after receiving the recommendations of the CEDAW Committee to submit its observations.[190] Additionally, the CEDAW Committee is permitted to invite the state in question to provide responses to the inquiry by way of article 18 of CEDAW and may, after six months have elapsed, invite the state party to inform the CEDAW Committee of the measures taken in response to its recommendations.[191] This is, in terms of domestic implementation, the extent of the guidance available and extent to which the CEDAW Committee has influence over its implementation. As Byrnes notes, "much of the responsibility (to implement recommendations on a domestic level) lies with the executive government and legislature".[192]

Notwithstanding questions around the domestic implementation of remedies, it is worth noting the wording of the CEDAW Committee insofar as its recommendations to resocialise are concerned. It was not until 2011 that the CEDAW Committee recommended resocialisation as a remedy in the form of mandatory training.[193] Previous cases referring to training as a remedy did not stipulate its mandatory

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[188] *S.L.* (n 84) para 7.15 (b)(viii). Here the Committee recommends the development and implementation of "effective measures to prevent similar violations from being repeated, with the active participation of all relevant stakeholders, to address the stereotypes, prejudices, custom and practices that condone or promote gender-based violence and domestic violence".

[189] For instance, in *R.P.B.* (n 80), the author was deaf and mute. In acknowledging the intersectional nature of the oppression the author faced, the Committee recommends that the state, at para 9(b)(iii), "ensure that all proceedings involving rape and other sexual offences are conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim's gender, age and *disability*" (own emphasis).

[190] CEDAW Optional Protocol (n 163) para 8(4).

[191] CEDAW Optional Protocol (n 163) para 9.

[192] Andrew Byrnes, "The Committee on the Elimination of Discrimination against Women" in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013) 47.

[193] *V.K.* (n 78) para 9(b)(ii).

nature.[194] While this could be attributed to a development of capacity within the CEDAW Committee to identify the value and import of resocialisation as a remedy, in the subsequent cases of *R.K.B.* and *Jallow*, the CEDAW Committee omits the use of "mandatory" where training is concerned.[195] In 2014, the CEDAW Committee reverted to the provision of mandatory training as a remedy in *Carreño*, though in another 2014 case, that of *R.P.B.*, it simply refers to adequate and regular training.[196] Of the 18 admissible cases that came after 2014, 10 included mandatory training as a remedy.[197]

Of note in this regard is that up until 2017, of the cases where the CEDAW Committee provided resocialisation as a remedy, few were aimed at the entirety of the population to eliminate the root causes behind the very complaints brought forward. While the CEDAW Committee sought to prevent future similar violations of access to justice by recommending resocialisation as a remedy by way of training of the judiciary, law enforcement and the like, it failed to include every other individual within state jurisdiction as subjects of resocialisation. It merely responds reactively to ensure that when violations do occur, those tasked with investigating, prosecuting, and adjudicating are better equipped to do so without the influence of bias and wrongful stereotypes. It is unfortunate that the CEDAW Committee does not utilise resocialisation as a remedy in a more robust, consistent manner to deeply embed its utility and value within state parties. If resocialisation remedies were implemented as the CEDAW intends, much of the discrimination women face would be eliminated prior to it reaching the level of investigation and prosecution.

Notwithstanding, the jurisprudence does demonstrate some progress being made in this regard. For instance in *L.R.* and *O.G.* the CEDAW Committee recommends that the state "[d]evelop and implement effective measures, with the active participation of all relevant stakeholders, such as women's organizations, to address the stereotypes,

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[194] Previously in *A.T.* (n 51) para 9.6 (II)(c), the Committee suggests that the State take all necessary measures to provide regular training, while in both *Yildirim* (n 57) *and Goekce* (n 57), the Committee speaks to the strengthening of training programmes and in *Vertido* (n 70), the Committee simply refers to training as a measure required to overcome stereotypes.

[195] *R.K.B.* (n 135) para 8.10 and *Jallow* (n 108) para 8.8 (a)(c).

[196] *R.P.B.* (n 80) para 9(b)(iii).

[197] See Communication 46/2012, *M.W. v Denmark* CEDAW Committee (21 March 2016) UN Doc CEDAW/C/63/D/46/2012; *X & Y* (n 121); *E.S.* (n 85); *O.G.* (n 83); *L.R.* (n 83); *X v Timor Leste* (n 84); *J.I.* (n 81); *X & Y* (n 121); *S.L.* (n 84); *S.T.* (n 84).

prejudices, customs and practices that condone or promote domestic violence".[198] Later, in *L.R.* the CEDAW Committee recommends mandatory training and capacity-building for the judiciary and law enforcement "in order to adequately *prevent* and address domestic violence against women".[199] Finally, in *S.L.* the CEDAW Committee recommends the state "develop and implement measures to prevent similar violations from being *repeated* with the active participation of all relevant stakeholders, to address the stereotypes, prejudices, customs and practices that condone or promote gender-based violence".[200] This positive trend, focusing on resocialisation as a remedy targeted at the wider population, often in addition to training of judicial authorities and law enforcement, is a promising advancement in the area of resocialisation as a remedy. This greater emphasis is also a testament to the development of the CEDAW Committee's capacities and jurisprudence.

4 6 Concluding remarks

Resocialisation is key to the effective implementation and realisation of the rights of women as contained in CEDAW. Evidenced by the number of individuals asserting the right to resocialisation through the Optional Protocol, this provision, while mostly overlooked, is established by the CEDAW Committee on several occasions as forming the basis for eliminating discrimination. Without the appropriate application of this provision by states, the rights of women will continue to remain subject to the harmful conceptions, biases, and stereotypes of those not only tasked with protecting, respecting, and fulfilling the rights of women but also by the generality of the population who continue to discriminate on such bases. This provision, therefore, must be given due recognition all relevant spaces.

Chapter 5 explores resocialisation with the context of the African regional human rights system, notably the African Charter.

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[198] *L.R.* (n 83) para 14(b)(viii) and *O.G.* (n 83) para 9(b)(xi).

[199] *L.R.* (n 83) para 14(b)(vii). Own emphasis

[200] *S.L.* (n 84), 7.15 (b)(viii). See also *X & Y* (n 84) para 11(b)(x). Own emphasis.

5 Resocialisation in the African Charter

5 1 Introduction

This chapter provides an analysis of the overarching legal framework governing human rights on the continent – the African Charter – and the relevant provisions contained therein related to resocialisation.[1] The purpose is to demonstrate that resocialisation as a right, obligation, and remedy in the Maputo Protocol is anchored in the African Charter.[2] While the African Charter does not overtly implicate resocialisation as a means to the realisation of women's rights in a similar fashion to the Maputo Protocol, as discussed in Chapters 6 and 7, this chapter argues that four central provisions in the African Charter call attention to resocialisation as a necessary element to the realisation of the rights of women as protected by the African Charter. Against this backdrop, Chapter 5 explores how resocialisation is defined, interpreted, and applied within the framework of the African Charter, specifically through articles 2, 3, 18(3) and 25.

Resocialisation, as argued throughout this research, supports each state's obligation to respect, protect and fulfil its duty of non-discrimination, as contained in articles 2 and 3 of the African Charter. Article 18(3) emphasises the rights of women and the obligation on states to protect those rights, implying the implementation of resocialisation to meet those ends. Similarly, the educational mandate in article 25 places a resocialisation obligation on states.

The exploration of these four provisions is undertaken through an analysis of state reports and, where relevant, by the accompanying Concluding Observations issued by the African Commission.[3]

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

[2] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6.

[3] 54 English Concluding Observations published by the African Commission in response to reports submitted by 37 states, are available for analysis. Of these, thus far, only five concluding observations contain observations relating to both the African Charter and the Maputo Protocol (Burkina Faso 2017, Eswatini 2022, Malawi 2022, Mauritania 2018, Rwanda 2019). Note that as of May 2022, many of the concluding observations of the African Commission were unavailable online. The information, therefore, reflects the contents of available documents. For example, though the state of Benin has submitted reports, none are available on the official website of the African Commission. Similarly, the concluding

The succeeding sections proceed in the following manner. Each of the relevant provisions of the African Charter is highlighted, detailing for each the drafting history, concepts and definitions, state obligations and state practice drawn from the reports submitted to the African Commission. Where available, responses by the African Commission by way of its Concluding Observations thereafter provide greater insight into resocialisation within the context of the African Charter and its practical application and interpretation by the African Commission.

5 2 Articles 2 and 3

5 2 1 Drafting history

Article 2 of the African Charter provides a general non-discrimination clause, which lists sex as a ground on which discrimination is prohibited. The Mbaye Draft[4] provided for non-discrimination in article 1, while article 2 referred to the rights of all peoples to self-determination. In this regard, the subsequent draft, the Dakar Draft, stipulated that in its efforts to maintain originality, it chose to place the principle of non-discrimination as the first principle of the draft.[5] This, however, not only changed in the Dakar Draft to article 2 but the term "discrimination" was omitted entirely and substituted with the term "distinction". The Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights nevertheless emphasised the principle of non-discrimination as central to Africa's conception of human rights.[6] The final draft of the

observations in response to Angola's 6th and 7th report, while noted on the website, are not available. Also note that according to the African Commission's website, 11 states have submitted all their reports, 19 are late by one or two reports, 18 are late by three or more reports and six have not submitted any reports. See African Commission on Human and Peoples' Rights, "State Reports and Concluding Observations" <https://www.achpr.org/statereportsandconcludingobservations> accessed 1 September 2022.

[4] Mbaye Draft African Charter on Human and Peoples' Rights (8 December 1979) CAB/LEG/667/1 reprinted in Christof Heyns (ed), *Human Rights Law in Africa* 1999 (Kluwer Law International 2002) 65.

[5] Organisation of African Unity African Charter on Human and Peoples' Rights (draft prepared by a Meeting of Experts of the Organisation of African Unity, Dakar, Senegal) (Dakar Draft) 1979, CAB/LEG/67/3/Rev.1, Guiding Principle, available in Heyns (n 4) 81.

[6] Report on the Draft African Charter presented by the Secretary-General at the thirty-seventh ordinary session of the OAW Council of Ministers, held in Nairobi, Kenya 15-21 June 1981, CM/1149 (XXXVII) available in Heyns (n 4) 92.

African Charter simply amended the previous wording of 'every person and every people' in the Dakar Draft to "every individual".

Article 3 of the African Charter stipulates that all are equal before the law and that every individual has the right to equal protection of the law. The Mbaye Draft ensured the recognition of all as "a person before the law"[7] and, separately in article 31, the right of all to "equality before the law". The Dakar Draft amended this by bringing the two articles together under article 3 and placing this provision directly after article 2, ensuring its complementarity. This remained as is in the final version of the African Charter.

5 2 2 Concepts and definitions

Article 2 of the African Charter protects the rights and freedoms of all as guaranteed by the Charter, irrespective of any status, including that of sex. As noted in Chapter 4, sex-based discrimination as a listed ground has evolved to include discrimination on the grounds of gender.[8] The right to non-discrimination remains a central feature of human rights and, as Rudman notes, "is one of the most basic rights resonating in most national constitutions and international human rights alike".[9]

While the African Charter does not refer to the word 'discrimination' explicitly,[10] the African Commission notes in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* (*Zimbabwe Lawyers for Human Rights*)[11] that this non-discrimination provision is "essential to the spirit of the African Charter".[12] As Mugwanya suggests, the African Charter's commitment to non-discrimination is emphasised in article 3, which promotes the equality of all before the law and equal protection of the law. In this regard, the African Charter effectively promotes formal (*de jure*) equality. The African Commission in *Zimbabwe Lawyers for*

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[7] Mbaye Draft (n 4) art 16.

[8] See Chapter 4 under 4 2.

[9] Annika Rudman, "The Protection against Discrimination Based on Sexual Orientation under the African Human Rights System" (2015) 15 African Journal on Human Rights 1, 14.

[10] Rudman (n 9) 15.

[11] *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009).

[12] *Zimbabwe Lawyers for Human Rights* (n 11) para 91. See also George William Mugwanya, *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (Transnational Publishers, Inc 2014) 192.

Human Rights confirms this focus on formal equality when it states that "[t]he most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment in similar conditions".[13] Later it relies on the similarly situated test, as noted in Chapter 2,[14] to advance the import of article 3(2), suggesting that this article "simply means that similarly situated persons must receive similar treatment under the law".[15] Thus, the African Charter "guarantees non-discrimination on the basis of sex, equality before the law and the elimination of discrimination against women, [though] it does not articulate specific violations of women's rights which result from discrimination".[16] Emphasis on substantive and transformative equality as central to equality, determined by the lived realities of women, is, therefore, lacking.[17]

Notwithstanding the African Charter's emphasis on formal equality, Albertyn and Goldblatt have argued, in the context of the South African Constitution, that the term "equal benefit of the law", as contained in section 9(1) of the Constitution of the Republic of South Africa, 1996[18] supports their "argument for reading the subsection substantively and more expansively since it entails recognising that equality is not just a negative right but may well require positive measures to ensure that the goal of equality is achieved".[19] This reasoning can, arguably, be applied to the African Charter's equality provision. Article 3(2) provides for the "equal protection of the law", a similar directive as that of section 9(1) of the 1996 Constitution. The formal equality nature of this provision arguably implies an obligation to fulfil to ensure both *de jure* and *de facto* equality, as discussed in Chapter 4.[20] Thus, while the African Charter

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[13] *Zimbabwe Lawyers for Human Rights* (n 11) para 96.

[14] See Chapter 2 under 2 3 2.

[15] *Zimbabwe Lawyers for Human Rights* (n 11) para 99.

[16] The Centre for Human Rights, Faculty of Law, University of Pretoria, "The Impact of the Protocol on the Rights of Women in Africa on Violence Against Women in Six Selected Southern African Countries: An Advocacy Tool" (2009) <https://www.chr.up.ac.za/images/publications/centrepublications/documents/gender_violence_against_women_advocacy_tool.pdf> accessed 26 May 2022, 2.

[17] See 5 3, as well as Chapter 2 for further discussion.

[18] Constitution of the Republic of South Africa, Act No. 35 of 1997, 10 December 1996.

[19] Cathi Albertyn and Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 South African Journal on Human Rights 248, 267.

[20] See Chapter 4 under 4 5 1 2.

provides for the basis of women's formal equality on the continent, the African Charter's equality provisions allow for a more purposeful interpretation to include substantive equality. This expansive reading emphasises the utility of the African Charter beyond its formal equality lens, particularly for women in states that have yet to ratify the Maputo Protocol.[21]

5 2 3 State obligations

Articles 2 and 3 of the African Charter remain foundational to the discourse on equality and non-discrimination. Article 2 of the African Charter echoes CEDAW's general non-discrimination clause as contained in article 2, though CEDAW's provision is more expansive.[22] While the language of the African Charter suggests advancing equality through formal equality, Cusack and Pusey note, in the context of CEDAW's aim to achieve gender equality, that eliminating discrimination furthers gender equality at formal, substantive and transformative levels.[23] The same could, arguably, be said of article 2 of the African Charter, reinforcing the above perspective of the African Charter as not only espousing formal equality but also substantive and transformative equality as well.

As the Charter stipulates, "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kinds".[24] This involves the due diligence obligation and the application of temporary special measures to advance this right, as discussed in

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[21] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019) 465. See also Mugwanya (n 12) 193. Here the author notes that "[t]he African Charter protects not merely formal equality, but substantive equality. In order to redress the past wrongs and imbalances, effect equity and make up for ingrained disabilities, there is a need to adopt a substantive approach to equality".

[22] Article 1 provides: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

[23] Simone Cusack and Lisa Pusey, "CEDAW and the Rights to Non-Discrimination and Equality" (2013) 14 Melbourne Journal of International Law 1, 10.

[24] African Charter (n 1) art 2.

Chapter 4.[25] In the context of women's rights, as Murray suggests, article 2 is often considered in tandem with other rights, including article 18(3).[26] The African Commission confirms that article 2 most often does not operate as a standalone provision.[27]

Article 3 is closely connected to the general non-discrimination clause in article 2, both of which the African Commission characterises as non-derogable provisions. These must be "respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter".[28] Thus, articles 2 and 3 are often cited together in the context of equality.[29] The African Commission in *Open Society Justice Initiative v Côte d'Ivoire,* for example, notes that,

> the right to non-discrimination which is protected by Article 2 of the Charter constitutes a legal guarantee to ensure the enjoyment of the rights to equality before the law and equal protection of the law under Article 3. In other words, where discrimination occurs, equality and equal protection of the law are automatically undermined. It follows that whenever a violation of Article 2 of the Charter is established, the rights under Article 3 have necessarily been violated. The only exception to this logical position is applicable when the discrimination authorized by law is justifiable and proportionate to the targeted goal.[30]

The opposite, however, is not true. A violation of article 3 does not automatically imply a violation of article 2.[31]

5 2 4 State practice

Most available state reports, filed in accordance with article 62 of the African Charter, address articles 2 and 3 together by elaborating on existing constitutional and

[25] See Chapter 4 under 4 5 1 2.

[26] Murray (n 21) 53.

[27] Murray (n 21) 48. At 53 Murray notes that "in most cases Article 2 is considered and found in conjunction with another right. There is, however, sufficient ambiguity and a handful of cases to suggest that it is not contingent on other rights".

[28] *Purohit and Moore v The Gambia (*2003) AHRLR 96 (ACHPR 2003) para 49.

[29] Murray (n 21) 45.

[30] *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06 African Commission on Human and Peoples' Rights 17th extra–ordinary session, 19–28 February 2015 (2016) para 155.

[31] Murray (n 21) 90.

legislative protections.[32] Botswana's report of 2015 addresses gender stereotypes under articles 2 and 3. It notes that despite "government's effort to promote equality before the law, especially gender equality, certain roles continue to be performed along gender lines [therefore] [t]here are still challenges towards the absolute elimination of role stereotypes and negative cultural practices".[33] However, in response to the above-mentioned report, the African Commission's Concluding Observations of 2019 to Botswana omits any reference to the challenges regarding the influence of stereotypes and negative cultural practices in the country and fails to provide any concrete resocialisation recommendations to address gender inequality generally. However, it recommends that the state implement awareness-raising measures to address gender-based violence specifically.[34]

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[32] For instance, see Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Maputo Protocol (January 2017) para 25; Botswana Second and Third Report to the African Commission on Human and Peoples' Rights (ACHPR): Implementation of the African Charter on Human and Peoples' Rights (2015) 25; Cameroon Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon Relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (3 January 2020) 8; Djibouti Combined Initial and Periodic Report under the African Charter on Human and Peoples' Rights para 51; Kingdom of Eswatini Formerly Known as the Kingdom of Swaziland Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa 19; Federal Democratic Republic of Ethiopia The Fifth and Sixth Periodic Country Report (2009–2013) on the Implementation of the African Charter on Human and Peoples' Rights in Ethiopia (April 2014) 37; The Republic of Gambia Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 21; The Kingdom of Lesotho Combined Second to Eighth Periodic Report Under the African Charter on Human and Peoples' Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa (April 2018) 4; Republic of Mauritius Ninth to Tenth Combined Periodic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (January 2016–August 2019) 56; Republic of Niger Fifteenth (15th) Periodic Report of the Republic of Niger on the Implementation of the African Charter on Human and Peoples' Rights Covering the Period 2017–2019, Presented Pursuant to Article 62 of said Charter 21.

[33] Second and Third Report of Botswana (n 32) 28.

[34] Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Botswana on the Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 26th extra–ordinary session para 73.

Chad's report of 2016 recognises the distinction between *de jure* and *de facto* equality, acknowledging that while efforts are being made to provide equality before the law, "socio-cultural constraints compel the majority of citizens to espouse customary norms over statutory law".[35] In this regard, it highlights the practices impacted by customary law, such as inheritance and access to property, as well as matrimonial relationships, which prioritise the union of families over the consent of women, who may not have the freedom to choose their partners.[36] Neither of the two states provides any commentary on how they intend to address these challenges.

Lesotho's report of 2018 notes that in matters relating to inheritance and marriage, women are permitted to choose between customary law and civil law.[37] This presupposes respect for women's decisions. Further, it notes that customary law serves as a barrier to the implementation of gender equality since customary laws are not subject to the constitutional non-discrimination obligation. Thus, "customary laws which have [a] discriminatory effect are not regarded as discriminatory".[38] Adequate protection of women's rights would, however, require that customary laws not be exempt from passing constitutional muster. In this regard, the state reports that steps are underway to introduce legislation aimed at addressing the dichotomy between constitutional guarantees to non-discrimination and customary law, though the report provides no details in this regard.[39] However, unlike many other state reports, Lesotho attempted to remedy this through non-legislative measures. It states that it, together with civil society,

> has embarked on awareness-raising lipitso (community gatherings) campaigns for recognition of the inherent dignity of women and equality of all persons regardless of their sex and to change people's mindsets about the place and value of a Mosotho woman in society, in the country's economic development and in leadership including traditional leadership.[40]

[35] Republic of Chad Combined Periodic Report of the Republic of Chad 1998–2015 on the Implementation of the African Charter on Human and Peoples' Rights (September 2016) para 71.

[36] Combined Periodic Report of the Republic of Chad (n 35) para 73.

[37] Combined Report of The Kingdom of Lesotho (n 32) para 18.

[38] Combined Report of The Kingdom of Lesotho (n 32) para 28.

[39] Combined Report of The Kingdom of Lesotho (n 32) para 20.

[40] Combined Report of The Kingdom of Lesotho (n 32) para 31.

The African Commissions Concluding Observations of 2018 to Lesotho highlights, as a positive aspect, the repeal of the impugned constitutional provision providing non-discrimination exemptions. This, however, is an incorrect observation as nowhere in Lesotho's report does the state indicate a process towards repealing the constitutional provision. Indeed, the impugned provision still stands, and the state reports that "[w]hile section 18(4) contains exceptions to the right to freedom from discrimination, in order to allow indigenous progressive recognition of the right in its full extent, it also contains a proviso that 'nothing shall prevent the making of laws in pursuance of principles of state policy in promoting a society based on equality'".[41] It is in this regard that the State of Lesotho highlights the introduction of legislation and policy to "off-set many of the limitations previously in place by reason of customary law".[42] The state does not, however, repeal the impugned exemption and neither does it provide any further details on what legislation and policies have come into being, the nature of those policies and the impact it has on non-discrimination generally. Unfortunately, the African Commission misunderstood this aspect of Lesotho's report resulting in a missed opportunity for the African Commission to address the dangers of cultural relativism despite constitutional guarantees. Notwithstanding this omission, the African Commission does implicate the "prevalence of deep rooted cultural and religious practices some of which are recognised by the Constitution" as factors impeding the realisation of rights,[43] while it reiterates that the persistent traditional and religious influences in the country serve to hinder advancements in gender equality.[44]

Nigeria's report of 2008 similarly notes the prevalence and influence of cultural stereotypes that serve as barriers to gender equality. For instance, it notes that customary laws support early childhood marriages, FGM and widowhood rites despite the presence of statutory laws outlawing such practices.[45] Notably, in its subsequent report of 2011, it stipulates the measures taken to address cultural practices affecting

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[41] Concluding Observations and Recommendations on the Kingdom of Lesotho's Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at its 68th ordinary session para 20.

[42] African Commission Concluding Observations Lesotho (n 41) para 20.

[43] African Commission Concluding Observations Lesotho (n 41) para 33.

[44] African Commission Concluding Observations Lesotho (n 41) para 51.

[45] Federal Republic of Nigeria 3rd Periodic Country Report: 2005–2008 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (September 2008) 24.

children, such as the education and sensitisation of traditional birth attendants who practice FGM so as to encourage its elimination.[46] Notwithstanding those attempts, the report specifies that the "challenges that are attributable to patriarchy, deep rooted traditional beliefs and customs, low level male involvement and participation in creating change, have contributed immensely to the perpetuation of gender inequality in the country".[47] The state repeats this verbatim in its report of 2017 and fails to provide any concrete steps to address this recognised barrier to gender equality.[48] The African Commission has yet to respond to Nigeria's 2017 report. Its Concluding Observations of 2015 to Nigeria highlights the role of harmful socio-cultural practices restricting the rights of women.[49] However, it makes no recommendations in this regard.

An analysis of state reports under articles 2 and 3 demonstrates that states are generally actively pursuing constitutional and legislative changes required to give effect to their obligations. In some instances, as detailed above, a recognition that customary laws, as one example, act as barriers to gender equality is evident. However, most states fail to stipulate any measures they intend to put in place to enable the legislation to impact the lived realities of women. In other words, most fail to engage with resocialisation to realise the rights of women in terms of these two articles.

The African Commission's approach to resocialisation in terms of article 2 and 3, as reflected in its Concluding Observations, is similarly noteworthy. In the Concluding Observations of 2017 to Mauritius' report, the African Commission notes, as an area of concern and under the sub-category of equality and non-discrimination, the existence of an exemption clause contained in the Mauritian Constitution which permits discrimination against women in matters relating to adoption, marriage,

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[46] Federal Republic of Nigeria 4th Periodic Country Report: 2008–2010 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (August 2011) 29.

[47] 4th Periodic Country Report of the Federal Republic of Nigeria (n 46) 30.

[48] Federal Republic of Nigeria's 6th Periodic Country Report: 2015–2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (August 2017) 44.

[49] Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011–2014), African Commission on Human and Peoples' Rights, adopted at its 57th ordinary session para 56.

divorce, burial, and inheritance.[50] In this regard, and again in reference to equality and non-discrimination, it recommends amending the offending provision, noting its discriminatory effects on women and recommending the implementation of measures to "address the issue of gender inequality".[51] It does not, however, stipulate what such measures might entail. Similarly, the Concluding Observations of 2015 to Mozambique make explicit reference to article 2 and the existence of discriminatory legislation in criminal procedure and inheritance, as well as the impact of harmful customary practices impacting the rights of women to inheritance.[52] In this regard, the African Commission recommends repealing discriminatory laws and the "sensitization of the general public on legislation prohibiting discriminatory practices against women".[53]

As noted above, articles 2 and 3 require that states eliminate discrimination in furtherance of gender equality on formal, substantive, and transformative levels. This triggers the due diligence obligation and the implementation of temporary special measures to further this goal, which further implicates the need for resocialisation. In this regard, and while some Concluding Observations do not explicitly refer to articles 2 and 3 in relation to women, the value of these provisions in the context of resocialisation can be inferred by the African Commission's more general comments. For instance, in its Concluding Observations of 2012 to Angola, the African Commission notes, as an area of concern, the state's failure to provide information on the prevalence of harmful practices affecting women and girls and any accompanying legislation giving effect to the rights of women to protection against early marriage and the general protection of women in rural areas.[54] The provision of such information allows the African Commission to assess whether and to what extent the rights of

[50] Concluding Observations and Recommendations on the 6th to 8th Combined Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 60th ordinary session para 62.

[51] African Commission Concluding Observations Mauritius (n 50) 11.

[52] Concluding Observations and Recommendations on the Second and Combined Periodic Report of the Republic of Mozambique on the Implementation of the Charter on Human and Peoples' Rights (1999–2010), African Commission on Human and Peoples' Rights, adopted at the 17th ordinary session para 45.

[53] African Commission Concluding Observations Mozambique (n 52) 11.

[54] Concluding Observations on the Cumulative Periodic Reports (2nd, 3rd, 4th and 5th) of the Republic of Angola, African Commission on Human and Peoples' Rights, adopted at the 12th extra-ordinary session para 34.

women in terms of these provisions are observed and where discrimination exists in violation of articles 2 and 3.

Similarly, in the Concluding Observations of 2009 to Benin, the African Commission recommends enacting legislation to prohibit discriminatory practices against women,[55] while the African Commission recommends to Botswana the implementation of measures to promote women's participation in social, economic and political spheres of society.[56] The Concluding Observations of 2004 to Burkina Faso also recommend implementing measures aimed at reducing discrimination and introducing temporary special measures to ensure an improvement in the participation rates of women within government.[57] The Concluding Observations of 2010 to Cameroon notes, as an area of concern, that despite the legislative protections combating gender discrimination, "few mechanisms actually protect these rights"[58], recommending that temporary special measures be implemented to ensure the eradication of discrimination against indigenous women in particular.[59]

Lastly, the Concluding Recommendations of 2018 to Niger are of interest. It highlights, as an area of concern, the "[p]ersistence of inequalities and disparities between boys and girls in several areas of life, which situation is likely to prevent women and girls from attaining their potential and participating in the development of the country".[60] It, therefore, recommends implementing measures to address the inequalities and that the state "[s]trengthen sensitization campaigns on the rights of

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[55] Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Benin, African Commission on Human and Peoples' Rights, adopted at the 45th ordinary session para 40.

[56] Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana, African Commission on Human and Peoples' Rights, adopted at the 47th ordinary session para 59.

[57] Concluding Observations and Recommendations on the Seventh and Eighth Periodic Report of the Republic of Burkina Faso, African Commission on Human and Peoples' Rights, adopted at its 35th ordinary session paras 30 and 33.

[58] Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon, African Commission on Human and Peoples' Rights, adopted at its 47th ordinary session, para 24.

[59] African Commission Concluding Observations Cameroon (n 58) para 45.

[60] Concluding Observations relating to the 14th Periodic Report of Niger (2014–2016) on the Implementation of the African Charter of Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 23rd extra-ordinary session para 114.

women and girls among all stakeholders, particularly among religious and customary authorities in order to accelerate the change in mentality of the people".[61] Not only is the African Commission ensuring that the target audience of such measures is broad in scope, it recognises the role that cultural relativism plays in gender inequality as well as the importance of resocialisation in addressing the underlying determinants of gender inequality. The African Commission's capacity to engage with resocialisation, as evident in its stance with some of its earlier Concluding Observations *vis a vis* the more recent ones, is a positive step towards embedding the utility of resocialisation in society.

5 3 Article 18

5 3 1 Drafting history

As further discussed below, article 18 is the only provision in the African Charter to explicitly safeguard the rights of women. However, such reference is made together with the protection of family rights, the rights of children, the elderly and the disabled. Notwithstanding, the progression made with the inception of the Mbaye Draft in 1979 through to the acceptance of the final draft of the African Charter in 1981 demonstrates an understanding, even if limited in scope at the time, of the need to explicitly protect the rights of women in the African Charter.

In this regard, the Mbaye Draft referred to women in two provisions over and above the general non-discrimination provision: one relating to the rights of women to fair remuneration and wages for equal work[62] and the other relating to the rights of 'mothers' before and after childbirth.[63] The narrow focus on women's rights only in relation to labour and childbirth was remedied in the following draft, the Dakar Draft, where women's rights were generally protected in article 18, a provision incorporating the rights of the family, children, aged and disabled. This provision initially contained

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[61] African Commission Concluding Observations Niger (n 60) 23.

[62] Mbaye Draft (n 4). Here it notes under article 6(3)(a)(i), "*Every person has the right to the enjoyment of just and favourable conditions of work which ensure in particular: Remuneration which provides all workers, as a minimum, with: Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work".*

[63] Mbaye Draft (n 4). Here it notes under article 8(5), "*Mothers have the right to special protection during reasonable periods before and after childbirth*".

five subsections. Article 18(3) of the Dakar Draft provided that "[t]he state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the child as stipulated in international declarations and conventions". Article 18(4) provided that "[w]omen and children shall have the right to special measures of protection in accordance with the requirements of their physical and intellectual well being".[64] Subsection 5 dealt with the rights of the aged and disabled.

While the Dakar Draft recognised the rights of women to non-discrimination over and above those relating to the rights of mothers and women in the sphere of work, the wording of this draft remained unclear insofar as its relation to existing international protection is concerned.[65] The ordinary meaning of article 18(3) above, arguably, implies two things: first, that the state ensures the elimination of all discrimination against women, and second, that the state also ensures the protection of the rights of the child as found in international law. The international law protections, therefore, did not extend to women and were confined to the rights of children only. Subsequently, in the Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights[66], arguably cognisant of this oversight and the potential misinterpretations that the Dakar Draft might elicit in this regard, subsection 3 was amended to reflect its current version as contained in the African Charter.[67] The wording in the final version is clearer and extends the existing international protection to women. Subsection 4, a subjective provision, was deleted entirely, while subsection 5, relating to the aged and disabled, became the current subsection 4.

5 3 2 Concepts and definitions

As is evident from the discussion above, the African Charter has undergone notable changes from draft to draft, improving its protection of women. However, provisions

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[64] Dakar Draft (n 5).

[65] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. See also Chapter 4 for a more detailed discussion on the international obligations to women.

[66] Report of the Secretary-General on the Draft African Charter (n 6).

[67] As a reminder, article 18(3) in its current form stipulates that "[t]he state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of *woman and* the child as stipulated in international declaration and conventions" (emphasis added). Subsection 5 became the current subsection 4 on the rights of the aged and disabled.

relating to women, couched in the African Charter's provisions relating to the family, entrenches a view of women as valuable only to the extent of their reproductive and caregiving capacities.[68] Placing the rights of women within the context of the family, which remains the chief source of discrimination against women, casts doubt on the seriousness of drafters in relation to women's rights. This approach arguably perpetuates the "traditional cultural values that placed women and children under the authority of the male household head".[69]

From a historical perspective, the Commission's Resolution on Maternal Mortality in Africa, issued in 2008, is an example of this.[70] While emphasising the rights of women to non-discrimination as guaranteed by international and regional law, the Commission draws on the African Charter and emphasises the prevention of maternal mortality as crucial to the maintenance of "the very foundation of the African family".[71] Whereas the rights of women to life, health and dignity are legitimate on their own, the Commission expresses its concern in this regard within the context of the "great role women play in securing the future of the society and that pregnancy being a natural occurrence, every society should seek to protect the life of the mother and child from conception, to delivery and beyond".[72]

5 3 3 State obligations

Article 18(3) stipulates that "[t]he state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of woman

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[68] Nicholas Wasonga Orago and Maria Nassali, "The African Human Rights System: Challenges and Potential in Addressing Violence against Women in Africa" in Rashida Manjoo and Jackie Jones (eds), *The Legal Protection of Women from Violence: Normative Gaps in International Law* (Routledge 2018) 113. Here the authors note the weak nature of the African Charter and suggest that "[t]his formulation of protection for women has limited practical benefits, failing to elevate the societal status of women beyond reproductive roles, and perpetuates the traditional cultural values that place women and children under the authority of the male household head". See also African Charter (n 1) art 18(3).

[69] Orago and Nassali (n 68) 113.

[70] African Commission on Human and Peoples' Rights, "135 Resolution on Maternal Mortality in Africa – African Charter/Res. 135 (XXXXIV)08" The African Commission on Human and Peoples' Rights Meeting at its 44th ordinary session held in Abuja, Federal Republic of Nigeria, from 10–24 November 2008 <https://www.achpr.org/sessions/resolutions?id=206(135> accessed 26 April 2022.

[71] Resolution on Maternal Mortality in Africa (n 70).

[72] Resolution on Maternal Mortality in Africa (n 70).

and the child as stipulated *in international declaration and conventions*.[73] In terms of the VCLT[74], "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[75] The ordinary meaning of article 18(3), therefore, implies an obligation on states to respect, protect and fulfil the rights of women and to do so in accordance with international law, such as the UDHR, CEDAW, the ICCPR and other relevant international instruments.[76] Further, the African Charter mandates the African Commission to "draw inspiration from international law on human and peoples' rights".[77] Article 61 further directs the African Commission to "take into consideration … international conventions".[78] Thus, the applicability of CEDAW in enhancing the protections afforded to women in article 18(3) is bolstered by articles 60 and 61. In this regard, Murray notes that "adopting an expansive attitude to this and Article 60 and 61 (even if the latter are not always expressly cited) has enabled the African Commission to draw upon other treaty provisions … to interpret provisions in the ACHPR including Article 18".[79] Similarly, Nmehielle suggests that the African Commission is empowered, through articles 18(3), 2, 60 and 61, to "adopt a progressive and dynamic approach to women's issues".[80]

5 3 4 State practice

State practice, as evident in the relevant state reports under article 18, suggests that states view the rights of women predominantly as an issue of sensitising women to their rights and freedoms.[81] As an example, Rwanda's report of 2016 notes the establishment of agencies aimed at "advocat[ing] for women's rights and sensitiz[ing]

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[73] Emphasis added.

[74] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

[75] VCLT (n 74) art 31(1).

[76] Murray (n 21) 461.

[77] African Charter (n 1) art 60.

[78] African Charter (n 1) art 61.

[79] Murray (n 21) 461.

[80] Vincent O Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (Martinus Nijhoff Publishers 2001) 135.

[81] Note that in many reports, states do not list its information according to each of the African Charter's provisions. Thus, often the rights of women are not referred to under their article 18 obligations.

women to take up leadership roles in all organs".[82] Rwanda's report on article 18(3) fails to acknowledge the importance of resocialisation of everyone, not just women, a failure the African Commission overlooked in its corresponding Concluding Observations. The African Commission's Concluding Observations of 2017 to Rwanda's report does not respond to or make any reference to women's rights under the African Charter. This is, presumably, because the report contains commentary on the implementation of Maputo Protocol obligations, to which the African Commission separately provides commentary. It is unfortunate, however, that not only did the African Commission provide no guidance at all on state obligations in terms of article 18(3) of the African Charter, but overlooked and missed an opportunity to highlight the necessity of sensitising everyone on the importance of women in leadership roles.

Cameroon's report of 2018 highlights, under article 18(3), the activities undertaken to sensitise girls on the importance of school enrolment and pregnancy-related risks, omitting any mention of the part that boys play in pregnancy or on the prevalence of gender-based violence as a source of teenage pregnancy.[83] In response to Cameroon's report, the African Commission's Concluding Observations of 2014 acknowledges, as a positive aspect, the steps taken to ensure the education of pregnant girls and the implementation of sensitisation programmes on the importance of educating girls.[84] It does not, however, highlight the above-mentioned singular focus of the state in sensitising girls to the exclusion of boys, missing an opportunity to ensure that the state is aware that its sensitisation programmes must be aimed at everyone. This, notwithstanding the general concerns raised relating to the "impact of sociological and cultural factors and deep-rooted prejudices, in particular against women".[85] The African Commission, in its Concluding Observations of 2021 to Lesotho's report recommends that the state provide incentives to women to take up leadership roles and contest for public office.[86] However, it does not mention any

[82] Republic of Rwanda 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights & The Initial Report on the Implementation Status of the Protocol to The African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol): Period Covered by the Report 2009–2016, 54.

[83] Republic of Cameroon 3rd Periodic Report of Cameroon Within the Framework of the African Charter on Human and Peoples' Rights, April 2013 para 482.

[84] Third Periodic Report of Cameroon (n 83) para 27.

[85] Third Periodic Report of Cameroon (n 83) para 46.

[86] African Commission Concluding Observations Lesotho (n 41) para 71.

accompanying resocialisation required to foster conducive conditions for women to function effectively in such roles.

Several state reports refer to sensitisation, awareness-raising, and the need for a change in mentality, attitudes and practices undermining women. However, these are arguably not dealt with as comprehensively as they could be. Niger's report of 2014 is one such example. Here it specifies measures taken to promote a "change in the mentalities of men and women".[87] In its report of 2019, it confirms measures taken in this regard, with some initiatives aimed solely at young girls and women and others at "men, women and especially young girls".[88] Later it notes the sensitisation of the entire population[89] and the development of empowerment programmes for women and girls to minimise their vulnerability.[90] While notable that the state recognises the need for resocialisation, it focuses its effort on women and girls, with less attention given to the overarching influence of systemic gender inequality. The African Commission's Concluding Observations of 2018 to Niger's report recommends that the state implement measures to sensitise "all stakeholders, particularly among religious and customary authorities in order to accelerate the change in mentality of the people".[91] While the African Commission follows the language used by the state closely by referring to the need to change public mentalities, it limits the scope of resocialisation to a select pocket of society.[92]

Sudan's report of 2012 observes that an increased awareness of the dangers of FGM has resulted in a reduction in the practice, crediting political will and persistent action for this success.[93] This notwithstanding the African Commission's observation, as an area of concern in its corresponding Concluding Observations of 2012, that violence against women, in particular rape and FGM, remains an ever-present

[87] Republic of Niger Combined Periodic Report of the Republic of Niger 2003–2014 on the Implementation of the African Charter on Human and Peoples' Rights para 360.

[88] Fifteenth Periodic Report of the Republic of Niger (n 32) para 280.

[89] Fifteenth Periodic Report of the Republic of Niger (n 32) para 537.

[90] Fifteenth Periodic Report of the Republic of Niger (n 32) para 541.

[91] African Commission Concluding Observations Niger (n 60) 23.

[92] Republic of Niger Periodic Report of the Republic of Niger (2014–2016) on the Implementation of the African Charter on Human and Peoples' Rights para 512.

[93] Republic of the Sudan 4th and 5th Periodic Reports of the Republic of the Sudan in Accordance with Article 62 of the African Charter on Human and Peoples' Rights 2008–2012, 45.

reality.[94] The fact that the African Commission does not engage with this area of concern in greater depth and does not draw on the value of resocialisation in this regard is an opportunity missed.

Gabon's report of 2012 acknowledges that the elimination of discrimination "must start with a change in the mental attitude in order to be able to contribute to changes in the role of men and women in Gabonese society and thus achieve true gender equality".[95] The African Commission recommends to the state in its Concluding Observations of 2014 that it implement temporary special measures to "sensitize Gabonese women and increase their leadership role and participation in the development and management of the country".[96] Thus, while the state targets Gabonese society at large, the African Commission takes a more narrow stance. This reflects the above-mentioned concern relating to a narrow focus on the resocialisation of women to the exclusion of men.

In Angola's report of 2017, the state provides a direct response to the African Commission's Concluding Observations of 2012.[97] In this regard, the African Commission recommends that the Angolan State take all necessary measures to implement legislation relating to violence against women, including the adoption of a national action plan.[98] The state's response, which includes increasing public awareness and mobilisation around violence against women, demonstrates that states are aware of their obligations under the African Charter and respect the authority of the African Commission in guiding them towards fulfilling their human rights responsibilities. It further signals the important role that the African Commission plays in interpreting the African Charter obligations as comprising of resocialisation and in practically applying it to the guidance it provides to states.

The influence of socio-cultural norms in limiting the realisation of rights is another overarching concern noted by some states. Djibouti's report of 2015 considers the

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[94] Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, adopted at its 12th extra-ordinary session para 36.

[95] The Gabonese Republic Initial Report by Gabon on Implementation of the African Charter on Human and Peoples' Rights 1986–2012, 93.

[96] Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights (1986–2012), adopted at its 15th extra-ordinary session 9.

[97] Sixth and Seventh Periodic Report of Angola, (n 32) para 106.

[98] African Commission Concluding Observations Angola (n 54) 8.

influence of socio-cultural norms limiting girls from reporting instances of FGM and commits to awareness-raising campaigns to deal with this challenge. It does not, however, address the prevention of FGM, thereby placing the onus on girls to effect the necessary change.[99] Niger's report of 2019 specifies the efforts made at "the social level, in order to promote change of mindset and social prejudices among Nigerien *young girls and women*".[100] Why it chose to limit the target of modifying mindsets and social prejudices to young girls and women only is unclear. Nonetheless, the state reports that a specific initiative existed aimed at developing the "knowledge and skills of young boys in sexual and reproductive health and positive attitudes on gender relations".[101] This initiative targeted unmarried boys from the ages of 15 to 24 who were not in school, again limiting the scope of mindset changes to a particular segment of the population only.[102]

Further illustrating the role that socio-cultural norms play in limiting the exercise of rights is that of Chad's report of 2016.[103] Despite constitutional equality guarantees, the report suggests that "strict enforcement of these laws is problematic because of certain social and cultural constraints".[104] In the concluding portion of the report, Chad highlights the significant impact of customary norms on its population's engagement with personal status matters such as marriage, divorce and inheritance.[105] While acknowledging the conflict of such norms with international human rights standards, the report highlights the prevalence of practices such as forced marriages and FGM.[106] However, the report omits any reference to the obligations to resocialise to address the causes of such practices.[107]

Djibouti's report of 2015 specifies the protections afforded to women by the Family Code regarding consent for marriage while listing some of the duties of each spouse. Here it notes the duty of the husband to provide for the family, reinforcing gendered

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[99] Combined and Initial Periodic Report of Djibouti (n 32) para 220. No corresponding Concluding Observation is available for analysis.

[100] Fifteenth Periodic Report of the Republic of Niger (n 32) para 277. Emphasis added.

[101] Fifteenth Periodic Report of the Republic of Niger (n 32) para 277.

[102] No corresponding Concluding Observation is available for analysis.

[103] Combined Periodic Report of the Republic of Chad (n 35) para 294.

[104] Combined Periodic Report of the Republic of Chad (n 35) para 294.

[105] Combined Periodic Report of the Republic of Chad (n 35) para 370.

[106] Combined Periodic Report of the Republic of Chad (n 35) para 370.

[107] No corresponding Concluding Observation is available for analysis.

roles and stereotypes while implicitly prioritising men's rights to work over those of women.[108] Later in the report, the state describes its attempts at awareness-raising campaigns on family planning and the benefits of birth control. As the report suggests, the purpose was to "enhance [the] development of the family unit, particularly women, the linchpins of the family, whose weakening could have a significant impact on the basic unit of society".[109] However, the report fails to address pressing issues of violence against women and the systemic patriarchal norms that limit access to birth control and reproductive health rights.[110]

In some instances, states deny the existence of inequality, in whatever form it manifests, and perceive the status quo as satisfactory. For instance, Eritrea's report of 2017 acknowledges the contribution of Eritrean women to liberation and asserts that gender equality is a priority for the state.[111] It also highlights the societal value placed on girls and women and emphasises that Eritrean society does not condone rape. Based on this assertion, the report categorically emphasises that sexual violence and rape are insignificant in Eritrea. It further suggests that the ability of women to travel at night is indicative of the absence of widespread violence against women.[112] The African Commission's corresponding Concluding Observations of 2018 do not challenge this unequivocal, yet objectively inaccurate statement made by the Eritrean State. This missed opportunity could have been used to raise awareness that violence against women, including rape, does exist in Eritrea.[113]

Nigeria's report of 2014 notes the prevalence of FGM, with 22% of women agreeing with this practice and 66% believing the practice should be abolished.[114] It avers that many women believe their partners are justified in beating them when they neglect the children or leave the home without informing their partners of their whereabouts.[115]

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[108] Combined Initial and Periodic Report of the Republic of Djibouti (n 32) para 202.

[109] Combined Initial and Periodic Report of the Republic of Djibouti (n 32) para 211.

[110] No corresponding Concluding Observation is available for analysis.

[111] The State of Eritrea Initial National Report (1999–2016) Prepared on the African Charter on Human and Peoples' Rights (ACHPR) para 307.

[112] Initial Report of the State of Eritrea (n 111) para 307.

[113] In this regard see US Department of State, "Eritrea 2017 Human Rights Report" 18 <https://www.state.gov/wp-content/uploads/2019/01/Eritrea.pdf> accessed 17 February 2023.

[114] Federal Republic of Nigeria 5th Periodic Country Report: 2011–2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (June 2014) 55.

[115] 5th Periodic Report of the Federal Republic of Nigeria (n 114) 55.

This information is presented in isolation, with the state refraining from commenting either on the information presented or on ways in which to change those mentalities. Similarly, it is unclear if the state views the statistics presented as concerning. While the African Commission's Concluding Observations of 2015 does specify, as with most Concluding Observations, the role of harmful cultural, religious, and traditional practices in contributing to the violation of women's rights, it did not address the prevalence of FGM or domestic violence in direct response to Nigeria's report.[116] In this regard, a generic observation by the African Commission, arguably, does little to encourage state engagement with resocialisation.

Without direct reference to article 18(3), the African Commission generally refers to the prevalence of harmful and/or deep-seated traditional practices and attitudes throughout several Concluding Observations within the context of the African Charter.[117] In response to Algeria's 2006 report, the African Commission describes,

[116] African Commission Concluding Observations Nigeria (n 49) para 56.

[117] See Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia, adopted at its 47th ordinary session para 61; Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia, adopted at the 56th ordinary session para 27; African Commission Concluding Observations Gabon (n 96) paras 35-26; Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya, adopted at its 19th extra-ordinary session para 30; African Commission Concluding Observations Lesotho (n 41) para 33; Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013), adopted at its 57th ordinary session para 57; Concluding Observations and Recommendations on the Periodic and Combined Report of the Islamic Republic of Mauritania on the Implementation of the African Charter on Human and Peoples' Rights (2006–2014) and the Initial Report of the Maputo Protocol, adopted at its 23rd ordinary session para 72; African Commission Concluding Observations Niger (n 60) para 75; African Commission Concluding Observations Nigeria (n 49) para 56; Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Senegal on the Implementation of the African Charter on Human and Peoples' Rights (2004–2013), adopted at its 18th extra-ordinary session para 51; Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in African of the Republic of South Africa, adopted at its 20th extra-ordinary session para 23; Concluding Observations and Recommendations on the Periodic Report of the Republic of Sudan, adopted at its 35th ordinary session para 13; Concluding Observations and Recommendations on the Combined 3rd, 4th and 5th Periodic Report of the Republic of Togo, adopted at its 51st ordinary session para 36; Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of Zimbabwe on the

as a factor restricting the enjoyment of rights, the role of "nefarious and persistent traditional practices which contributes to the violation of women's rights".[118] The Concluding Observation of 2017 to Burkina Faso notes, as an impediment to the enjoyment of rights, "[t]he sociological and cultural factors, persistence of customary practices and deep-rooted prejudice, particularly against women".[119] The Concluding Observations of 2010 to Cameroon similarly highlight the persistence of traditional practices and customs as an obstacle to the realisation of human rights in general,[120] while the later Concluding Observation of 2014 highlights the role of customary practices and deep-rooted prejudices as impacting the realisation of the rights of women specifically.[121] In one of the most recent Concluding Observations, in response to the report of Eswatini, the African Commission similarly emphasises the "weight of sociological and cultural factors, entrenched patriarchal customary practices, as well as deeply rooted bias, particularly, against women, continue to act as barriers to the full enjoyment of women's rights'.[122] Unfortunately, the African Commission simply makes reference to these underlying determinants without providing greater insight into the necessity for resocialisation in terms of article 18(3).

5 4 Article 25

5 4 1 Drafting history

Implementation of the African Charter on Human and Peoples' Rights (2007–2019) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African (the Maputo Protocol) (2008–2019), adopted at its 69th ordinary session para 9.

[118] Concluding Observations on the 3rd and 4th Combined Periodic Reports of the People's Democratic Republic of Algeria, adopted at its 42nd ordinary session para 11.

[119] Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011–2013), adopted at its 21st extra-ordinary session paras 16–18.

[120] African Commission Concluding Observations Cameroon (n 58) para 13.

[121] Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon, adopted at its 15th extra-ordinary session para 46.

[122] Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the Implementation of the African Charter on Human and Peoples' rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, adopted at its 70th ordinary session para 20.

The current version of article 25 of the African Charter finds no comparable provision in the Mbaye Draft. Instead, it originates in the Dakar Draft, the wording of which remains unchanged in the final draft of the African Charter. While it remains unclear as to why the drafters included this provision in the Dakar Draft, the emphasis that the drafting history places on the duties of people and individuals gives some insight into its inclusion. In this regard, the address of the then President of the Republic of Senegal points to the importance of individual duties and observes that "[i]n Africa, the individual and his rights are wrapped in the protection of the family and other communities".[123] The Dakar Draft, under subsection II, stipulates that:

> The part dealing with duties is an innovation … It is necessary to point out here that if individuals have rights to claim, they also have duties to perform. In traditional African societies, there is no opposition between rights and duties or between the individual and the community. They blend harmoniously.[124]

In the Dakar Draft, the provisions are placed within defined categories and chapters, with chapter two delineating the duties of individuals. Article 25 was the first provision in chapter two. Thus, the drafters were cognisant of the importance that the educational process set out in article 25 plays as a prerequisite to the maintenance of individual duties in the human rights context. The Report of the Secretary-General suggests that,

> [a] most distinguishing feature of the Charter is, in addition to the rights of individuals and peoples, the provision of their respective duties to the community; for it recognises that the individual has certain obligations towards his fellow men, the family, society, the state and towards the national and international community.[125]

Thus, for individuals to understand the rights and freedoms to which they owe a duty, the state must educate them on its contents.

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[123] Address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal 28 November 1979, available in Heyns (n 4) 80.

[124] Dakar Draft, II Plan (n 5) 81–82.

[125] Report of the Secretary-General (n 6) available in Heyns (n 4) 82.

In the final draft of the African Charter, article 25 no longer falls under the chapter of duties. Notwithstanding, the above-mentioned link between article 25 and individual duties is still relevant, as discussed below.[126]

5 4 2 Concepts and definitions

While the African Charter does not make provision for resocialisation within the specific context of women's rights, article 25 presents a general duty to "promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained [therein]". The African system requires that states promote and ensure the rights and freedoms of all by engaging in measures whereby individuals are resocialised to acknowledge and respect the equal dignity and value of all.[127] This educational imperative is broad in scope and is not limited to specific rights. This implies, therefore, a greater effort on the part of states to ensure that all the rights and freedoms are adequately catered to and promoted without favouring some rights over others. In the context of women's rights, this is significant given society's propensity to overlook women in general.

5 4 3 State obligations

In terms of article 25, states are obligated to implement measures to promote and ensure the respect of the rights and freedoms contained in the African Charter, including the rights of women as contained in articles 2, 3 and 18(3). The obligation to *promote* and *ensure* implies a two-pronged approach to its implementation.[128] Both terms infer an active engagement with human rights education by the state. The promotion of human rights education alone, however, is inadequate. States must also implement human rights educational initiatives at an appropriate standard.

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[126] See 5 4 2.

[127] See Annika 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. Here Rudman notes that "[i]t is important to note that the Maputo Protocol, alongside the African Charter and the Universal Declaration of Human Rights, refers to dignity as a right and not as a fundamental value or guiding principle as is done, for example, in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the CEDAW".

[128] Emphasis added.

In 1993, the African Commission passed a resolution on human rights education, where it reiterated the value of both articles 17[129] and 25, stipulating that human rights education is "a prerequisite for the effective implementation of the African Charter on Human and Peoples' Rights and other international human rights instruments".[130] The African Commission proceeds to note the obligation on states to provide human rights education "at all levels of public and private education … to law enforcement personnel, civil or military, as well as medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment".[131] Nothing in article 25 itself provides a basis for the African Commission's narrow scope. As Murray suggests, "attention to human rights education has been rather generalised, requiring simply that states (and on occasion, others), educate various sectors of the population in human rights".[132] Murray further observes that "[l]ittle reference is made to the more nuanced discussions around how human rights is taught, what precisely is taught, at what levels, and the implicit presumptions on which it is based".[133] This point is exemplified by the state reports discussed below.[134]

The effective implementation of article 25 has the potential to alter the landscape of human rights on the continent and the acceptance of the rights of all by individuals. In particular, it has the potential to foster a more coherent understanding of article 27(2), which acts as a limitations clause. It provides that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".[135] This provision, when interpreted in conjunction with article 25, has the potential to promote greater respect for the rights and freedoms of women. Specifically, cultural relativism may be viewed as less

[129] The Right to Education.

[130] African Commission on Human and Peoples' Rights, "Resolution on Human Rights Education", (1993) African Charter/Res.6(XIV)93 <https://www.achpr.org/sessions/resolutions?id=86> accessed 31 August 2022.

[131] Resolution on Human Rights Education (n 130).

[132] Murray (n 21) 560.

[133] Murray (n 21) 560.

[134] See 5 4 4.

[135] Makau Wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 VA J Int'L 339, 369.

influential when viewed in light of article 27(2) in conjunction with article 25. In this regard,

> [i]ndividuals are asked to reflect on how the exercise of their rights in certain circumstances might adversely affect other individuals or the community. The duty is based on the presumption that the full development of the individual is only possible where individuals care about how their actions would impact on others. By rejecting the egotistical individual whose only concern is fulfilling self, article 27(2) raises the level of care owed to neighbors and the community.[136]

The introductory statement of the Meeting of Experts in Dakar makes clear that "[t]he conception of an individual who is utterly free and utterly irresponsible and opposed to society is not consonant with African philosophy".[137] However, as Mugwana notes, caution ought to be exercised to ensure that individual duties "should not be emphasized to the detriment of individual rights as dictatorial regimes are wont to do".[138] Ensuring that human rights education is effectively implemented implies that states regularly evaluate the effectiveness of the human rights education it implements on the behaviour of its populace.[139] As the state reports below indicate, not only do states poorly engage with this obligation, where they do, they do so exclusively from the perspective of its promotional mandate.

5 4 4 State practice

The approach taken by states towards its obligations under article 25 varies considerably from state to state. Many make no reference to this provision at all, while others simply note that awareness-raising is taking place without providing further information in this regard.[140] Those that do make reference to this provision often

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[136] Wa Mutua (n 135) 369.

[137] Dakar Draft (n 5), in Heyns (n 4) 81.

[138] Mugwanya (n 12) 231.

[139] UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), "General Recommendation No 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28 para 24 onwards.

[140] See for instance, Republic of Benin Combined Periodic Report from the Sixth to Tenth (6th–10th) Periodic Reports on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights. At 72 it notes, "Nothing to report on". The two most recent reports by the Republic of Cameroon

provide some detail as to the measures taken to educate the populace on human rights in general, with the training of magistrates, law enforcement and judges prioritised, while others include human rights education in school curricula, textbooks and law degree programmes at universities.[141]

For instance, Algeria's report of 2014 indicates the initiatives undertaken, including human rights education within schools, universities and the police force on topics related to, *inter alia*, the UDHR, characteristics of human rights, and respect for human rights during preliminary investigations by the police.[142] It also includes "raising

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are silent on this provision. See Single Report Comprising the 4th, 5th and 6th Periodic Report Cameroon (n 32) and 3rd Periodic Report of Cameroon (n 83). The same is true of: Ghana 2nd Periodic Report on Ghana's Compliance with its Reporting Obligations Pursuant to Article 62 of the African Charter on Human and Peoples' Rights; Government of Liberia General Report on the Human Rights Situation in Liberia (September 2012); Mauritania 10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the Implementation of the Provisions of the African Charter on Human and Peoples' Rights (July 2016); Sixth Periodic Report Nigeria (n 48); Senegal Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights (2013); Periodic Report Republic of Sudan (n 93). See also Republic of Cote D'Ivoire Periodic Report of the Republic of Cote D'Ivoire under the African Charter on Human and Peoples' Rights at 50-51 where it notes that "sensitization is not enough due to financial and logistical constraints". Initial National Report of The State of Eritrea (n 111) notes at 65 that "awareness raising and educational programme on civics, gender, human rights, health and education is regularly conducted". Combined Second to Eighth Periodic Report Lesotho (n 32) 103 notes the existence of awareness campaigns and that it commemorates important human rights related public holiday. The Republic of Mali Periodic Report to the African Commission on Human and Peoples' Rights relating to the Implementation of the African Charter on Human and Peoples' Rights, 2001–2011. At 71, it references a particular educational programme relating to human rights though it does not elaborate on this.

[141] People's Democratic Republic of Algeria African Charter on Human and Peoples' Rights Fifth and Sixth Periodic Report. At 69, it notes, pursuant to African Commission Concluding Observations Algeria (n 118), the training of magistrates, law enforcement and judges. See also Republic of Burundi African Charter on Human and Peoples' Rights First Implementation Report; Central African Republic Initial and Cumulative Report of the Central African Republic on the African Charter on Human and Peoples' Rights; Democratic Republic of Congo Eighth, Ninth and Tenth Periodic Reports to the African Commission on Human and Peoples' Rights; Republic of Mauritius Ninth to Tenth Combined Periotic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (January 2016–August 2019).

[142] Fifth and Sixth Periodic Report People's Democratic Republic of Algeria (n 141) para 420, 69. See also Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights, from 2008–2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples'

awareness and training magistrates and other personnel responsible for training magistrates and other personnel in charge of law enforcement".[143] While the above initiatives are positive, the scope is arguably narrow. Measures aimed at the resocialisation of the generality of the population in order to reshape societal views on the role and value of women are notably absent.[144]

Gabon's report of 2012 combines its information relating to articles 17 and 25 together, noting an initiative undertaken to train women educators in early childhood development. This is another example of the limited view of states on article 25.[145] The African Commission's Concluding Observations of 2014 to Gabon recommends human rights education in three distinct ways: the implementation of human rights education at primary, secondary and tertiary levels, human rights training specifically for police and law enforcement and awareness-raising on rights, legal procedures and remedies for the entire population.[146] Though it makes these recommendations without explicit reference to the obligations contained in article 25, the African Commission's broadened view relating to the recipients of human rights education demonstrates a progressive understanding of the responsibilities of states in this regard.

Similarly, in its Concluding Observations of 2017 to Burkina Faso, the African Commission highlights that a lack of human rights awareness across the generality of the population remains a factor impeding the enjoyment of rights.[147] Likewise, in the

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Rights on the Rights of Women from 2005–2014 (Initial Report and 1st, 2nd and 3rd Periodic Reports) paras 66–67.

[143] Fifth and Sixth Periodic Report People's Democratic Republic of Algeria (n 141) para 421, 69. See also Republic of Kenya Combined 8th–11th Periodic Report on the African Charter on Human and Peoples' Rights (November 2014) para 304, which focusses its educational endeavours on civil servants and law students, as does Republic of Malawi Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (2005–2013) para 130.

[144] No corresponding Concluding Observation is available for analysis.

[145] Initial Report of Gabon (n 95) 82.

[146] African Commission Concluding Observation Gabon (n 96) 10.

[147] African Commission Concluding Observations Burkina Faso (n 119) paras 16–18. In this regard, the state's report notes educational endeavours in relation to the rights of prisoners (para 103) and awareness raising on remedies to violations (para 29). No mention is made of article 25 directly or of human rights education targeted at everyone.

context of Malawi, the Africa Commission broadens the scope and recommends, though without direct reference to article 25, the raising of awareness "of the entire population of Malawi about their rights under the African Charter".[148] It makes a similar recommendation to Liberia[149], Nigeria[150] and Togo,[151] though none refer explicitly to article 25.

Ethiopia's report of 2014 includes information on human rights education measures targeted to police, prosecutors, prison authorities and the military, as well as awareness-raising on the rights of women, children, and people with disabilities. The report highlights special efforts made at raising awareness of the human rights of women, though the target audience of such is unclear.[152] The corresponding Concluding Observations of 2015 do not comment on this obligation at all. Niger's

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[148] African Commission Concluding Observations Malawi (n 117) para 133. In Report to the African Commission Malawi (n 143) para 130, the state notes efforts made in relation to its article 25 obligations though such efforts are targeted to law enforcement and the judiciary. While it does reference general human rights programmes targeted at the public, no details are provided. See also the Concluding Observations and Recommendation on the Third Periodic report of the Federal Republic of Nigeria, adopted at its 44th ordinary session para 35, which recommends publicising the provisions of the African Charter across the country. In African Commission Concluding Observations Nigeria (n 49), it reiterates its recommendation in this regard, while in African Commission Concluding Observations Sudan (n 94) para 57, the African Commission recommends the training of the judiciary, police, and prison officials on human rights law.

[149] Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' rights, adopted at its 17th extra-ordinary session, 10. Here it recommends that the state "[i]ncrease its efforts to raise awareness of the African Charter among judges, lawyers and prosecutors to ensure that its provisions are taken into account by courts and take effective measures to widely disseminate the Charter to the public". The Initial and Combined Periodic Report Liberia (n 140) at para 102 notes, as a key priority, the need to provide periodic human rights education to citizens, including through school curricula, though it does so without direct reference to article 25.

[150] African Commission Concluding Observations Nigeria (n 49) at para 113 and 129, where the African Commission recommends it "[t]ake all necessary measures to popularize the Charter, the Maputo Protocol and other human rights instruments amongst the Nigerian populace". 5th Periodic Report of Nigeria (n 114) contains no information relating to article 25.

[151] African Commission Concluding Observations Togo (n 117) 11. Here it recommends that the state "[r]aise awareness at all levels about citizens' rights". Togolese Republic 3rd, 4th and 5th Combined Periodic Reports of the Government of the Republic of Togo (December 2010) does specify efforts made with direct reference to article 25, though the state notes financial constraints to its effective implementation of awareness raising in terms of this provision.

[152] Periodic Country Report of Ethiopia (n 32) 126.

report of 2014 records the efforts made at sensitising the entire population on human rights, emphasising such education in schools and training institutions, with a focus on women's rights and the rights of children and those with disabilities.[153] The report notes, further, the training of defence and security forces on human rights.[154] In its 2019 report, Niger reiterates the human rights educational measures taken in schools and includes information regarding its utilisation of radio stations as a means to creating awareness of the rights and duties of individuals.[155] Over and above that, Niger underscores the importance of human rights education by incorporating human rights content in textbooks.[156] Finally, it highlights training sessions for law enforcement "in order to respect and protect human dignity and defend human rights without distinction as to race, colour or national or ethnic origin".[157] No mention is made of distinctions made on the basis of sex/gender.

Finally, the African Commission's Concluding Observations of 2005 to Egypt are of interest. In this regard, the African Commission recommends the "effective implementation of the African Charter, and [to] ensure that gender equity and equality is integrated in all programmes, structures and activities".[158] This implies an educational process as per article 25 of the African Charter. However, the term equity is not one employed in human rights law.[159] As Facio and Morgan suggest, "[e]quity is not a concept associated with human rights, except maybe in the sense that both have to do with social justice".[160] Indeed, the CEDAW Committee has made clear the distinction between equity and equality, emphasising the importance of ensuring that states are aware that the terms are not, in fact, synonymous and interchangeable.[161] The African Commission, in employing the use of the word equity in the context of

[153] Periodic Report of the Republic of Niger (n 92) para 423.

[154] Periodic Report of the Republic of Niger (n 92) para 423.

[155] Fifteenth Periodic Report of the Republic of Niger (n 32) paras 343–344.

[156] Fifteenth Periodic Report of the Republic of Niger (n 32) para 346.

[157] Fifteenth Periodic Report of the Republic of Niger (n 32) para 350.

[158] Concluding Observations and Recommendations on the Seventh and Eighth Periodic Report of the Arab Republic of Egypt, adopted at its 37th ordinary session para 24.

[159] Alda Facio and Martha I Morgan, "Equity or Equality for Women? Understanding CEDAW's Equality Principles" (2009) 60 Alabama Law Review 1133, 1135.

[160] Facio and Morgan (n 159) 1136.

[161] Facio and Morgan (n 159) 1141.

gender equality, risks undermining the rights of women as contained in the legal convention.

5 5 Concluding remarks

This chapter demonstrates the African Charter's reach in relation to resocialisation, despite the absence of explicit resocialisation provisions. Articles 2, 3, 18(3) and 25 hold significant resocialisation potential and, where appropriately interpreted and applied, could advance and accelerate the realisation of women's rights in Africa. Notwithstanding the richness of the law, state reports and Concluding Observations provide insight into the extent to which states and the African Commission fail to adequately engage with resocialisation as a tool for achieving gender equality. In this regard, the African Commission's Concluding Observations could generally benefit from a more comprehensive approach to its response to state reports. While the African Commission highlights the need for resocialisation in its own way, the haphazard way it does so, coupled with its failure to appeal directly to specific resocialisation provisions and, in many cases, its failure to respond to several issues raised in state reports, demonstrates a significant challenge.

As noted throughout this research, the law alone is insufficient in altering the lived realities of women. The African Charter, therefore, provides ample authority and scope for states to engage with and apply resocialisation in the context of gender equality. When coupled with the Maputo Protocol, the potential for resocialisation to anchor itself into the operation of human rights on the continent is significant. Chapters 6 and 7 explore the Maputo Protocol in greater depth, with Chapter 6 focusing on its resocialisation provisions and Chapter 7 on its application.

6 Resocialisation in the Maputo Protocol

6 1 Introduction

This chapter provides an analysis of relevant provisions of the Maputo Protocol. Like Chapter 5, the purpose is to highlight the resocialisation provisions. Unlike the African Charter, however, the provisions of the Maputo Protocol addressed in this chapter are explicit in their emphasis on resocialisation.

This chapter begins with a brief background followed by a more in-depth analysis of its resocialisation provisions. For each provision, similar to the structure of Chapter 5, the drafting history, concepts, and definitions, as well as the state obligations, form part of the analysis. Where applicable, the analysis may refer to sub-regional law from SADC, EAC and the ECOWAS. This serves to elaborate on and underscore the state's responsibility in this regard at a sub-regional level. This helps bolster women's rights to resocialisation when considered alongside continental obligations. The interpretation and application of these provisions then follow in Chapter 7.

6 2 The drafting history of the Maputo Protocol and its relationship with CEDAW and the African Charter

The Maputo Protocol was developed as a Protocol to the African Charter to supplement the protection of women's rights contained in the African Charter, as discussed in Chapter 5. As Rudman notes, "[t]o contribute to a more comprehensive protection of African women's rights, the Maputo Protocol was created as an African Charter-adjacent instrument under Article 66 of the latter".[1] It was developed to overcome the African Charter's silence regarding the real challenges to women's rights.[2] In this regard, the preamble of the Maputo Protocol notes that,

> despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of State Parties, and their solemn

[1] Annika 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, 428.

[2] Ashwanee Budoo, "Analysing the Monitoring Mechanisms of the African Women's Protocol at the Level of the African Union" (2018) 58 Afr Hum Rts LJ 58, 59–60.

> commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.[3]

The Maputo Protocol saw its beginnings in March 1995 at the Seminar on the African Woman and the African Charter on Human and Peoples' Rights, held in Lomé, Togo.[4] Later, in July 1995, the OAU Assembly of Heads of States and Government confirmed the need for a women's protocol to the African Charter.[5] The International Commission of Jurists (ICJ), in collaboration with the African Commission, put forward the first draft of the Maputo Protocol, the Nouakchott Draft,[6] in 1997. Following this draft was the Kigali Draft[7] of 1999, which was drafted parallel to the Draft Convention on Harmful Practices.[8] The Draft Convention on Harmful Practices was a joint collaborative effort by the former OAU's Women's Unit and the Inter-African Committee on Traditional Practices (IAC).[9] The cornerstone of the IAC remains the elimination of all forms of harmful practices affecting women and girls on the continent. For this reason, the Draft Convention on Harmful Practices came about.[10] However, rather than draft two separate women's rights instruments, the African Commission and Women's Unit

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[3] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 Preamble.

[4] Seminar on the African Woman and the African Charter on Human and Peoples' Rights, Lomé, Togo, 8–9 March 1995, organised in collaboration with WILDAF, as referred to in the 8th Annual Activity Report of the African Commission 1994–1995.

[5] OAU Assembly of Heads of State and Government July 1995, 31st ordinary session Resolution AHG/Res 240 (XXXI).

[6] Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania 12–14 April 1997 (Nouakchott Draft).

[7] Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples Rights 1–15 November 1999 Kigali, Rwanda (Kigali Draft).

[8] Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls (Draft Convention on Harmful Practices) IAC/OAU/197.00 and CAB/LEG/117.141/62/Vol.1. See also Semalulu Nsibirwa, "A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (2001) 1 Afr Hum Rts LJ 40, 42.

[9] Inter-African Committee on Traditional Practices (IAC), About Page [n.d] <http://iac-ciaf.net/about-iac/> accessed 22 August 2022. The prevalence of harmful practices on the continent, most notably that of FGM, prompted the formation of the (IAC) in 1984.

[10] Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart Publishing 2005) 223.

began to work collaboratively to enhance the Kigali Draft to address the prevalence of harmful practices.[11] This resulted in the finalisation of an integrated document in September 2000, named the Final Draft.[12] Thereafter, a meeting of experts was convened in 2001 in Addis Ababa (Report of the Meeting of Experts),[13] followed by comments by the Office of the Legal Counsel in 2002 (Comments by the Office of the Legal Counsel)[14] and comments from the NGO Forum in 2003 (Comments by the NGO Forum).[15] Finally, the Addis Ababa Draft of 2003 (Addis Ababa Draft)[16] was adopted by the Meeting of Ministers, with the final version of this instrument materialising with the finalisation of the Maputo Protocol in March 2003, adopted on 11 July 2003.

The process of drafting the Maputo Protocol was not without its challenges or its delays. What is notable, however, is the collaboration between the African Union and the IAC and the impact such collaboration had on the final draft of the Protocol. For instance, in the Nouakchott Draft, several prohibited actions were listed, such as the implementation of death sentences on pregnant women, trafficking and the prohibition of "all traditional and cultural practices which are *physically* harmful to women and girls and which are against recognised international norms (including force-feeding, genital mutilation, infibulation, etc."[17] A similar provision is found in article 5(d) of the Kigali Draft, though this draft prohibits physically and/or morally harmful practices, thus

[11] Nsibirwa (n 8) 42. In this regard, the IAC in its 9 May 2000 letter to the OAU, agrees to the merger of the two documents. See also below for further details of the inclusion of harmful practices within the Maputo Protocol.

[12] Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000, reprinted in Annex A of Nsibirwa (n 8) 42.

[13] Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

[14] Comments by the Office of the Legal Counsel (2002) CAB/LEG/66.6/Rev.1 [Comments on the Final Draft including the amendments by the Meeting of Experts].

[15] Comments by the NGO Forum (2003) CAB/LEG/66.6/Rev.1 [Comments on the Final Draft including the amendments by the Meeting of Experts].

[16] Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM/RTS/DRAFT/PRT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 [Fourth Draft] (Addis Abba Draft).

[17] Emphasis added. Nouakchott Draft (n 6) art 5.

expanding the scope of protection.[18] It does state, however, in article 13, that violence against women can take the form of physical, sexual or psychological harm, yet another improvement regarding the manner in which harms can manifest.[19] The Maputo Protocol appropriately acknowledges that certain practices, including violence against women, can manifest physically, sexually, psychologically or in the form of economic harm. This broadens the scope to align with established international standards.[20]

Unlike the previous versions, the Maputo Protocol addresses harmful practices in a section of its own rather than sporadically throughout the document, giving it necessary amplification. Furthermore, the broader concept of resocialisation, which addresses harmful practices, attitudes, stereotypes, normalised cultural practices, and the like underpinning discrimination against women, is similarly given greater prominence in the final draft.

As Murray suggests, the Maputo Protocol is an "African CEDAW … reflecting the specificities of women's rights on the continent".[21] Its incorporation of African values sets it apart from its counterparts, and as Viljoen suggests, it "speaks in a clearer voice about issues of particular concern to African women, [and] locates CEDAW in African reality".[22] Maintaining the African ethos in African legal instruments is crucial to maintaining the legitimacy of such instruments and garnering support from both states and the population. The Maputo Protocol is not an importation of Western ideals into the African context. To argue otherwise denies the reality of how the African system

[18] Emphasis added.

[19] Kigali Draft (n 7) art 13.

[20] UN Women, "Frequently asked questions: Types of Violence against Women and Girls" [n.d] <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence> accessed 24 August 2022. Indeed, see Maputo Protocol (n 3) definition section, art 1 where it defines violence against women as including acts causing physical, sexual, psychological, and economic harm.

[21] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019) 466.

[22] Frans 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, 21.

is “embedded in and responsive to a region with distinct cultural, political, and social contexts”.[23]

As discussed in Chapter 4, the CEDAW Committee notes that three central obligations arise from a reading of articles 1 to 5.[24] The first obligation requires that there be no discrimination against women in laws (*formal* or *de jure* equality), the second that the position of women be improved in real terms (*substantive* or *de facto* equality), and the third that systems of disadvantage and difference are addressed to give effect to transformative equality.[25] As Albertyn and Goldblatt note, “equality necessitates a rejection of certain key assumptions of traditional liberal legalism”.[26] They argue further that “[t]he law should recognise the unequal life chances occasioned by race, gender, socio-economic status and a host of other factors, which affect a person’s ability to compete on an equal footing”.[27] It is the same rejection of formal notions of equality, coupled with the transformative potential of its provisions, that is reinforced in the Maputo Protocol. The Maputo Protocol gives prominence to substantive and transformative equality in a way that the African Charter does not. The transformative potential of several provisions in the Maputo Protocol strengthens arguments in favour of resocialisation as a precursor to substantive gender equality. As Albertyn and Goldblatt note, efforts at true equality, incorporating all its elements, is not without its challenges. Transformative equality “involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality”.[28] Importantly in this context, resocialisation seeks to address the underlying determinants that maintain those systems of advantage and disadvantage.

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[23] Alexandra Huneeus and Mikael Rask Madsen, “Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems” (2018) 16 Int J Const Law 136, 137.

[24] See Chapter 4 under 4 3.

[25] UN Committee on the Elimination of Discrimination against Women, “General Recommendation No 25: Article 4, paragraph 1 on the Convention (Temporary Special Measures)” (2004) UN Doc HRI/GEN/1/Rev.1 paras 6–7.

[26] Cathi Albertyn and Beth Goldblatt, “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 S. Afr. J. Hum. Rights 248, 251.

[27] Albertyn and Goldblatt (n 26) 251.

[28] Albertyn and Goldblatt (n 26) 249.

Substantive notions of equality, precipitated by the Maputo Protocol, are acknowledged by the African Commission as central to the realisation of women's rights on the continent. For instance, the African Commission notes in its General Comment 6 that the Maputo Protocol complements the African Charter "by expanding the substantive protection of women's rights in Africa".[29] This General Comment goes on to provide a comprehensive definition of substantive equality, which includes transformative equality in the form of the "structural change of social norms".[30] As discussed in Chapter 2, meaningful attempts at gender equality necessarily demand the realisation of formal, substantive, and transformative equality. The provisions discussed in the succeeding sections remain crucial to the realisation of substantive and transformative gender equality.

6 3 Article 2(2)

6 3 1 Drafting history

The Nouakchott Draft made brief reference to resocialisation in article 4, where it required states to "promote a positive image of women in the media".[31] It further stipulated that states must take steps to "eliminate the use of stereotypes in the treatment of women by the media [and] alter the socio-cultural models of behaviours for women and men".[32] Unlike the final article 2(2) of the Maputo Protocol, article 4 required that states take steps to "alter the socio-cultural models of behaviour" rather than "modify the social and cultural patterns of conduct". While article 4 is significant, the alteration of human behaviour is only mandated to promote a positive image of women in the media. Beyond the media, this draft had no requirement to alter or

[29] African Commission on Human and People's Rights, "General Comment No 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D))", 19 February–4 March 2020, 5.

[30] General Comment 6 (n 29) 11 stipulates that "'Substantive equality' refers to the form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and socio-cultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law".

[31] Nouakchott Draft (n 6) art 4.

[32] Nouakchott Draft (n 6) art 4.

modify behaviour. The Kigali Draft expanded on article 4 by replacing the previous version with the text of CEDAW's article 5(a) almost verbatim, apart from the inclusion of the reference to "through special measures such as public education", which does not exist in CEDAW.[33]

Notably, the influence of stereotypes is recognised beyond the context of the media and closely aligns with CEDAW. This demonstrates an important progression by drafters, with the input of experts and NGOs, in understanding the importance of resocialisation in general and addressing stereotypes specifically.

6 3 2 Concepts and definitions

Article 2(2) of the Maputo Protocol echoes that of CEDAW's article 5.[34] As a subsection of the general clause relating to combating all forms of discrimination against women, it requires that states commit 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 superiority of either of the sexes, or on stereotyped roles for women and men.

This is the first provision in the Maputo Protocol to establish resocialisation as a prerequisite to substantive equality. In contrast to CEDAW's article 5(a), which mandates state parties to take "all appropriate measures", as discussed in Chapter 4, article 2(2) expands on this scope by including avenues for the modification of harmful behaviour, such as public education, information, and communication strategies. The influence of stereotypes is flagged for the first time in this section of the Maputo Protocol in more general terms, similar to those of article 5(a) of CEDAW.[35]

In contrast to CEDAW, however, article 2(2) does not refer to family education and a "proper understanding of maternity as a social function", as stipulated in article 5(b) of CEDAW. In this regard, article 14 of the Nouakchott Draft contained remnants of

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[33] Kigali Draft (n 7) art 4(b).

[34] See Chapter 4 on a more detailed analysis of the obligations to respect, protect and fulfil.

[35] See Emma Lubaale, "Article 2: Elimination of Discrimination against Women" in Rudman, Musembi and Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 56, 66.

CEDAW's article 5(b), although instead of referring to maternity as a social function as article 5 of CEDAW does, it referred to motherhood and the upbringing of children as a social function.[36] This was echoed in the subsequent Kigali Draft[37], though the version settled on in the Maputo Protocol omits the word "motherhood" entirely and obligates states to "recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the state and the private sector have a secondary responsibility".[38]

6 3 3 State obligations

Article 2(2) of the Maputo Protocol requires, *inter alia*, that states ensure a change in the traditional role of women and men in society; it prescribes the realisation of substantive, transformative equality.[39] Article 2(2) requires a commitment to resocialisation. This commitment is, thus, an obligation owed by states and, as article 5 of CEDAW, confers a right to resocialisation upon women. Unlike CEDAW, where the right to a remedy is implied through article 2(c),[40] the Maputo Protocol explicitly provides for the right of women to an effective remedy in article 25.[41] Read together with the equal protection and access to justice provision in article 8, which echoes CEDAW article 2(c), resocialisation as a right is holistically provided for in the Maputo Protocol. Thus, resocialisation as an obligation, right and remedy finds its origin in article 2(2) of the Maputo Protocol.

In expanding on the scope of article 5(a) of CEDAW, article 2(2), the Maputo Protocol guides states on the methods to be used to affect the requisite modification, which is arguably broad in scope. In this regard, article 2(2) specifies the use of public education, information, education, and communication strategies. While this could be

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[36] Here it notes that states commit themselves to "recognise motherhood and the upbringing of children as a social function for which both parents must take responsibility, as well as the state and employers (the introduction of nurseries and creches at places of work etc)". As noted in Chapter 4 under 4 4 2, the initial drafts of CEDAW's article 5(b) similarly referred to motherhood rather than maternity as a social function.

[37] Kigali Draft (n 7) art 15(l).

[38] Maputo Protocol (n 3) art 13(l).

[39] See also Chapter 4 under 4 3.

[40] See Chapter 4 under 4 5 3 where it notes that the CEDAW Committee finds that CEDAW implies that women have a right to remedies by virtue of article 2(c).

[41] Maputo Protocol (n 3) art 25.

misconstrued as furthering a purely educational agenda, as important as that is, a narrow construction of the methods suggested would limit the scope of states' obligations. Broadly construed, the obligation filters into every aspect of societal functioning beyond purely educational methods, including, *inter alia*, the creation of appropriate governance structures that give effect to the requisite implementation of obligations, the accompanying appointment of civil servants who advance this obligation, the equal representation of women at all levels of government, the implementation of mechanisms for the monitoring and evaluation of resocialisation measures implemented and gender mainstreaming, to name a few. The policies, strategies, approaches, and practices employed by a state serve to advance the objectives of article 2(2) by communicating a positive narrative of the value and role of women in society and in bolstering the state's role as the upholder of rights, further serving as an example to which individuals might aspire. Using this method in tandem with others could contribute to discharging article 2(2) obligations. These other methods include educational strategies, the role of the media, and the involvement of traditional leaders and women in devising strategies, among others. Article 2(2) also implies a negative obligation to refrain from all behaviours, practices and narratives that drive discrimination.

Beyond this, as noted in Chapter 4,[42] resocialisation as an obligation places a due diligence obligation on states to prevent and respond to violations occurring at the hands of non-state actors. Thus, the perpetuation of harmful narratives and stereotypes around the role and value of women within society by non-state actors fall within the overall responsibility of the state, triggering state responsibility when violations occur. Promoting and implementing resocialisation within every pocket of society, therefore, falls within the mandate of the state. Failing to do so is a violation of article 2(2) of the Maputo Protocol, as well as article 5(a) of CEDAW.

Sub-regional instruments are further instructive and often mirror regional instruments to some or the other extent insofar as resocialisation is concerned. This further bolsters arguments in favour of resocialisation as these can serve as further guidance on state engagement with resocialisation and demonstrates harmony between continental and sub-regional instruments, as discussed below. For instance, article 7 of the SADC Protocol on Gender and Development (SADC Protocol) contains

[42] See Chapter 4 under 4 5 1 4.

a resocialisation provision mandating the implementation of educational programmes aimed at addressing "gender bias and stereotypes".[43] This Protocol came about in 2008 and takes cognisance of the adoption of the Maputo Protocol in its preamble. The preamble to the SADC Protocol, similarly, recognises the influence of social, cultural, and religious practices, attitudes and mindsets, though without reference to article 2(2) of the Maputo Protocol. It is possible, therefore, that this particular provision was inspired by article 2(2) of the Maputo Protocol. This Protocol is significant in its attempts at creating "synergy between various commitments on gender equality and equity made a regional, continental and international levels".[44]

The ECOWAS Protocol on Democracy and Good Governance (ECOWAS Protocol)[45] contains a provision obliging states to eliminate all forms of discrimination and harmful and degrading practices. It does not, however, identify resocialisation as the means to achieving this.[46] This Protocol came into being prior to the Maputo Protocol, which might be why resocialisation does not feature as prominently. Notwithstanding, the ECOWAS Commission, in its 2020 Guidelines on Peace and Security, notes that one key challenge to adhering to the Women, Peace and Security Agenda with regard to preventative diplomacy and mediation is the prevalence of "[c]ultural barriers and gender stereotyping of the role of women and men [which] are not accurately acknowledged and acted upon".[47] This serves to reinforce the important role that resocialisation in terms of article 2(2) plays in the realisation of women's rights.

The EAC launched its Gender Policy (EAC Gender Policy) in 2018, after the inception of the Maputo Protocol, containing numerous provisions aimed at enhancing gender equality and empowering women. The policy notes its complementary role alongside the other legal commitments made by states, including those at an

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[43] Southern African Development Community, "SADC Protocol on Gender and Development" (2008) art 7(e).

[44] SADC Protocol (n 43) Preamble.

[45] Economic Community of West African States, "Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security" (2001) A/SP1/12/01 <https://eisa.org/pdf/ecowas2001protocol.pdf> accessed 31 May 2022.

[46] ECOWAS Protocol on Democracy and Good Governance (n 45) art 40.

[47] ECOWAS Commission, ECOWAS Department of Political Affairs, Peace and Security (PAPS), "Guidelines on Women, Pease and Security" 29.

international level and at a regional level, once against demonstrating the synergy between instruments.[48] Section 4.6 of the EAC Gender Policy's guiding principles include the principle of non-discrimination, calling for the "elimination of stereotypes, prejudices and other negative practices against women".[49] In emphasising non-discrimination, a further principle relates to violence against women and the elimination of harmful cultural practices "which endanger the health and general well-being of women as in (Art. 2) of Maputo Protocol".[50]

6 4 Article 5

6 4 1 Drafting history

Article 5 of the Maputo Protocol is dedicated to the elimination of all forms of harmful practices. In the Nouakchott Draft, article 5 prohibited "all traditional and cultural practices which are physically harmful to women and girls".[51] As noted under 6 2 1 above, the Kigali Draft and the Draft Convention on Harmful Practices were drafted parallel to the Kigali Draft, reflecting the provision relating to harmful practices as it was in the Nouakchott Draft.

The Final Draft referred to harmful practices in article 6. Here the target for creating awareness of harmful practices is "all stakeholders". This narrow scope of awareness-raising was amended at the Meeting of Experts, where "all stakeholders" was replaced with "all sectors of society".[52] The Maputo Protocol reflects this amendment, ensuring that awareness-raising measures are aimed at every pocket of society and not only those with a special interest or concern over harmful practices.

In the Final Draft, subsection 6(b) refers to prohibiting the "amelioration or preservation of harmful practices". This was removed in the subsequent draft. The Meeting of Experts amended this provision to provide for the prohibition of the medicalisation and para-medicalisation of FGM, scarification and all other practices, while the Comments by the Office of the Legal Counsel inserted the legislative

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[48] East African Community, "Gender Policy", 2018 <http://fawe.org/girlsadvocacy/wp-content/uploads/2018/12/EAC-Gender-Policy.pdf> accessed 1 September 2022, 10.

[49] EAC Gender Policy (n 48) 29.

[50] EAC Gender Policy (n 48) 30.

[51] Nouakchott Draft (n 6) art 5.

[52] Report of the Meeting of Experts (n 13) art 6(a).

prohibition of the above practices, with sanctions, in an effort to enforce its prohibition.[53] This version made its way to the Addis Ababa Draft, subsection (b) and the final version of the Maputo Protocol.

The reference in 6(c) to the rehabilitation of victims in the Final Draft was amended at the Meeting of Experts with the removal of "rehabilitate". The Comments by the Office of the Legal Counsel made further amendments by including the provision for legal services[54], while the Addis Ababa Draft provided for legal and judicial support.[55] Finally, subsection 6(d) of the Final Draft referred to the protection and provision of asylum to those women and girls subjected to harmful practices and other forms of intolerance.[56] The Report of the Meeting of Experts[57] removed the provision of asylum, with the Maputo Protocol remaining silent in relation to asylum for survivors of harmful practices.

6 4 2 Concepts and definitions

Article 5 provides that "State Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards".[58] Harmful practices are defined in the Maputo Protocol as "all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".[59] This definition remains largely unchanged from that of the Draft Convention on Harmful Practices.[60] It is no coincidence that "attitudes" form part of its definition.[61] As Nsibirwa notes, the inclusion of attitudes in the definition "means that negative mindsets need to be changed".[62]

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[53] Comments by Office of Legal Counsel (n 14) art 5(b).

[54] Comments by Office of Legal Counsel (n 14) art 5 (c).

[55] Addis Ababa Draft (n 16) art 5(c).

[56] Final Draft (n 12) art 6(d).

[57] The Report of the Meeting of Experts (n 13).

[58] Maputo Protocol (n 3) art 5.

[59] Maputo Protocol (n 3) art 1(g).

[60] Draft OAU Convention on Harmful Practices (n 8) art 1. The Maputo Protocol includes the right to dignity, education and physical integrity to the definition contained in the Draft OAU Convention.

[61] See Chapters 2 and 3.

[62] Nsibirwa (n 8) 43.

In 2012, the African Commission published a General Comment on women and HIV (General Comment 1).[63] Referring to articles 2 and 5 of the Maputo Protocol, the African Commission instructs states to adopt appropriate measures to address "gender disparities, patriarchal attitudes, harmful traditional practices".[64] Unlike the Resolution on Maternal Mortality, discussed in Chapter 5, General Comment 1 is not couched within the framework of the family, the natural occurrence of pregnancy or on society's need to secure the future of civilisation.[65] Indeed, General Comment 1 mandates states to collaborate with traditional and religious leaders, civil society and other organisations in an effort to raise the necessary awareness to eliminate existing barriers to the enjoyment of sexual and reproductive health.[66] The African Commission emphasises the necessity of creating enabling conditions wherein women are afforded the opportunities to exercise these rights. The establishment of such enabling conditions, however, remains contingent on effective resocialisation. As the Commission states in General Comment 2, "[a]n essential step towards eliminating stigmatization and discrimination related to reproductive health includes, but is not limited to, supporting women's empowerment, sensitizing, and educating communities, religious leaders, traditional chiefs and political leaders on women's sexual and reproductive rights".[67]

6 4 3 State obligations

The obligations on states in terms of article 5 are multifaceted. As a starting point, all practices harmful to women must be prohibited and condemned. The nature of this provision is, like article 2(2), two-pronged. States must not only prohibit such acts but also condemn them. Prohibition implies the legislative banning of harmful practices, accompanied by sanctions where they occur, with a view to eradicating all such

[63] African Commission on Human and Peoples' Right, "General Comment Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" adopted at the 52nd ordinary session of the African Commission held in Yamoussoukro, Côte d'Ivoire 9–22 October 2012. See Chapter 7 under 7 3 2 for more on General Comment 1.

[64] General Comment 1 (n 63) para 46.

[65] See Chapter 5 under 5 3 2.

[66] General Comment 1 (n 63) para 46.

[67] African Commission on Human and Peoples' Right, "General Comment 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c)" (General Comment 2), adopted at the 55th ordinary session of the African Commission, 28 April–12 May 2014 para 44.

practices, providing support to victims and protecting women at risk of being subject to harmful practices. Condemnation implies the express and regular disapproval of harmful practices by the state and is itself a form of resocialisation. In this regard, the regular condemnation of harmful acts by states serves to alter existing narratives. While the extent to which it would influence the underlying harmful narratives underpinning gendered discrimination may be perceived as limited, the converse, state silence, would only serve as tacit acceptance of the status quo. Further, where states behave in a legislatively prohibited manner, the legitimacy of legislation as a deterrent is, thus, undermined. The condemnation of harmful acts is, thus, a crucial component in the elimination of harmful practices specifically and resocialisation generally.[68]

As noted in Chapter 4, the Joint General Recommendation of the CEDAW Committee and the CRC Committee,[69] which provides clarity on the obligation of states to eliminate harmful practices, confirms that legislation alone is insufficient to combat harmful practices and that the requirements of due diligence necessitates "a comprehensive set of measures to facilitate [legislative] implementation, enforcement and follow-up and monitoring and evaluation of the results achieved".[70] Further, the Joint General Recommendation stresses the importance of ensuring that the implementation of targeted measures not be delayed on any grounds, including its justification in the name of culture or religion.[71] It also notes that harmful practices are "deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles".[72] The role of resocialisation in discharging the obligation to eliminate harmful practices is, thus, underscored with the Committees stressing the obligation on states to "challenge and change patriarchal ideologies and structures that constrain women and girls from fully exercising their

[68] UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices" UN Doc CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 (8 May 2019) para 40.

[69] Joint General Recommendation 31 (n 68).

[70] Joint General Recommendation 31 (n 68) para 41.

[71] Joint General Recommendation 31 (n 68) para 31.

[72] Joint General Recommendation 31 (n 68) para 6.

human rights and freedoms".[73] While this is emphasised within the context of CEDAW, the same is true in the context of article 5 of the Maputo Protocol, as the objectives remain the same: the elimination of harmful practices and the realisation of substantive and transformative gender equality.

6 5 Article 4(2)(d)

6 5 1 Drafting history

Within the context of women's right to life, integrity and security of the person, article 4(2)(d) of the Maputo Protocol obligates states to "actively promote peace education through curricula and social communication". This obligation is set forth to "eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women". Neither the Nouakchott nor the Kigali Drafts contained a provision to this effect. Article 4 of the Final Draft, which refers the right to physical and emotional security, similarly contains no such provision. This provision was only included for discussion in the Meeting of Experts,[74] though it included "girls" in its reference to violence. The Addis Ababa Draft contains no reference to girls and mirrors article 4(2)(d) of the Maputo Protocol.[75]

6 5 2 Concepts and definitions

As noted in Chapter 7,[76] state practice appears to place greater emphasis on article 4(2)(c) than 4(2)(d), which requires that states identify the causes and consequences of violence against women and to take appropriate measures to prevent and eliminate such violence. This two-pronged approach mandates state action first in the form of identifying the causes and consequences of violence; and second by taking appropriate measures to prevent and eliminate such. The former generates state

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[73] Joint General Recommendation 31 (n 68) para 61. See Satang Nabaneh, "Article 5: Elimination of Harmful Practices" in Rudman, Musembi and Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 117, 129 where the author notes that "[i]t has been observed that in countries where the enactment of anti–FGM law is accompanied by culturally–sensitive education and sensitisation, there is evidence to show a decline in both practice and support of it".

[74] See Report of the Meeting of Experts (n 13) art 4(2)(d).

[75] Addis Ababa Draft (n 16) art 4(2)(d).

[76] See Chapter 7 under 7 2 3.

capacity to respond to the latter, while article 4(2)(d) builds on the latter by explicitly providing the means to prevent such violence. It emphasises the utility of resocialisation in addressing the identified causes and consequences of violence against women by way of peace education.[77] These two provisions are, therefore, closely connected.

Article 4(2)(d) stipulates that states must "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 violence against women". Several elements, therefore, must be fulfilled in furtherance of this provision. Of central importance is the goal that this provision aims to achieve – the eradication of elements in traditional and cultural beliefs, practices and stereotypes underlying violence against women. In other words, the resocialisation of the populace for the purposes of ensuring that the norms, standards, behaviours, attitudes, and other socio-cultural determinants influencing violence against women are addressed and modified to those that recognise the rights and freedoms of women, including their accompanying right to be free from violence. The resocialisation method mandated by this provision is the *active promotion* of *peace education*.[78] "Active" advancement implies that the process is dynamic and ongoing and entails regular monitoring and evaluation to determine its success. To promote implies that the state takes a stance against violence against women by encouraging the implementation of peace education across the generality of society. Peace education would, arguably, involve education on the rights of women as contained in international and regional law, focusing on eliminating violence against women and the establishment of societal compliance with the relevant legislation. As the CEDAW Committee notes in its General Recommendation 35 on violence against women in relation to the development of curricula, the "content should target

[77] Ruth Nekura, "Article 4: The Rights to Life, Integrity and Security of the Person" in Rudman, Musembi and Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 90, 105. Here the author reaffirms the obligation to resocialise to eliminate the underlying determinants to gender inequality, noting that "root causes are structural in nature, stemming from patriarchal dominance, control and social mechanisms that force women into a subordinate position in both public and private spheres".
[78] Emphasis added.

stereotyped gender roles and promote the values of gender equality and non-discrimination".[79]

The method mandated for the provision of this peace education is curricula and social communication. Curricula denotes the development of programmes and courses to be implemented in various educational settings such as schools and universities, training centres and other state-created and informal spaces. It similarly implies a formality to its content creation and implementation, necessarily excluding haphazard and poorly thought-through attempts to realise this right. Social communication entails the use of every available avenue at the disposal of the state that provides an opportunity to reinforce the importance of peace and the rights of women to a life free from violence to the public. These avenues include, amongst others, the use of social media, state radio and TV stations, and the distribution of print material to all localities. In this regard, the role of the media, as referred to in relation to articles 2(2), 8 and 12, is underscored by the CEDAW Committee's General Recommendation 35 where it notes the role of the state in implementing measures to "encourage the media to eliminate discrimination against women, including the harmful and stereotypical portrayal of women or specific groups of women, such as women human rights defenders, from their activities, practices and output, including in advertising, online and in other digital environments".[80]

6 5 3 State obligations

State parties to the Maputo Protocol are obligated by article 4(2)(d) to take an active role in the promotion of peace education. The reference to curricula and social communication as the means to such promotion makes explicit the broad nature of the audience to which the education must be targeted. This recognises the need for the resocialisation of everyone.

The CEDAW Committee's General Recommendation 35 reiterates the responsibility of states in implementing measures to tackle acts or omissions by their

[79] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 35 on Gender-based Violence against Women, Updating General Recommendation No 19" (26 July 2017) UN Doc CEDAW/C/GC/35 para 30(b)(i).

[80] General Recommendation 35 (n 79) para 30(d).

own agents and those of non-state actors by virtue of their due diligence obligation.[81] General Recommendation 35 notes further that states must take preventative measures to address violence against women, including the development of

> effective measures … to address and eradicate stereotypes, prejudices, customs and practices set out in article 5 of the Convention, which condone or promote gender-based violence against women and underpin the structural inequality of women with men.[82]

In this regard, the CEDAW Committee emphasises the development of educational curricula and awareness-raising programmes, similar to the provisions of article 4(2)(d).[83]

By virtue of the due diligence obligation, states are obligated to address the perpetuation of harmful narratives by non-state actors that legitimise violence against women and counter the goal of peace education. Thus, inaction on the part of states where this occurs directly violates this provision. It is arguable, therefore, that this obligation extends to private school settings and the content of their curricula too. Similarly, state responsibility is also triggered when non-state actors utilise private social communication, such as social media, to advance rhetoric that fuels violence against women.

At a sub-regional level, the SADC Declaration on Gender and Development[84] came into being in 1997, emphasising the SADC region's commitment to gender equality. A year later, the Addendum to the 1997 Declaration on Gender and Development notes the increasing levels of violence against women and, in reaffirming its commitment to its elimination stresses, *inter alia*, the importance of eradicating harmful traditional norms and beliefs, practices and stereotypes in the name of religion undermining the rights of women and legitimising the persistence of violence against women.[85] Furthermore, it highlights the important role that the media plays in assisting with such

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[81] General Recommendation 35 (n 79) para 24. See also Chapter 4 under 4 5 1 4.

[82] General Recommendation 35 (n 79) 13.

[83] General Recommendation 35 (n 79) para 30(b)(i) and (ii).

[84] Southern African Development Community, "Declaration of Gender Equality and Development" (1997).

[85] Southern African Development Community, "An Addendum to the 1997 Declaration on Gender and Development by the SADC Heads of State or Government" (1998) art 13.

eradication.[86] The SADC Protocol obligates states to implement measures "to discourage traditional norms, including social, economic, cultural and political practices which legitimise and exacerbate the persistence and tolerance of gender based violence with a view to eliminate them".[87] These measures include the promotion of peace education, as elucidated in article 4(d).

In 2015, the ECOWAS Gender and Development Centre published its Supplementary Act Relating to Equality of Rights Between Women and Men for Sustainable Development (Supplementary Act).[88] Interestingly, article 26 provides a contrasting approach to resocialisation, mandating the

> review [of] customary norms, including social, economic, cultural and political practices and religious beliefs that legitimize and exacerbate the persistence and tolerance of gender-based violence in order to punish such practices, and to denounce their negative impact on society through awareness campaigns.[89]

This refers only to those norms and practices subject to punishment. This presupposes a criminal element to such norms and practices, thus confining the reach of resocialisation to acts criminal in nature, precluding the "lesser infringements" acting as barriers to the realisation of the rights of women. Moreover, it is unclear what it means for states to denounce their negative impact on society and what, if any, results that might yield if not coupled with resocialisation aimed at modifying the underlying determinants of violence. Subsection 2, however, introduces measures aimed at all segments of society to effect attitudinal change and eradicate gender-based violence. Those measures could include peace education as provided for by article 4(d). Article 13 echoes the provision of peace education within the context of violence against women, where it mandates that states "shall adopt and implement gender-sensitive policies and educational programmes that address issues relating to gender stereotypes and gender-based violence".[90]

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[86] SADC Addendum (n 85) art 15.

[87] SADC Protocol (n 43) art 21(1).

[88] Economic Community of West African States, "Supplementary Act A/SA.02/05/15 Relating to Equality of Rights Between Women and Men for Sustainable Development in the Ecowas Region" (2015) A/SA.02/05/15 available at <https://ccdg.ecowas.int/wp-content/uploads/Supplementary-Act.pdf> accessed 31 May 2022.

[89] ECOWAS Supplementary Act (n 88) art 26(1).

[90] ECOWAS Supplementary Act (n 88) art 13.

Lastly, the EAC's Gender Policy, section 2.12, refers to sexual and gender-based violence and harmful practices.[91] This section highlights the linkage between sexual and gender-based violence and socio-cultural norms which normalise the former.[92] It observes that violence "is caused by unequal power relations between men and women, socio-cultural norms that normalize GBV practices and changing gender roles".[93] It further suggests that the violence women experience decreases when women's levels of participation in decision making increase.[94] In this regard, it emphasises the value of educational and economic independence in eliminating violence against women. It does not, however, acknowledge the role of educating the entire populace in terms of article 4(2)(d) to reduce incidents of violence against women.

6 6 Article 8

6 6 1 Drafting history

Article 8 of the Maputo Protocol refers to access to justice and equal protection before the law. Specifically, 8(c) provides for "the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women". Section 8(d) implies that access to justice and equal protection of the law requires that "law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality".

The Nouakchott Draft very narrowly considered access to justice in article 9, with no reference to resocialisation for the purposes of ensuring access to justice. Instead, the Nouakchott Draft suggested the implementation of adequate structures to "inform women and make *them* aware of their rights".[95] The Kigali Draft refers to the provision of legal aid in article 10(b) and notes that states are required to implement measures, including "appropriate education programmes to inform *women* and make *them* aware of their rights".[96] It, too, makes no reference to resocialisation as a necessary

[91] EAC Gender Policy (n 48) 22.

[92] EAC Gender Policy (n 48) 22.

[93] EAC Gender Policy (n 48) 22.

[94] EAC Gender Policy (n 48) 23.

[95] Nouakchott Draft (n 6) art 9. Emphasis added.

[96] Kigali Draft (n 7) art 10(b). Emphasis added.

component to access to justice and equal protection before the law and both drafts limit the scope of resocialisation to women only.

Article 9(c) of the Final Draft repeated the version of the Kigali Draft verbatim. The Meeting of Experts amended the Final Draft to instead obligate states to "set up adequate structures including appropriate educational structures for *all* social strata with particular attention to women and sensitize and inform them of the rights of women and girls".[97] This improvement takes cognisance of the role of resocialising the entire population.

The Meeting of Experts was also instructive in that it was here that subsection (d) was first introduced, though the text differs from the current Maputo Protocol version.[98] The Addis Ababa Draft changed the numbering and name of the sub-heading to article 8 and to "Access to Justice and Equality before the Law", reflecting the current version in the Maputo Protocol. It also changed the text of article 8(c) by replacing "all strata of society" to "sensitise everyone". Thus, not only did the Addis Ababa Draft expand the target recipients of resocialisation article 8(c) to all of society, but it also included another important provision, namely article 8(d).

6 6 2 Concepts and definitions

Article 8(c) requires that states first establish adequate education and other appropriate structures with particular attention to women and, second, to sensitise everyone to the rights of women. What qualifies as "adequate" or as "educational and other appropriate structures" is, thus, of importance to the fulfilment of this obligation. Discharging state obligation in this regard broadly implies the implementation of resocialisation measures. This provision notes education as one such measure, though this is, similarly, broad in scope and could include formal education in schools and universities, shorter training programmes, and education through example, amongst others. While this educational imperative is nestled under the heading of access to justice, it is intimately connected to the obligations contained in article 12.[99]

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[97] Report of the Meeting of Experts (n 13) 13. Emphasis added.

[98] Report of the Meeting of Experts (n 13) art 9(d) stipulates that states shall "ensure that law enforcement organs at all levels are aware of gender equality and women's human rights and shall enforce the law in a gender responsive manner".

[99] See below under 6 7.

The phrase “other appropriate structures” implies the use of media, for example, as a tool for the resocialisation of society. The method of resocialisation is, arguably, deliberately broad to allow for multiple means to achieving the required objective.

However, the word “adequate” places a condition on the measures implemented. Whether or not the measures are “adequate”, as required by this obligation, is arguably determined by the results achieved. As noted above under 6 5 2, regular monitoring and evaluation is necessary for resocialisation, without which a state’s capacity to ensure that the measures implemented are “adequate” remains limited. The CEDAW Committee’s General Recommendation 33 notes that the “right to access to justice for women is essential to the realization of all the rights protected under [CEDAW]”.[100] It highlights further that “[d]iscrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms … has an adverse impact on the ability of women to gain access to justice on an equal basis with men”.[101] Adequate educational and other measures, therefore, are those that address gender stereotypes, stigma, and harmful and patriarchal cultural norms.

As the drafting history above notes, the obligation to “sensitise everyone” is important as it widens the target audience beyond women and girls.[102] Sensitisation involves the development of awareness, which is an ongoing effort. Continuing resocialisation raises societal consciousness and, arguably, gives effect to the responsibility of states to sensitise everyone.

Article 8(d) stipulates that law enforcement must be equipped to effectively interpret and enforce gender equality rights. In this regard, the terms “equipped” and “effectively interpret and enforce” are instructive. Both imply an active, rather than passive, engagement with women’s rights for the purposes of ensuring that the rights to access to justice and equality before the law are upheld. To effectively interpret the rights of women presupposes an enhanced understanding of those rights and the role that individual attitudes and assumptions play in such interpretation. Similarly, it has implications for the enforcement of these rights. Resocialisation is, therefore,

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[100] UN Committee on the Elimination of Discrimination against Women, “General Recommendation No 33 on Women’s Access to Justice” (3 August 2015) CEDAW/C/GC/33 para 1.

[101] General Recommendation 33 (n 100) para 8.

[102] In this regard see Annika Rudman, “Article 8: Access to Justice and Equal Protection Before the Law”, in Rudman, Musembi and Makunya (eds), *The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 185, 193.

necessary to ensure that law enforcement safeguards and protects the rights of women, without which legal rights remain conceptual.

The term “equipped” implies the development of skills and capacities required to effectively interpret and enforce rights. As demonstrated in Chapter 4, the influence of gendered norms and stereotypes on women’s access to justice and equal protection before the law is significant, where judicial authorities base their decisions on the inflexible standards placed on women and their behaviour.[103] Equipped judicial officers would, therefore, understand the role of harmful socio-cultural norms and behaviours on women’s rights and would possess the requisite skills to ascertain when those harms emerge and serve as barriers to gender equality. Eliminating the influence of these underlying determinants to gender inequality then becomes possible.

6 6 3 State obligations

Article 8(c) mandates resocialisation measures with a view to eliminating stereotypes, harmful norms, and the like that serve as barriers to women’s access to justice. These measures must be aimed at “everyone”. States are obligated to eliminate the influence of other norms and cultural practices which serve to impede access to justice and equality before the law. These include the practice of women having to obtain permission to initiate legal action and the stigmatisation of women fighting for their rights, amongst others.[104]

The CEDAW Committee describes this right as comprising the following necessary components: “justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems”.[105] In the context of good quality justice systems, the CEDAW Committee recommends the implementation of measures to ensure that “evidentiary rules, investigations and other legal and quasi-judicial procedures are impartial and not influenced by gender stereotypes or prejudice”.[106] As Cusack notes, judges must “refrain from stereotyping (obligation to respect), ensure stereotyping does not infringe human rights (obligation to protect) [and] ensure women can exercise and enjoy the right to be free from wrongful gender

[103] See 4 5 1 1.

[104] General Recommendation 33 (n 100) para 25.

[105] General Recommendation 33 (n 100) para 14.

[106] General Recommendation 33 (n 100) para 18(e).

stereotyping (obligation to fulfil)".[107] The obligations on the part of judges equally apply to other civil servants, such as the police force.

Article 8(d), as noted above, presupposes the resocialisation of law enforcement for the purposes of ensuring that existing harmful conceptions and biases against women do not sway the work of those tasked with protecting the rights and freedoms of women. Indeed, as is true of article 8(c), the obligations to respect, protect and fulfil are implicated in article 8(d). Failure to equip or resocialise law enforcement for the purposes of effective interpretation and enforcement of rights triggers state responsibility and is a failure to respect, protect and fulfil the rights of women.

At the sub-regional level, article 6 of the ECOWAS Supplementary Act is dedicated to access to justice, with subsection (e) providing for the development of "educational programmes to eliminate discrimination and gender stereotyping and to promote participation of women in the legal system".[108] This echoes article 8 of the Maputo Protocol with the inclusion of the mandate to eliminate gender stereotyping for the purposes of advancing women's access to justice, arguably, influenced by article 2(2) of the Maputo Protocol since it came into being subsequent to the Maputo Protocol. While article 8(c) appears to be narrower in scope by its omission of gender stereotyping as a target of elimination in comparison to the ECOWAS Supplementary Act, the totality of the Maputo Protocol's resocialisation provisions, when read together and in its true spirit, adequately safeguard women's rights to access to justice through the targeting of stereotypes. The ECOWAS Supplementary Act emphasises the state's obligations to resocialisation in the context of access to justice and equality before the law.

6 7 Article 12

6 7 1 Drafting history

Article 12(b) provides that in the context of the right to education and training, states are required to take all appropriate measures to "eliminate all stereotypes in textbooks,

[107] Simone Cusack, "Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-based Violence Cases" (2014) Final Paper Submitted to the Office of the High Commissioner for Human Rights, <https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc> accessed 5 December 2022.

[108] ECOWAS Supplementary Act (n 88).

syllabuses and the media, that perpetuate such discrimination".[109] Article 12(e) also refers to resocialisation and requires that states "integrate gender sensitisation and human rights education at all levels of education curricula including teacher training".

Article 13 of the Nouakchott Draft contained an obligation on states to "eliminate all reference [to] the stereotypes which perpetuate such discrimination in textbooks and syllabuses".[110] The Kigali Draft amended the wording slightly, though the substance remained the same.[111] The Comments by the Office of the Legal Counsel amended the wording to provide certainty around the obligation by suggesting the removal of the word "reference" in relation to stereotypes.[112] The amended version obligated the elimination of the stereotypes themselves rather than merely its references. This version also introduced gender sensitisation and human rights education, as contained in article 8(e) of the Maputo Protocol, for the first time.[113] The Addis Ababa Draft omitted the term "reference" and included the elimination of stereotypes in the media.[114]

6 7 2 Concepts and definitions

Article 10 of CEDAW refers to the rights of women to education, with subsection (c) providing for the elimination of any stereotyped conceptions of the roles of women and men in all forms of education, including in textbooks. Article 12 of the Maputo Protocol largely echoes CEDAW though the Maputo Protocol extends this obligation to also eliminate stereotypes in the media and to the resocialisation of teachers. Article 12 is, arguably, an extension of the obligations contained in the primary resocialisation provision, article 2(2), which notes the modification of harmful socio-cultural norms and behaviours through public education, as well as the obligation contained in article 8(c) relating to the establishment of adequate educational and other structures for the

[109] Maputo Protocol (n 3) art 12(1)(b).

[110] Nouakchott Draft (n 6) art 13.

[111] Kigali Draft (n 7) art 14. Here it notes under 14(1)(b) that states are obligated to take measures to "eliminate all references in textbooks and syllabuses to the stereotypes which perpetuate such discrimination".

[112] Comments by the Office of the Legal Counsel (n 14) art 11(b).

[113] Comments by the Office of the Legal Counsel (n 14) art 11(1)(d).

[114] Addis Ababa Draft (n 16) art 12(1)(b).

purposes of sensitisation on the rights of women. As Viljoen notes, education "runs like a golden thread throughout the Protocol".[115]

Crucially, "all levels of education" implies those beyond formal school and university structures. It includes existing informal spaces and those that the state is obligated to create to disseminate and implement resocialisation methods, such as training, workshops, and town halls. Because mandatory schooling regulations vary from country to country, this provision must be interpreted to encompass all educational structures beyond formal schooling. It is important, therefore, that the integration of gender sensitisation and human rights education remains broad in scope insofar as its target is concerned. Similarly, engaging in traditional spaces with chiefs and leaders is an important element of discharging this obligation.

The mandate in article 12(b) to eliminate stereotypes in textbooks, syllabuses and the media that perpetuate discrimination recognises the role of education and the media in entrenching harmful notions that give rise to gendered discrimination. This obligation is both positive and negative in nature. It requires that states take positive steps to eliminate existing stereotypes and harmful narratives and refrain from developing educational material of the same nature.[116] It similarly entails the inclusion of girls and women in educational material as active participants in society. It is, therefore, inadequate to remove stereotypes and harmful narratives without also incorporating women and girls in materials in an effort to normalise their presence and participation in society. This feature of article 12(b) is directly correlated with the gender sensitisation requirement in article 12(e) since sensitisation requires the awareness that women and girls are important contributors and participants of society.

6 7 3 State obligations

The CEDAW Committee, in its General Recommendation 36, acknowledges the role of societal structures, such as schools, in maintaining systems of disadvantage,

[115] Viljoen (n 22) 31.

[116] See Sheila Parvyn Wamahiu and Celestine Nyamu Musembi, "Article 12: The Right to Education" in Annika Rudman, Musembi and Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 260, 267 where the authors notes that "[t]here is evidence pointing to the harmful effects of stereotyping on girls. For example, by promoting images of girls and women as the 'weaker' sex, they 'contradict values of gender equality and non–discrimination, and dampen girls' career aspirations and self–esteem'".

particularly those relating to the perpetuation of gender roles and norms.[117] Therefore, the right to education pertains not only to access and equal treatment in schools but also to the promotion of substantive equality within the educational system itself.[118] A focus on the elimination of stereotypes in textbooks, syllabi and the media, as per article 12(b), therefore, mandates that states actively work towards preventing the reproduction of harmful socio-cultural norms, with article 12(e) recognising the role of individuals, such as teachers, in reproducing those harmful norms and mandating preventative state action. As the CEDAW Committee notes, the modification obligation contained in article 5 obligates states to transform institutions and systems "so that they are no longer grounded in historically determined male paradigms of power and life patterns".[119] In order for resocialisation to be successful, prioritising the elimination of harmful socio-cultural norms and practices from textbooks, syllabi, school programmes, teaching methods, and the like is crucial. This prioritisation will impact and accelerate the realisation of the other substantive rights of women and girls.[120]

A state's obligation to resocialisation through education is underscored by the case of *APDF*.[121] While the case does not refer to article 12 directly, an important remedy provided by the African Court involved the implementation of education for the purposes of resocialisation.[122] It does so in terms of article 25 of the African Charter, discussed in Chapter 7[123] and emphasises the importance of gender sensitisation and education and the corresponding obligations on the state to resocialise its populace, an obligation also provided for in article 12(e). A state's obligation to resocialisation through education is importantly highlighted in this case.

At a sub-regional level, article 30 of the SADC Protocol reinforces the value of the role of the media in perpetuating harmful narratives regarding women. It provides that:

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[117] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 36 (2017) on the Right of Girls and Women to Education" (27 November 2017) UN Doc CEDAW/C/GC/36 para 16.

[118] General Recommendation 36 (n 117) para 16.

[119] General Recommendation 36 (n 117) para 26.

[120] General Recommendation 36 (n 117) para 26.

[121] African Court in *Association Pour Le Progrés et la Défense des droits des Femmes Maliennes (APDF) and The Institution for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380.

[122] *APDF* (n 121) para 135(xii).

[123] See Chapter 7 under 7 5 1.

> State Parties shall take measures to discourage media from a) promoting pornography and violence against all persons, especially women and children; b) depicting women as helpless victims of violence and abuse; c) degrading or exploiting women, especially in the area of entertainment and advertising, and undermining their role and position in society; and d) reinforcing gender oppressions and stereotypes.[124]

Notably, this provision employs the word "discourage", weakening state obligations in this regard. Notwithstanding, when viewed together with the more obligatory nature of the Maputo Protocols provisions, to which most SADC countries are party,[125] this article supports the premise that the media plays a significant role in reinforcing harmful, patriarchal notions of the inferiority of women. As Rudman notes in a different yet equally applicable context,

> [f]rom a feminist perspective, opposing the negative forms of patriarchal power that contribute to violence against women means observing that there is a clear distinction between how women and men are generally depicted in song lyrics … Women are portrayed in a subordinate position, referred to as 'whore', 'bitch' or simply as sexual tools/objects available for exploitation, who have an un-nuanced lust for sex or are simply there as pleasers for men.[126]

Here the author notes the importance of resocialisation within the context of South Africa's Broadcasting Complaints Commission in relation to the degrading and sexist songs played by radio stations. As Rudman notes, "any prevention of gender-based violence, such as rape, must focus centrally on changing the social norms around men, social constructions of masculinity and sexual entitlement".[127]

The ECOWAS Protocol, article 30(5), provides for the rights of women to equal education, mandating states to eliminate stereotyped conceptions regarding the role of women and men in all forms of education.[128] The ECOWAS Supplementary Act requires, in the context of the media, that states prohibit demeaning publication of pictures and articles of women,[129] and similar to the SADC Protocol, mandates that

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[124] SADC Protocol (n 43) art 30.

[125] Botswana is the only SADC country yet to sign and ratify the Maputo Protocol.

[126] Annika Rudman, '"Whores, Sluts, Bitches and Retards' – What Do We Tolerate in the Name of Freedom of Expression?" (2012) 26 Agenda 72, 74.

[127] Rudman (n 126) 79.

[128] ECOWAS Protocol on Democracy and Good Governance (n 45) art 20(5).

[129] ECOWAS Supplementary Act (n 88) art 34(2)(2).

states simply "encourage the media to give equal opportunities to women and men in all aspects of media coverage, by increasing the number of programmes on women or produced by women, or programmes that fight against gender stereotypes".[130] Interestingly, the former provision requires a prohibition, while the latter simply asks that states provide encouragement. This demonstrates that lawmakers, arguably, view violations of an egregious nature – the publication of demeaning content – as more compelling a violation than those characterised in this research as "lesser infringements", for instance, the gender stereotyping that serves to undermine equal opportunities to women in all aspects of media coverage, as contained in article 34(3). The use of the word "or" rather than "and" in relation to equal opportunities in the media is also unfortunate as it suggests that states may realise their obligations through only one of the methods stipulated. This could have the effect of states ignoring the utilisation of programmes that fight against gender stereotypes entirely, thereby overlooking resocialisation.

Lastly, while not directly in relation to the right of women to education and training, the EAC Treaty is notable in its reference to socio-economic transformation and sustainable growth, which necessarily implicates the utilisation and provision of education for such transformation and growth. In this regard, it notes that such development remains contingent upon the full participation of women. To further this objective, states are required to, amongst others, "abolish legislation and discourage customs that are discriminatory against women", "promote effective education awareness programmes aimed at changing negative attitudes towards women", and "take such other measures that shall eliminate prejudices against women and promote equality of the female gender with that of the male gender in every respect".[131] While it is true that the participation of women contributes to the advancement of society as a whole, it is equally true that the ability of women to participate in socio-economic development holds significance in a more self-directed manner; it contributes to her financial independence, to her ability to own property, to gain access to credit and other loans, enhances her educational knowledge, augmenting her capacity to make informed choices about her own life, and advancing autonomy, amongst others.

[130] ECOWAS Supplementary Act (n 88) art 34(3).

[131] East African Community, "Treaty for the Establishment of the East African Community (As amended on 14th December, 2006 and 20th August, 2007" art 121(b), (c) and (e).

Considering that gender equality is a fundamental principle guiding the achievement of the objectives of the Community, this Treaty could have been strengthened by further emphasising this principle in a way that does not limit the value of women's participation solely to the socio-economic development of the broader society. However, it is worth noting the Treaty's emphasis on education as a tool for resocialisation.

6 8 Article 17

6 8 1 Drafting history

Article 17 saw its first manifestations in article 18 of the Nouakchott Draft, which protects the rights of women to "the right, as human beings, to enjoy life in a positive cultural environment and to participate at all levels in the determination of cultural policies".[132] This version highlighted the role that cultural relativism plays in exacerbating discrimination against women by emphasising the obligation on states to "take all measures to protect women and society from the harmful effects of fundamentalism and of cultural and religious practices which oppose this right".[133] The Kigali Draft employed similar language while also emphasising the obligation on states to "protect women and society against all forms of intolerance and repugnant cultural and religious practices".[134] The Kigali Draft did not make any other reference to "religious practices" and neither did it attempt to define the term "repugnant". The omission of any other references to religious practices as a source of discrimination might, as suggested in Chapter 3, be because religion remains a rigidly defended concept, with its inclusion in legal instruments possibly acting as a deterrent to state consent to the Maputo Protocol.[135] The Final Draft was amended to mirror the final version contained in the Maputo Protocol.

Of interest are the Comments by the Office of the Legal Counsel, which inserted phrases into article 17 of the Final Draft. In this regard, it suggested the inclusion of

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[132] Nouakchott Draft (n 6) art 18.

[133] Nouakchott Draft (n 6) art 18. As noted in Chapter 3 under 3 5, explicit reference to "religion" would likely act as a deterrent to states signing CEDAW and this is, arguably, similarly a reasoning for its exclusion in the final version of the Maputo Protocol.

[134] Kigali Draft (n 7) art 19.

[135] See Chapter 3 under 3 5.

"non-discriminatory" beside the word "positive" to establish a positive, non-discriminatory cultural context.[136] Further, it added "without degrading portrayals of women" in this subsection.[137] Subsection 2 was, similarly, amended to guarantee the participation of women in the formulation and implementation of cultural policies at all levels.[138] The Addis Ababa Draft, however, disregarded those suggestions and amended the provision, designating it as article 17 and mirroring the current form in the Maputo Protocol.[139] The final version of article 17, while omitting reference to intolerant and repugnant cultural and religious practices and to non-discriminatory and degrading portrayals of women, nonetheless requires that states employ resocialisation methods to give effect to this obligation. This, necessarily, implies the elimination of cultural relativism, non-discrimination, and the prohibition of degrading portrayals of women in cultural contexts.

6 8 2 Concepts and definitions

As noted throughout this research, despite gender equality guarantees in international and regional law, the rights of women are often violated in the name of culture.[140] Cultural relativism, therefore, remains a barrier to gender equality. Article 17 of the Maputo Protocol offers protection to women, arguably directly aimed at countering cultural relativism. The ordinary meaning of the right to a positive cultural context suggests that women and girls are entitled to environments that are positive regardless of the cultural context in which they find themselves. This implies the elimination of practices that are not positive – harmful practices – and which do not give credence to non-discrimination generally. The elimination of harmful socio-cultural practices and the accompanying stereotypes, biases and harmful conceptions is, thus, required by

[136] Comments by the Office of the Legal Counsel (n 14) art 16(1).

[137] Comments by the Office of the Legal Counsel (n 14) art 16(1).

[138] Comments by the Office of the Legal Counsel (n 14) art 16(2): "State Parties shall take all appropriate measures to enhance the participation of women in the formulation AND IMPLEMENTATION of cultural policies at all levels". Emphasis added in the original.

[139] Addis Ababa Draft (n 16).

[140] See Chapter 3 under 3 5. In this regard, culture is viewed as an all-embracing concept to include religion and practices ordinarily not seen as cultural but as the norm, such as the gender pay gap, as noted under 3 6.

article 17. In other words, article 17 mandates the implementation of resocialisation to establish and protect positive cultural environments.[141]

The denial of the right of women to the resocialisation of the population by the state, both intentionally and by omission, has implications for the rights of women to a positive cultural context. As Ssenyonjo suggest, this right "seeks to encourage the active contribution of all members of society to the progress of society as a whole".[142] Where resocialisation is not actively pursued, the underlying determinants of gendered discrimination remain, denying women the right to a positive cultural context. Ssenyonjo also suggests that this right is "intrinsically linked to, and is dependent on the enjoyment of, other human rights".[143]

The African Charter's reference to culture is instructive in this context. Article 17(2) of the African Charter safeguards the free participation of every individual in the cultural life of the community.[144] Article 17(3) highlights the role of the state in promoting and protecting the morals and traditional values of the community. Of relevance, too, is article 22, which underscores the freedom of individuals to economic, social and cultural development "with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind". Article 29(7), which encapsulates individual duties, provides for the duty to,

> preserve and strengthen positive African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general to contribute to the promotion of the moral well being of society.

These provisions, when viewed in their totality and in light of the overall object and purpose of the African Charter as well as international legal obligations, position culture and cultural rights in a positive manner. Not only is the protection and preservation of positive culture seen as a duty of the state, but it similarly is a duty of

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[141] In this regard see Adetokunbo Johnson, "Article 17: Right to a Positive Cultural Context" in Annika Rudman, Musembi and Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (Pretoria University Law Press 2023) 357, 360–361 where the author notes the linkage between this provision and article 5(a) of CEDAW as well with articles 2(2) and 5 of the Maputo Protocol. See also pg. 364.

[142] Manisuli Ssenyonjo, "Culture and the Human Rights of Women in Africa: Between Light and Shadow" (2007) 51 Journal of African Law 39, 52.

[143] Ssenyonjo (n 142) 52.

[144] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 17(2).

individuals. As discussed in Chapter 5,[145] article 27(2) acts as a limitation to the exercise of rights, which must consider the rights of others, women included. The provisions relating to culture in the African Charter are also, subject to this limitation, further enhancing the positive nature of culture and cultural practices. Indeed, the state's obligation to protect and promote morals and traditional values in accordance with article 17(3) must be done so in light of all the other provisions of the African Charter. This necessarily implies the protection and promotion of morals and traditional values that enhance gender equality aims and the accompanying limitations imposed on practices and behaviours that do not enhance the rights and freedoms of women. Thus, these provisions bolster the aims of the Maputo Protocol's article 17 obligation to protect the rights of women to a positive cultural context.

As demonstrated in Chapter 7, however, state practice indicates a misunderstanding of what this right entails. This provision does not concern women's engagement with cultural heritage sites, the upkeep, contribution to and maintenance of museums or related activities that seek to enhance and nurture cultural heritage spaces of a given community. It seeks to alter the existing harmful environments in which women find themselves, an alteration that is possible only through resocialisation. Similarly, as noted in Chapter 3,[146] cultural participation must not only be positive, but it must also involve and allow for the element of choice. This is particularly crucial given that, as Ssenyonjo notes, "cultures and traditions as they presently exist are mainly made for and by men!".[147] Forced cultural practices are, therefore, prohibited.

A second element of this right is the right to participate at all levels in the determination of cultural policies. Given that most cultural contexts are determined by men for men, the inclusion of women in determining what a positive cultural context entails to them is, therefore, a crucial element to the realisation of this right. Failure to include women in culture creation risks further marginalisation, and it is this element of culture that article 17 seeks to address. An enabling environment that allows women to contribute to such change without fear or favour is, thus, an obligation on the state, as suggested above.

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[145] See Chapter 5 under 5 4.

[146] See Chapter 3 under 3 6 1.

[147] Ssenyonjo (n 142) 51.

6 8 3 State obligations

Article 17 of the Maputo Protocol provides further support to the obligation on states to modify harmful cultural and societal patterns of conduct, with the provision of women's right to a positive cultural context. The inclusion of this right, one that finds no comparison in other human rights instruments, is not only progressive in nature but also provides the requisite responsiveness to arguments in favour of cultural relativism. Indeed, the existence of such a provision tempers the weight of cultural and religious justifications on the infringement of women's rights. More than that, however, article 17 couches culture in positive terms, obligating states to ensure that women have a say in the determination of positive culture based on African values. As Banda notes, the preamble of the Maputo Protocol ensures that African values are determined "based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy".[148] Further, article 17 mandates the creation, by states, of the requisite enabling environment within which women can modify customs and practices that run counter to gender equality.[149] The obligation to fulfil is, thus, implicated in this regard, as states are required to implement the necessary steps, including temporary special measures, that give rise to those enabling environments in which the right to a positive cultural context can be exercised. The obligation to respect requires that a state not hinder, directly or indirectly, the rights of women to a positive cultural context, while the obligation to protect involves ensuring the prevention of violations of this right by third parties.

In the Zimbabwean High Court decision of *S v Thomas Brighton Chirembwe*,[150] it refers to the right of women to a positive cultural context in a case involving multiple counts of rape and its accompanying prison sentences.[151] In this regard, it acknowledges that "[r]ape is a form of gender based violence that emanates from

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[148] Fareda Banda, "Blazing a Trail: The African Protocol on Women's Rights Comes into Force" (2006) 50 Journal of African Law 72, 75. See also Preamble to the Maputo Protocol.

[149] Jing Geng, "The Maputo Protocol and the Reconciliation of Gender and Culture in Africa" in Susan Harris Rimmer and Kate Ogg, *Research Handbook on Feminist Engagement with International Law* (2019) Edward Elgar Publishing 411–429. Also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372365> accessed 7 December 2022 16.

[150] HH 162-15, HC CRB No R1006/12.

[151] *Chirembwe* (n 150) 6.

cultural attitudes towards women that permit the use of sex as an instrument of power and control".[152] This is an accurate depiction of the influence of culturally determined practices on the rights of women and demonstrates the extent to which the violation of this right has implications for the realisation or in this case violation, of other substantive rights. The state's obligation to eliminate the underlying determinants of violence against women through resocialisation directly contributes to the rights of women to live in a positive cultural context, or in this case, a violation of this right. The right of women to live in a society free from violence is an expression of the right to live in a positive cultural context.

6 9 Concluding remarks

This chapter draws attention to several provisions in the Maputo Protocol referring to different aspects and methods of resocialisation. The expanse of the resocialisation provisions entrenches the overall assumption of this research: that the acceleration of gender equality remains contingent upon the modification of the harmful underlying determinants giving rise to violations of rights. The reliance on resocialisation by drafters of the Maputo Protocol is no coincidence, as demonstrated in the drafting history of each provision. Indeed, it is apparent that drafters were alive to the reality that resocialisation is a necessary precondition to gender equality. From a legislative perspective, therefore, the opportunity presented to the African regional human rights system to engender a culture of resocialisation that seeks to alter harmful conceptions relating to the role and value of women in society to those in which their rights and freedoms are acknowledged and accepted. As is further demonstrated in Chapter 7, however, state engagement with resocialisation could do with significant improvement. This is true, too, of the way the African Commission and the Special Rapporteur interpret and apply resocialisation on the continent. Chapter 7, therefore, is dedicated to interpreting and applying the Maputo Protocol's resocialisation provisions, including an analysis of existing African jurisprudence dealing with these resocialisation provisions.

[152] *Chirembwe* (n 150) 6.

7 The Maputo Protocol in practice

7 1 Introduction

Chapters 5 and 6 have outlined the legislative framework governing resocialisation on the African continent. This chapter considers how the Maputo Protocol[1] is interpreted and applied by states, the African Commission, the Special Rapporteur and the regional and sub-regional courts.

In this regard, Chapter 7 proceeds as follows: first, it considers state practice in relation to the provisions outlined in Chapter 6 by way of state reports together with the accompanying Concluding Observations provided by the African Commission.[2] Thereafter, it considers the practice of the African Commission through its General Comments. Subsequently, this chapter considers the approach of the Special Rapporteur through the lens of its resolutions and guidelines, followed by the jurisprudence of the African and ECOWAS Courts.

7 2 State practice

7 2 1 Article 2(2)

As noted in Chapter 6, article 2(2) expands on article 5(a) of CEDAW, obligating states to ensure the realisation of transformative equality, together with substantive and formal equality.[3] Resocialisation as an obligation, right and remedy has its origins in article 2(2) of the Maputo Protocol.

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[1] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6.

[2] Note, in this regard, that to date only 21 reports from 18 states in terms of the Maputo Protocol have been submitted. Note further that an analysis of state engagement with resocialisation in terms of the highlighted provisions and the accompanying conclusions are done so within the context of a state's engagement with the particular resocialisation provision and not in relation to resocialisation undertaken in the context of other provisions not forming part of this research. For example, where states refer to awareness-raising within the context of article 3, this does not influence the discussion on the capacity of states to engage with resocialisation within the context of article 2(2).

[3] See Chapter 6, under 6 3 2 and 6 3 3.

Of the available Concluding Observations, only three refer to article 2 generally.[4] While states often report on the non-discrimination clause under article 2(1), no report thus far has made specific reference to the general resocialisation provision contained in article 2(2). The obligation to modify in terms of article 2(2) is either subsumed in its discussion on non-discrimination in general or entirely overlooked by states in their reports. This notwithstanding, South Africa's report of 2015 provides a comprehensive account of the impact of stereotyping and prejudice on the rights of women. It acknowledges that it is,

> cognisant that gender-based stereotyping and prejudice is rooted in the gender discourses of masculinity and femininity with concomitant prescribed behaviours, norms and attitudes that ultimately lead to discrimination and gender-based violence. It is an articulation of, or an enforcement of, power hierarchies and structural inequalities that are informed by belief systems, cultural norms and socialization processes.[5]

This is arguably an accurate articulation of the effects of stereotyping and socio-cultural attitudes and behaviours on the legitimisation of gender discrimination.

The fact that states fail to report on article 2(2) and to specifically refer to resocialisation cannot, however, be presumed to imply that states lack an understanding of the role and influence of socio-cultural practices and behaviours on the realisation of the rights of women. For instance, Malawi's report of 2015 notes significant challenges due to customs and cultural practices, seeking to address it

[4] Concluding Observations and Recommendations on the Kingdom of Eswatini's Combined 1st to 9th Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, adopted at its 70th ordinary session; Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (2015–2019) and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005–2013), adopted at its 70th ordinary session; Concluding Observations and Recommendations on the Combined 11th, 12th, and 13th Periodic Report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 64th ordinary session.

[5] Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa para 128.

through formal equality rather than transformative equality or resocialisation.[6] Moreover, in relation to the general non-discrimination provision of article 2(1), Seychelles' 2019 report recognises that "[g]ender discrimination and bias … may be present in societal gender roles and attitudes, thus, making it harder to eradicate stereotypes made unintentionally".[7] Understanding that challenges of this nature exist is noteworthy, though the state does not address the necessity of modifying those patterns of conduct in line with article 2(2).

Zimbabwe's report of 2019 notes that it has not encountered challenges in the implementation of article 2.[8] This statement is of particular interest given that, as discussed throughout this research, resocialisation is challenging to implement.[9] For a state to report that implementation is not challenging demonstrates that the state either overlooked this obligation entirely or failed to engage in any measures to resocialise its population.

The African Commission's Concluding Observations of 2022 to Eswatini notes the "persistence of pervasive structural disparities and deep-rooted harmful gender stereotypes" as an area of concern.[10] However, this is noted without direct reference to article 2(2).[11] In this regard, the African Commission recommends that Eswatini "[s]trengthen its efforts to combat deep-rooted harmful gender stereotypes".[12]

The Concluding Observations of 2022 to Malawi highlights, as a positive aspect of the state's report, the "lobbying, advocacy, awareness and sensitization campaigns to reduce gender disparities".[13] It notes further, as an area of concern, the influence that patriarchal and cultural values have on the implementation of temporary special

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[6] Republic of Malawi Report to the African Commission on Human and Peoples' Rights, Implementation of the African Charter on Human and Peoples Rights (1995–2013) and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005–2013) para 150.

[7] Republic of Seychelles Country Report 2019: Protocol to the African Charter on Human and Peoples' Rights of Women in Africa 10.

[8] The Republic of Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human and Peoples' Rights and 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 76.

[9] See Chapter 2 under 2 2 1.

[10] African Commission Concluding Observations Eswatini (n 4) para 48.

[11] The report notes this concern under the general heading "Articles 2 and 3 – Equality and Non-discrimination".

[12] African Commission Concluding Observations Eswatini (n 4) para 80.

[13] African Commission Concluding Observations Malawi (n 4) para 62.

measures, recommending that the state "increase its efforts in challenging deeply rooted beliefs and attitudes surrounding women's appointment in public and political positions".[14] These, too, are emphasised without direct reference to article 2(2). The Concluding Observations of 2019 to Rwanda commends the state for its efforts in terms of its article 2 obligations generally, noting that the state has ensured gender equality and the empowerment of women in the country through several strategies.[15]

Moreover, the African Commission's Concluding Observations of 2015 to Liberia are of interest. Here it notes the "patriarchal attitudes and stereotypes relating to the role and responsibilities of men and women [which] exacerbate harmful traditional practices".[16] The Commission recommends that Liberia "[s]trengthen its efforts to eliminate existing patriarchal and gender stereotypes on the roles and responsibilities of women and men in the family and society".[17] Though no direct mention of article 2(2) is made, it is one of only two Concluding Observations in response to a state report to make use of the language contained in this article, even if not verbatim. The African Commission's Concluding Observations of 2015 to Malawi contains similar references.[18]

7 2 2 Article 5

[14] African Commission Concluding Observations Malawi (n 4) para 83.

[15] African Commission Concluding Observations Rwanda (n 4) para 66. Unfortunately, the state report to which the African Commission responds is unavailable, leaving it difficult to ascertain whether the strategies to which the African Commission refers protect, promote, and fulfil their article 2(2) obligations.

[16] Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights, adopted at its 17th extra-ordinary session para 24.

[17] African Commission Concluding Observations Liberia (n 16) 11, para i.

[18] African Commission Concluding Observations Malawi (n 4) para 69 notes "[t]he existence of customary discriminatory practices such as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life, as well as traditional beliefs resulting in acts of torture and violence against elderly women on account of suspicious of practicing witchcraft". Para 102 recommends that the state "[a]dopt a comprehensive strategy to modify or eliminate negative cultural practices and stereotypes which are harmful to and discriminate against women and to promote women's full enjoyment of their human rights".

Malawi's Report of 2013, as an example, recognises the prevalence of culture as the main contributor to the harmful practices women experience,[19] while Eswatini's report of 2019 discusses harmful practices within its constitutional and legislative framework, noting that practices ought to be "examined with the constitutional lens".[20] It further suggests that with its legislative arrangements in place, "women are no longer forced to engage in cultural practices".[21] While legislative measures such as these are important, so too is the creation of enabling environments allowing the exercise of choice. Whether the appropriate conditions exist for women to make such choices remains unclear. This is recognised by Gambia's 2018 report, which considers the existence of enabling legislation that protects against FGM, specifying that:

> Despite the legislation enacted to prohibit these entrenched harmful practices, evidence has shown the Legislation alone is not enough. Evidence from neighbouring countries and at the global level that have legislated against the practice indicates that people with entrenched beliefs will resort to other measures that will enable them to practice what they believe in. There is therefore a need for attitudinal change and beliefs and the need for sustained sensitization, awareness creation and behaviour change communication for people to give up the practice.[22]

Aside from this general acknowledgement, the state provides no information on the steps it takes to make those necessary attitudinal changes concerning FGM. It does note, however, advocacy and sensitisation conducted in relation to the dangers of child marriages.[23] In contrast, Lesotho's 2018 report notes that no legislative bans on FGM exist. Nonetheless, the state reports on its awareness-raising campaigns regarding the dangers of FGM.[24] Liberia's 2012 report, while reporting in terms of the

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[19] Report of the Republic of Malawi (n 6) para 189.

[20] Kingdom of Eswatini Formerly Known as the Kingdom of Swaziland Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa paras 406–410.

[21] Combined Periodic Report of the Kingdom of Eswatini (n 20) para 407.

[22] The Republic of Gambia Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 138. This echoes the position of the CEDAW Committee and the CRC Committee noted under 6 3 3 3 above.

[23] Combined Report of The Republic of Gambia (n 22) 139.

[24] The Kingdom of Lesotho Combined Second to Eighth Periodic Report Under the African Charter on Human and Peoples' Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa (April 2018) para 346.

African Charter only, is similarly illustrative, given that the state is bound by the provisions of the Maputo Protocol.[25] Here it emphasises its opposition to FGM and its embeddedness in the cultural practices of the country.[26] Notwithstanding, the state asserts the position that any legislative prohibition on this practice would do nothing to "prevent its practice".[27] It notes, instead, the introduction of legislation "to help safeguard the process of FGM".[28] In doing so, the state reports its aim of engaging in the "health aspects of FGM […] to modify the practice through the use of trained medical practitioners".[29] No outright ban on FGM exists in Liberia, despite its article 5 obligation in terms of the Maputo Protocol.[30] As noted in Chapter 6, article 5 requires that states prohibit and condemn all forms of harmful practices, a two-pronged obligation mandating legislative prohibitions and express condemnation.[31] Failure to prohibit and condemn all forms of harmful practices triggers state responsibility, and as noted in Chapter 6, silence serves as tacit acceptance by the state.[32]

In its report on the Maputo Protocol of 2020, Kenya describes the challenges it faces with protecting women and girls from violence and harmful practices, citing the prevalence and influence of "negative gender norms and power dynamics".[33] Nestled

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[25] Liberia ratified the Maputo Protocol in 2004 and has yet to report on its implementation of the provisions of the Maputo Protocol.

[26] Government of Liberia General Report on the Human Rights Situation in Liberia (September 2012) para 93, 21.

[27] Government of Liberia General Report (n 26) para 93, 21.

[28] Government of Liberia General Report (n 26) para 93, 21.

[29] Government of Liberia General Report (n 26) para 93, 21. Note that in 2018 the then President of Liberia signed an executive order banning FGM. This was subsequently renewed, though legislative prohibitions are yet to be introduced.

[30] In this regard, in February 2022, the head of the Traditional Council of Liberia announced a ban on FGM for three years. See Equality Now, "Liberian Government Suspends FGM for Three Years: What's the Next Big Step", 31 March 2022 <https://www.equalitynow.org/news_and_insights/liberian-government-bans-fgm-for-three-years-whats-the-next-big-step/#:~:text=Liberia%20has%20not%20criminalized%20FGM&text=Liberia%20must%20adhere%20to%20its,rights%20of%20women%20and%20girls> accessed 30 January 2023. Despite this suspension, FGM is not legislatively banned.

[31] See Chapter 6 under 6 4 3.

[32] See Chapter 6 under 6 4 3.

[33] Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and The Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (April 2020) para 262, 72.

under comments made regarding articles 3, 4 and 5 of the Maputo Protocol, the state reports on efforts made to train law enforcement officers and community elders as champions of girls' rights and the contribution of men in protecting the rights of girls.[34] These and other initiatives are aimed primarily at eliminating FGM. In expanding the scope of harmful practices, the state notes an initiative to end abuse, harassment and negative stereotyping of girls and young women.[35] Given the definition of harmful practices, as discussed in Chapter 6, states must consider harmful practices beyond the most egregious forms to include all forms of harmful practices.[36]

Finally, South Africa's report of 2015 demonstrates a misunderstanding of what constitutes harmful practices.[37] As noted in the Joint General Recommendation, harmful practices are those behaviours grounded in discrimination on, *inter alia*, the basis of sex, gender and age, causing immediate physical and mental consequences, impacting the dignity, physical, psychosocial and moral integrity of women and children.[38] While South Africa's report outlines efforts made to eliminate certain practices, legislative provisions exist that permit virginity testing in girls over the age of 16, with the proviso that consent is obtained only after "proper counselling of the child".[39] The law further provides that testing be done "in the prescribed manner".[40] In this regard, the relevant regulatory provisions prescribe that a form be completed and signed by the child giving consent, amongst other requirements.[41] The meaning of "proper counselling" is not specified in the regulation, allowing scope for different

[34] Combined Report of The Republic of Kenya (n 33) paras 249 and 251, 70.

[35] Combined Report of The Republic of Kenya (n 33) para 254, 71.

[36] See Chapter 6 under 6 4 2.

[37] Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (August 2015) paras 166–167. See also the definition of harmful practices in the Maputo Protocol as discussed in Chapter 6 under 6 4 2.

[38] UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices" UN Doc. CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 (8 May 2019) para 15.

[39] South African Children's Act 38 of 2005 sec 12(5).

[40] South African Children's Act (n 39) sec 12(5)(c).

[41] South African Children's Act, 2005 General Regulations Regarding Children, No. R261, s 3(1).

interpretations.[42] The state notes the challenges with eliminating such practices due to their deeply ingrained nature, this despite the Joint General Recommendation emphasising that the state is obligated to ensure that there be no delays in implementing resocialisation measures.[43]

Only three Concluding Observations made direct reference to article 5, though several refer generally to the influence of harmful traditional practices.[44] For instance, the African Commission's Concluding Observations of 2017 to Burkina Faso note concern regarding the practice of "clandestine excision…[and] the continuation of early marriages".[45] It recommends that the state take the necessary steps to combat this practice and institute penalties for all involved, including family members.[46] Furthermore, the Commission notes the steps taken by the state in response to eliminating harmful practices, in particular, the changes made to various domestic legislation outlawing marital offences, FGM and unsafe abortion, the training of paralegals in the promotion of women's rights, the introduction of awareness-raising campaigns on the practice of excision, involving traditional chiefs and religious leaders in the country, and the launch of a hotline facilitating the reporting of violence against children, amongst others.[47] These are all noted under a section entitled "Elimination of Harmful Practices" without direct reference to article 5.

The Concluding Observations of 2022 to Malawi note concern regarding the lack of information on prevalent forms of harmful cultural practices, recommending that the state include more information in this regard in its future report.[48] It emphasises the necessity of implementing legal, policy and programmatic measures to stop early, child and forced marriage and the provision of information regarding "reproductive

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[42] The trauma surrounding the physical testing, together with the outcome of such testing, carries with it significant consequences to girls. For instance, where a girl is deemed a virgin, she is often targeted since a common misconception exists that sex with a virgin cures HIV/Aids. Similarly, girls marked as non-virgins face societal ostracisation.

[43] See Chapter 6 under 6 4 3.

[44] Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011–2013), adopted at its 21st extra-ordinary session para 45; African Commission Concluding Observations Malawi (n 4) para 64; African Commission Concluding Observations Rwanda (n 4) para 69.

[45] African Commission Concluding Observations Burkina Faso (n 44) para 62.

[46] African Commission Concluding Observations Burkina Faso (n 44) para 69.

[47] African Commission Concluding Observations Burkina Faso (n 44) para 45.

[48] African Commission Concluding Observations Malawi (n 4) para 75.

health to avoid early sexual activity and ultimately early marriages".[49] However, the African Commission does not elaborate on the target audience of such initiatives. Lastly, the Concluding Observations of 2017 to Rwanda highlights the African Commission's satisfaction with an initiative aimed at promoting positive masculinity while noting the lack of information provided on the enactment of legislation aimed at targeting the prevalence and influence of harmful practices.[50] In this regard, it recommends adopting and improving programmes and policies aimed at its eradication, as well as more information on other forms of harmful practices in the country.[51]

7 2 3 Article 4(2)(d)

The African Commission has yet to issue a Concluding Observation addressing resocialisation in the context of this provision. The state reports do, however, provide insight into this provision's practical application.

Angola's report of 2017 communicates the steps taken with regard to its article 4(2) obligation. In addressing the prevalence of stereotypes and cultural practices underpinning discrimination in the context of the right to life, the report refers to the implementation of "information, awareness-raising and education campaigns".[52] In this regard, though without direct reference to article 4(2)(c)'s second prong of the two-pronged obligation, as discussed in Chapter 6, the state notes steps taken to prevent and eliminate violence against women.[53] Similarly, it does not refer specifically to the active promotion of peace education as per article 4(2)(d). The Democratic Republic of Congo's report of 2015 notes under article 4(2)(c) the introduction of several studies undertaken in the country to enable behavioural change.[54] Such studies, the state

[49] African Commission Concluding Observations Malawi (n 4) para 88.

[50] African Commission Concluding Observations Rwanda (n 4) paras 69 and 84.

[51] African Commission Concluding Observations Rwanda (n 4) para 89.

[52] Republic of Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011–2016 para 29 of Part C.

[53] See Chapter 6 under 6 5 2 which highlights the two-pronged approach mandated by article 4(2)(c).

[54] Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights From 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples'

notes, have contributed to the revision of national strategies aimed at combating violence, taking into account "stereotypes that are anchored in the mentality and behaviour of individuals within grassroots communities".[55] This gives effect to the first prong of article 4(2)(c), which requires identifying the causes and consequences of violence against women, as discussed in Chapter 6.[56] The report specifies further that the "strategy focuses precisely on the fight against stereotypes and other sexist prejudices".[57] What these strategies are and their resultant impact, however, is unclear. Notwithstanding, the state report refers to resocialisation and the negative impact of socio-cultural attitudes and behaviours on the realisation of gender equality.[58] Togo's report of 2017, while acknowledging its prevalence and problematic nature, refers to gender stereotyping under article 4(2)(c) only.[59] Indeed, many reports refer to gender stereotypes under article 4(2)(c) without reference to article 4(2)(d).[60] This demonstrates a disconnect between identifying the causes and consequences of violence against women and the implementation of resocialisation to address the causes and consequences through resocialisation measures such as peace education, as noted in Chapter 6.[61] Similarly, overlooking article 4(2)(d) indicates a lack of appreciation of the due diligence obligation of states to address the

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Rights on the Rights of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports) para 164.

[55] Periodic Reports Democratic Republic of Congo (n 54) para 164.

[56] See Chapter 6 under 6 5 2.

[57] Periodic Reports Democratic Republic of Congo (n 54) para 164.

[58] For instance, para 174 of the Periodic Reports Democratic Republic of Congo (n 54) notes that "[n]early all men in the DRC, even the most educated do not approve of gender equality and still hold onto stereotypes. Likewise, women have accepted most of the social norms that support their position as inferior compared to men. Yet, it is precisely such attitudes which influence the occurrence of most violent actions against women. The findings of the 2007 DHS survey have shown that more than three quarters of women (76%) think it is justifiable for a man to beat his wide if she argues with him, burns his food, abandons the children, goes out without telling him, or refuses to have sex with him. Such an opinion is to some extent supported and backed by the church which recommends that women should obey and submit to the husband who is the family head. It is rare to see a woman who has sued the husband for violence, yet there exist in many families".

[59] State of Togo 6th, 7th and 8th Periodic Reports of the State of Togo on the Implementation of the African Charter on Human and Peoples' Rights (August 2017) paras 574–548.

[60] See for instance, Periodic Reports Democratic Republic of Congo (n 54) 37. Here it notes stereotyping of women in the context of article 4(2)(c) comprehensively.

[61] See Chapter 6 under 6 5 2.

perpetuation of harmful narratives by non-state actors that legitimise violence against women, as discussed in Chapter 6.[62] The Gambia's report of 2018, for instance, refers to "female stereotypes" under article 4(2)(c), noting the impact of the patriarchy on women's participation in leadership roles.[63] In this regard, it comments that,

> Cultural phenomena have created the stereotype 'impression that men are superior and women are inferior' and a 'socialization process [that] has also led men and women to perceive men as leaders and women as supporters.' These perceptions are alleged to "put women in the private sphere as wives, mothers and daughters and men in the public domain of decision-making", as well as the economic and political arena.[64]

Aside from noting the efforts of civil society organisations, the state makes no reference to its own efforts to comply with its article 4(2)(d) obligation.[65] Notwithstanding, the state notes its collaboration with the United Nations International Children's Emergency Fund in training law enforcement officials on appropriately dealing with violence against women under the relevant domestic legislation.[66] Very little emphasis is placed on resocialisation in the context of this provision by states in their reports.

7 2 4 Article 8

The African Commission has yet to issue a Concluding Observation addressing resocialisation in the context of this provision. The state reports do, however, provide insight into this provision's practical application.

The Democratic Republic of Congo's report of 2015 discusses efforts made pursuant to article 8(c) comprehensively. It reports on the various measures taken to "raise awareness and educate the population on the respect for women's rights".[67] These include awareness-raising on sexual violence and early marriages, collaboration with traditional chiefs on harmful traditional practices, and community

[62] See Chapter 6 under 6 5 3.

[63] Combined Report of The Republic of Gambia (n 22) 139.

[64] Combined Report of The Republic of Gambia (n 22) 62.

[65] Combined Report of The Republic of Gambia (n 22) 139.

[66] Combined Report of The Republic of Gambia (n 22) 141.

[67] Periodic Reports Democratic Republic of Congo (n 54) para 121.

engagement on sexual violence and HIV/AIDS. The state acknowledges that magistrates, lawyers, court clerks and prison personnel lack the requisite knowledge of women's rights, in direct violation of the requirements set out in article 8(d).[68] While it notes these shortcomings, the state omits any reference to measures it intends to implement to remedy this. Whether a state discharges its obligations in terms of articles 8(c) and (d) depends not only on the provision of resocialisation measures but on the *adequate* provision of such measures, as discussed in Chapter 6.[69] This requires regular monitoring and evaluation, as noted in Chapter 8, to ensure such adequacy.[70]

Togo's report of 2017 reiterates the principle of non-discrimination in the context of access to justice and observes that the feminisation of poverty has direct implications for women's access to judicial services. In this regard, and without noting article 8(c) directly, it highlights the establishment of a legal unit aimed at training women, in collaboration with the police services, on access to justice.[71] Further, it notes the training of various public servants, such as judicial assistants and security forces on gender and women's rights, though again without direct reference to article 8(d).[72] As noted in Chapter 6, equipping law enforcement organs at all levels presupposes their resocialisation through such training.[73] Eswatini's report of 2020 notes the provision of training programmes for the judiciary, state and private lawyers and the police service on legislative provisions safeguarding the rights of women, also without reference to article 8(d).[74] Similarly, Zimbabwe's report of 2019 refers to awareness campaigns carried out aimed at "popularising the Domestic Violence Act, building community activism against domestic violence, strengthen[ing] the capacity of the community to establish mechanisms for preventing and responding to domestic violence".[75] Whether such initiatives are adequate, as required by article 8(c) and as discussed in Chapter 6, is unclear.[76] Campaigns aimed at traditional leaders are also

[68] Periodic Reports Democratic Republic of Congo (n 54) para 126.

[69] See Chapter 6 under 6 6 2. Emphasis added.

[70] See Chapter 8 under 8 5 5.

[71] Periodic Reports State of Togo (n 59) para 509.

[72] Periodic Reports State of Togo (n 59) para 510.

[73] See Chapter 6 under 6 6 3.

[74] Combined Periodic Report of the Kingdom of Eswatini (n 20) para 446.

[75] Combined Reports of Zimbabwe (n 8) para 3.4 of Part C.

[76] See Chapter 6 under 6 6 2.

highlighted, aimed at transforming masculinity and addressing "rigid gender and social norms and the negative effects of patriarchy".[77]

State engagement with this resocialisation in terms of this provision is comparatively less than with other provisions, limiting the scope of this analysis. The lack of information in terms of this provision demonstrates a gap in understanding insofar as state obligations to resocialise the populace and to enhance access to justice are concerned.

7 2 5 Article 12

The African Commission has yet to issue a Concluding Observation addressing resocialisation in the context of this provision. The state reports do, however, serve to provide insight into the practical application of this provision.

Cameroon's report of 2019 presents, as part of its efforts to realise the rights contained in article 12 generally, its "fight against cultural barriers within the framework of awareness raising among communities".[78] State practice further includes the implementation of campaigns relating to behavioural change for parents to "raise the young girl properly".[79] What "properly" refers to is not elaborated upon. Similarly, the report does not elaborate on what constitutes cultural barriers and what the awareness-raising campaigns aimed to achieve. A strategy implemented by civil society involved the education of the wives of traditional leaders regarding the protection of children's rights and the promotion of education for young girls.[80] As noted in Chapter 6, article 12 generally addresses the rights of women to education and training, with resocialisation through the elimination of stereotypes in textbooks, syllabuses and the media, as well as the integration of gender sensitisation and human rights education at all levels of education.[81] Cameroon's account of its endeavours demonstrates a lack of appreciation of the resocialisation objectives of article 12(b).

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[77] Combined Reports of Zimbabwe (n 8) para 3.5 of Part C.

[78] Cameroon Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon Relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention (2015–2019) para 762.

[79] Periodic Reports of the Republic of Cameroon (n 78) para 764.

[80] Periodic Reports of the Republic of Cameroon (n 78) para 764.

[81] See Chapter 6 under 6 7.

South Africa's report of 2015 addresses measures taken pursuant to article 12 in a comprehensive manner. It reports on the adoption of a National Curriculum Statement in 2002, which "is a radical departure from the previous racists and sexist curriculum model".[82] In this regard, it highlights the implementation of education regarding pregnancy, sexual violence, the prevention of pregnancy and lifestyle choices in the national curriculum's Life Orientation programme.[83]

Burkina Faso's report of 2015 refers to resocialisation under article 12(e) in relation to the measures taken to sensitise parents, teachers, and decision-makers on the importance of educating girls.[84] It further notes its intention to pursue the incorporation of education relating to FGM into primary and secondary curricula modules, though without any reference to article 12.[85] No mention is made regarding stereotypes in textbooks and syllabuses.

As Chapter 6 highlights, the implementation of gender sensitisation and human rights education must be provided at all levels of education. The above state reports demonstrate a narrow focus on education in formal school settings, limiting the scope and reach of article 12. Similarly, South Africa's report, as noted above, confirms a move away from racist and sexist curricula, though it does not specify the nature of the gender-sensitive curricula or even if it targets stereotypes as required by article 12(b).[86]

7 2 6 Article 17

This particular provision is often narrowly construed by states. For instance, in Angola's report of 2016, in referring to the steps taken to advance and respect a positive cultural context, the state reports on the construction of cultural centres, financing packages allocated to national culture, the creation of Arts Schools, libraries, museums and the existence of grants prizes and exclusive events. Its final comment includes a sentence stating that "[i]n all these programmes the participation of women

[82] Combined Periodic Report of the Republic of South Africa (n 5) para 308.

[83] Combined Periodic Report of the Republic of South Africa (n 5) para 308.

[84] Burkina Faso Periodic Report of Burkina Faso Within the Framework of the Implementation of Article 63 of the African Charter on Human and Peoples' Rights (January 2015) para 339.

[85] Periodic Report of Burkina Faso (n 84) para 95.

[86] See Chapter 6 under 6 6 3.

is encouraged".[87] While culture includes the above initiatives, this singular view of culture fails to account for culturally based and normalised attitudes, practices and behaviours feeding discrimination against women. Similarly, Burkina Faso's report of 2015 emphasises the equal rights of women in various aspects of cultural life.[88] As discussed in Chapter 6, the ordinary meaning of this right is that women and girls are entitled to environments that are positive regardless of the cultural context in which they find themselves.[89] Furthermore, the participation of women in the context of this provision is to facilitate positive cultural creation. The encouragement of women in cultural programmes, therefore, misses the mark entirely.

Cameroon's report of 2015 notes efforts undertaken in furtherance of article 17 though it focuses its efforts on the elimination of harmful practices, conflating article 5 and 17 obligations.[90] As noted in Chapter 6, the right to a positive cultural context extends beyond the elimination of harmful practices.[91]

The Democratic Republic of Congo's report of 2015 provides a comprehensive account of article 17.[92] In this regard, it notes the influence that harmful cultural norms and practices have on women's ability to enjoy positive cultural contexts. Indeed, it notes that "Congolese culture does not encourage the promotion of women".[93] The state makes this comment directly in relation to article 17, demonstrating a broader, yet still incomplete, understanding of the rights of women to positive cultural contexts. Similarly, Malawi's report of 2015 highlights the enaction of legislation aimed at enhancing "positive cultural context[s] for women".[94] It does so in direct reference to its article 17 obligations, noting the influence that harmful culture has on women's ability to enjoy positive cultural contexts.

Only one Concluding Observation refers to article 17 in any depth. In its Concluding Observations of 2017 to Burkina Faso, under the heading "Right to favourable cultural

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[87] Sixth and Seventh Report of Angola (n 52) paras 102–110.

[88] Periodic Report of Burkina Faso (n 84) para 349.

[89] See Chapter 6 under 6 8 2.

[90] Periodic Reports of the Republic of Cameroon (n 78) para 892.

[91] See Chapter 6 under 6 8.

[92] Periodic Reports Democratic Republic of Congo (n 54) para 292.

[93] Periodic Reports Democratic Republic of Congo (n 54) para 292.

[94] Republic of Malawi Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (2005–2013) para 225.

environment", the African Commission notes that women and men have equal right to "recreational activities, sports and all aspects of cultural life".[95] This reference to article 17 overlooks the essence of the right of women to live in positive cultural contexts, as discussed in Chapter 6.[96]

7 3 The African Commission

7 3 1 Joint General Comment

The African Commission's mandate is both protectional and promotional in nature.[97] As discussed above, the approach to resocialisation is exemplified in several ways, over and above the issuing of Concluding Observations.

In the Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage (Joint General Comment), the African Commission, together with the African Committee of Experts on the Rights and Welfare of the Child (Committee of Experts) signal harmful practices as one of the many root causes of child marriage.[98] It highlights the right to be free from discrimination based on gender or sex as central to the Maputo Protocol.[99] Further, it notes that "[c]hild marriage is a manifestation of gender inequality and constitutes discrimination based on sex and gender … [it] reinforces harmful social constructions of gender, supports systems of patriarchy and entrenches patterns of discrimination".[100] In this regard, child marriage is considered by the African Commission and the Committee of Experts as a violation of the rights of girls to non-discrimination.[101]

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[95] African Commission Concluding Observations Burkina Faso (n 44) para 49.

[96] See Chapter 6 under 6 8 2 and 6 8 3.

[97] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 30.

[98] African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), "Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage" (2017).

[99] Joint General Comment (n 98) para 11.

[100] Joint General Comment (n 98) para 11.

[101] Joint General Comment (n 98) para 11.

The Joint General Comment further highlights that "[s]tates must prohibit and condemn all forms of harmful practices that perpetuate child marriage or negatively affect the human rights women".[102] In doing so, it refers to article 5 of the Maputo Protocol. The Joint General Comment further notes that "[a]ttitudes and beliefs that perpetuate the subordination of women and girls contribute to the prevalence and impact of child marriage".[103] It also notes that the right to be free from harmful practices directly correlates with the duty of the state to promote a positive cultural context in terms of article 17 of the Maputo Protocol.[104] It recognises that other harmful practices often give rise to child marriages, such as abduction and kidnapping, FGM, virginity testing and so forth, most of which are justified in the name of culture and religion.[105] The Joint General Comment importantly emphasises the need to modify social and cultural patterns of behaviours as contributors to the prevalence of child marriage.[106]

Notwithstanding this reference to attitudes and beliefs and the need for modification, the Joint General Comment omits any reference to article 2(2). It encourages the organisation of public awareness initiatives with the aim of transforming beliefs and attitudes about child marriage and women, however, without reference to any legal obligations contained in either the African Charter or the Maputo Protocol.[107]

7 3 2 General Comment 1

The African Commission's General Comment 1 is the Commission's first General Comment on the interpretation of a provision of the Maputo Protocol.[108] In the context of article 14(1)(d), which provides for the rights of women to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS, the Commission

[102] Joint General Comment (n 98) para 48.
[103] Joint General Comment (n 98) para 50.
[104] Joint General Comment (n 98) para 48.
[105] Joint General Comment (n 98) para 49.
[106] Joint General Comment (n 98) para 50.
[107] Joint General Comment (n 98) para 61.
[108] African Commission on Human and Peoples' Rights "General Comment Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" adopted at the 52nd ordinary session of the African Commission held in Yamoussoukro, Côte d'Ivoire (9–22 October 2012) 1, Preface

notes that the obligation on states to promote these rights includes sensitisation on the "importance of the right to protection and to be informed on one's status and that of one's partner".[109] Further, it emphasises the important role of education in addressing harmful gendered norms and conceptions around the role of women in society and to "challenge conventional notions of masculinity and femininity which perpetuate stereotypes harmful to women's health and well-being".[110] In this regard, it notes the resocialisation obligations contained in articles 2 and 5 of the Maputo Protocol. Similarly, in relation to barriers to sexual and reproductive health rights, the Commission instructs states to eliminate existing barriers and to take special measures to "address gender disparities, harmful traditional and cultural practices, patriarchal attitudes, discriminatory laws and policies in accordance with articles 2 and 5 of the Protocol".[111] The Commission further highlights the duty of states to enact legislation addressing, amongst others, discrimination due to prejudices and practices which increase the risks of women to HIV and related rights abuses.[112]

7 3 3 General Comment 2

The second General Comment to address sexual and reproductive health rights generally, General Comment 2 provides clarity on the rights of women to control their fertility;[113] to decide whether to have children, the number and spacing of children,[114] the rights of women to choose any method of contraception and to family planning education.[115] General Comment 2 further relates to the Maputo Protocol's mandate to provide accessible health services, which includes information, education and communication programmes to women,[116] especially women in rural areas, while also safeguarding the rights of women to abortion in certain circumstances.[117]

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[109] General Comment 1 (n 108) para 23.

[110] General Comment 1 (n 108) para 26.

[111] General Comment 1 (n 108) para 46.

[112] General Comment 1 (n 108) para 35.

[113] Maputo Protocol (n 1)

[114] Maputo Protocol (n 1) art 14(1)(b).

[115] Maputo Protocol (n 1) art 14(1)(c).

[116] Maputo Protocol (n 1) art 14(2)(a).

[117] Maputo Protocol (n 1) art 14(2)(c).

The African Commission highlights the necessity of resocialisation to counter gender inequality. It suggests that states "imperatively take all necessary measures to remove socio-cultural structures and norms that promote and perpetuate gender-based inequality".[118] The African Commission furthermore highlights obstacles to the realisation of this right, instructing states to take "all appropriate measures, through policies, sensitization and civic education programs, to remove all obstacles to the enjoyment by women of their rights to sexual and reproductive health".[119] It also emphasises the special attention necessary to address "patriarchal attitudes, harmful traditional practices, prejudices of health care provides, discriminatory laws and policies, in accordance with Articles 2 and 5 of the Protocol".[120]

Specifically, the African Commission emphasises the significance of affording women the right to choose, noting that such choices are personal in nature and involve "taking into account *or not* the beliefs, traditions, values and cultural or religious practices, and the right to question or to ignore them".[121] In this regard, General Comment 2 strengthens article 17 rights to a positive cultural context. Therefore, this aspect of the General Comment has broader implications for positive culture creation.

General Comment 2 makes clear that this right to health demands the removal of the underlying determinants to violations of rights, such as "ideology or belief-based barriers".[122] Further, the General Comment notes that while an individual health care provider may object to the provision of sexual and reproductive health care, states are obligated to ensure that provisions are made for women to be referred to alternative health care providers and that "only health personnel directly involved in the provision of contraception/family planning services enjoys the right to conscientious objections and that it is not for the institutions".[123] Significantly, conscientious objections are prohibited in emergent cases where a woman's health is at risk.[124] In this regard,

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[118] African Commission on Human and Peoples' Right "General Comment 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" adopted at the 55th ordinary session of the African Commission held in Luanda, Angola (28 April–12 May 2014) para 22.

[119] General Comment 2 (n 118) para 60.

[120] General Comment 2 (n 118) para 60.

[121] General Comment 2 (n 118) para 24. Emphasis added.

[122] General Comment 2 (n 118) para 25.

[123] General Comment 2 (n 118) para 26.

[124] General Comment 2 (n 118) para 26.

General Comment 2 further emphasises that socio-cultural attitudes and standards violate women's rights to life, non-discrimination and to health for various reasons, including "in that they deprive her of her decision-making power".[125] General Comment 2 reflects the necessity for resocialisation.

General Comment 2 also delineates the importance of education in the furtherance of women's health and reproductive rights as per article 14(2). In this regard, it suggests that the creation of enabling environments in which women can assert their rights presupposes the elimination of stigmatisation and discrimination. Such elimination is, furthermore, contingent upon resocialisation, or as the African Commission stipulates, "sensitizing and educating communities, religious leaders, traditional chiefs and political leaders on women's sexual and reproductive rights as well as training health-care workers".[126] It further advances the need for resocialisation by emphasising that states provide training to legal professionals to safeguard and respect these rights to avoid arresting, charging and prosecuting women who seek the health care they are entitled to seek by virtue of the Maputo Protocol.

Of significance in General Comment 2 is the African Commission's direct reference to articles 2 and 5 of the Maputo Protocol. While the general resocialisation provision contained in article 2(2) is not directly referenced, the African Commission mentions articles 2 and 5, which when read together, as discussed in Chapter 6, implicates resocialisation. In this regard, the African Commission underscores the importance of providing information and education on family planning, contraception and safe abortion for women, adolescent girls, and young people. While the content of such information and education is not explicitly outlined, the African Commission's reference to the resocialisation provisions above implies that the content must be aimed at altering the harmful underlying notions and perceptions that give rise to the violation of these rights.

While General Comments 1 and 2 are confined to the substantive right contained in article 14, they are nevertheless significant in the promotion of resocialisation to address the underlying causes of violations of women's rights in general. The African Commission's instruction to states to eliminate harmful socio-cultural norms and behaviours is, thus, instructive beyond health and reproductive rights.

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[125] General Comment 2 (n 118) para 27.

[126] General Comment 2 (n 118) para 44.

7 3 4 General Comment 6

General Comment 6 considers the role of discriminatory social constructs that undermine the rights of women on the continent.[127] It acknowledges how social perceptions that women's resources are used for the upkeep of the family while men's resources are for the purchase of property undermine the women's ability to acquire property.[128] The purpose of General Comment 6, therefore, is to elaborate on the obligation on states to "effect transformative changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which encourage discrimination, patriarchy and structural inequality impeding the equitable sharing of marital property to the disadvantage of women".[129]

Describing the reality of African women's property rights, the African Commission presents the socio-cultural framework influencing the denial of rights, including social attitudes to marriage and the role and value of women in society.[130] The Commission acknowledges that "these institutions are still steeped in traditional conceptions of marriage and the role and contribution of women during marriage [and that] they tend to apply distribution regimes that in most cases disadvantage women".[131] General Comment 6 reiterates the role that norms, attitudes and stereotypes play in undermining the rights of women by noting that "women's contributions to marriage will continuously be rendered invisible, and their legitimate claims to marital property will continue to be undermined due to gender-biased norms and practices which favour males in property allocation decisions".[132]

The African Commission emphasises the modification of such socio-cultural in direct reference to article 2(2) of the Maputo Protocol.[133] In referring to notions of substantive equality, the African Commission provides states with guidance on

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[127] African Commission on Human and Peoples' Rights, "General Comment No 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D)), adopted at the 27th Extra Ordinary Session of the African Commission (19 February–4 March 2020) para 1.

[128] General Comment 6 (n 127) para 5.

[129] General Comment 6 (n 127) para 12.

[130] General Comment 6 (n 127) para 17.

[131] General Comment 6 (n 127) para 20.

[132] General Comment 6 (n 127) para 24.

[133] General Comment 6 (n 127) para 31.

achieving substantive equality, including the implementation of temporary special measures to protect the property rights of women.[134] In this regard, it observes that a "substantive equality approach … requires States to recognize that women are in an unequal position".[135] It continues to emphasise that,

> because of political, cultural, and historical factors … treating men and women alike may not necessarily lead to equality between the sexes because the playing ground is not level. The formulation of equality as substantive equality is one of these. At its most basic level substantive equality recognizes that equal treatment in itself does not and indeed did not guarantee equal outcomes or equality of opportunities; as a result the law should consider relevant differences that pose disadvantage to an individual or a particular group. As opposed to the form of laws, its concern is with the actual enjoyment of a right and unmasking the factors that hinder attainment of equality in fact.[136]

Amongst the recommendations to states on how to give greater effect to the realisation of women's property rights, the African Commission recommends the implementation of awareness-raising initiatives. It notes the need for transforming discriminatory practices and customs legitimising the denial of rights.[137] Furthermore, it emphasises the importance of capacity building and training among relevant stakeholders on property rights as well as on the essence of substantive equality.[138] It, however, limits the obligation to implement capacity building and training to a select pocket of society; relevant stakeholders and civil society.[139]

7 4 The Special Rapporteur on the Rights of Women in Africa

[134] General Comment 6 (n 127) para 40.
[135] General Comment 6 (n 127) para 40.
[136] General Comment 6 (n 127) para 42.
[137] General Comment 6 (n 127) para 58.
[138] General Comment 6 (n 127) para 59.
[139] General Comment 6 (n 127) paras 59 and 60.

The mechanism of the Special Rapporteur was created by the African Commission in 1999 in recognition of the "need to place particular emphasis on the problems and rights specific to women in Africa".[140] The mandate of the Special Rapporteur includes,

> assist[ing] African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, particularly in line with the domestication of the newly entered into force Protocol to the African Charter on Human and Peoples' Rights, relative to the Rights of Women in Africa and the general harmonization of national legislation to the rights guaranteed in the Protocol.[141]

Furthermore, the mandate includes, *inter alia*, promotional and fact-finding missions in member states, following up on the implementation of the African Charter and Maputo Protocol by preparing reports and proposing recommendations, drafting resolutions, and undertaking comparative studies on the situation of women in various African countries.[142] Most notably, the Special Rapporteur serves as "a focal point for the promotion and protection of the rights of women in Africa".[143]

7 4 1 Resolution on the Protection of Women against Digital Violence in Africa

The African Commission, through the Special Rapporteur, issued the Resolution on the Protection of Women against Digital Violence in Africa,[144] a notable instrument that importantly emphasises the utility of resocialisation. This resolution embodies article 2(2) of the Maputo Protocol and article 5 of CEDAW. It instructs states, in the context of digital violence against women, to embark on awareness-raising campaigns that target boys and men, as well as relevant stakeholders.[145] It proceeds to instruct states

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[140] African Commission on Human and Peoples' Rights, "38 Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa" (1999) ACHPR/Res/38 (XXV) 99 <https://www.achpr.org/sessions/resolutions?id=43> accessed 25 May 2022.

[141] African Commission on Human and Peoples' Rights, "Special Rapporteur on Rights of Women in Africa: Mandate and Biographical Notes" (nd) <https://www.achpr.org/specialmechanisms/detailmech?id=6> accessed 25 May 2022.

[142] Mandate of the Special Rapporteur on Rights of Women in Africa (n 141).

[143] Mandate of the Special Rapporteur on Rights of Women in Africa (n 141).

[144] African Commission on Human and People's Rights, "Resolution on the Protection of Women against Digital Violence in Africa" (2022) ACHPR/Res.522 (LXXII).

[145] Resolution on the Protection of Women against Digital Violence (n 144) para 3.

to develop programmes that address the root causes of digital violence "within the general context of gender-based violence in order to bring about changes in social and cultural attitudes and remove gender norms and stereotypes".[146] The target audience, therefore, is wide in scope. Additionally, the resolution instructs states to provide "mandatory and continuous training for practitioners and professionals dealing with victims of digital violence including law enforcement authorities, social and child healthcare staff, criminal justice actors and members of the Judiciary".[147]

Prior to the above Resolution on the Protection of Women against Digital Violence in Africa, the Resolution on the Need to Adopt Legal Measures for the Protection of Women Human Rights Defenders in Africa briefly alludes to and acknowledges the prevalence of violence against women human rights defenders "often justified on grounds of social norms, customs, religion and tradition".[148] In this regard, it calls on states to "recognise the importance of the role of women human rights defenders"[149]. This resolution does not, however, refer to the modification of socio-cultural norms and behaviours.

7 4 2 Niamey Guidelines

The Niamey Guidelines reiterates the vulnerability of women and girls to sexual violence.[150] The Niamey Guidelines highlight the state's obligation to eliminate the root causes of violence, including "patriarchal preconceptions and stereotypes about women and girls".[151]

The Niamey Guidelines instruct states to engage with various strategies to address sexual violence. These include awareness-raising, education, training professionals, urban and rural planning and cooperation with local stakeholders and civil society

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[146] Resolution on the Protection of Women against Digital Violence (n 144) para 3.

[147] Resolution on the Protection of Women against Digital Violence (n 144) para 5.

[148] African Commission on Human and People's Rights, "Resolution on the Need to Adopt Legal Measures for the Protection of Women Human Rights Defenders in Africa" (2018) ACHPR/Res. 409 (LXIII).

[149] Resolution on the Need to Adopt Legal Measures for the Protection of Women Human Rights Defenders in Africa (n 148).

[150] African Commission on Human and Peoples' Rights "Guidelines on Combating Sexual Violence and its Consequences in Africa" adopted during its 60th ordinary session held in Niamey, Niger (8–22 May 2017) (Niamey Guidelines).

[151] Niamey Guidelines (n 150) 18.

organisations. In relation to awareness-raising, it guides states on the target audience of such awareness-raising campaigns and instructs that such campaigns ought to "make men and boys responsible for their actions and encourage them to be involved in combating sexual violence and its consequences".[152] It then discusses the role that toxic masculinity plays in driving harmful behaviour, noting the need for campaigns to deconstruct stereotypes about masculinity. The target audience includes advertising professionals, journalists, and other communication specialists, emphasising the role of the media in addressing harmful socio-cultural norms, as discussed in Chapter 6.[153]

The Niamey Guidelines stress the significance of education for the purposes of challenging "sexist and gender stereotypes", though unlike with awareness-raising campaigns, it does not specify the target audience. Its third strategy, namely that of training professionals, suggests the training of the police force, security forces, customs personnel, firefighters, judges and magistrates, teachers, medical personnel, traditional and religious leaders, and the private sector, amongst others.[154] It is notable that the Niamey Guidelines provide such an expansive list of those for whom training is necessary, specifying that it represents a non-closed list. Of interest, however, is that none of the measures described – awareness-raising, education and training – broaden the target audience to align with the requirement in article 2(2) that modification be implemented across the board and not only in select pockets of society. The Niamey Guidelines, however, provide explanatory notes which include the relevant legal provisions contained in the African Charter and Maputo Protocol, including the resocialisation provisions detailed in Chapters 5 and 6, such as articles 2, 3, 18(3) of the African Charter and articles 2(2), 4(2)(d) and 8 of the Maputo Protocol. Thus, in the context of sexual violence, the Niamey Guidelines direct states towards the relevant resocialisation provisions.

7 5 The African Court on Human and Peoples' Rights

The Protocol to the Establishment of an African Court on Human and Peoples' Rights (Court Protocol)[155] states that the goal of the African Court is to complement the

[152] Niamey Guidelines (n 150) 20.

[153] Niamey Guidelines (n 150) 20. See also Chapter 6 under 6 7 3.

[154] Niamey Guidelines (n 150) 21 and 22.

[155] Protocol to the African Charter on Human and Peoples' Rights on the Establishment

protective mandate of the African Commission.[156] Those with direct access to the Court include the African Commission, the state which has lodged a complaint to the Commission, the state against which the complaint was made, a state whose citizen is a victim of violations and African intergovernmental organisations.[157] Direct individual access, as provided for in article 5(3), is only available to the citizens of a state party to the Court Protocol where the state has made an article 34(6) declaration. Thus, direct individual access is not, by default, permissible. To date, of the 33 states to have ratified the Protocol, only eight states allow for direct individual access: Burkina Faso, Malawi, Mali, Ghana, Tunisia, Gambia, Niger and Guinea Bissau.[158]

7 5 1 APDF v Mali

APDF[159] is significant because it is the first case to raise violations of rights under Maputo Protocol before the African Court. Mali had tried to align its legislation to the Maputo Protocol by developing a Family Code. However, Islamic organisations protested this new code, preventing its promulgation. A second attempt was made, which partially appeased the community but infringed upon women's rights. This second attempt, the new Family Code of Mali adopted by the National Assembly in December 2011, became the basis for the challenge brought to the African Court.

The first violation concerned the minimum age of marriage.[160] The impugned provision set the minimum age of marriage for boys at 18 and girls at 16, and where compelling reasons exist, at the age of 15. This is in direct violation of article 6(b) of the Maputo Protocol, setting the minimum age of marriage at 18.

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of an African Court on Human and Peoples' Rights (10 June 1998).

[156] Court Protocol (n 155) art 2.

[157] Court Protocol (n 155) art 5(1).

[158] African Court of Human and Peoples' Rights: Protecting Human Rights in Africa, "Declarations", <https://www.african-court.org/wpafc/declarations/> accessed 25 January 2023. In this regard, see *Hossou and Adelakoun v Benin* [2021] AfCHPR 10. Here the Court is faced with a challenge regarding Benin's withdrawal of the declaration deposited under article 34(6). The Court in this case decided against the Applicants and held, in para 35, that "the Respondent state is entitled to withdraw the declaration that it deposited under Article 34(6)".

[159] African Court in *Association Pour Le Progrés et la Défense des droits des Femmes Maliennes (APDF) and The Institution for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380.

[160] *ADPF* (n 159) para 9(i).

The second is related to the right to consent to marriage.[161] For religious marriages, no sanctions were applicable to marriage officers officiating a religious marriage where the consent of the parties was not obtained, in contrast to civil marriages where marriage officers were required to verify consent. Thus, the potential for arranged and forced marriages posed a significant risk to girls under religious law.

The third violation related to the equal right to inheritance of women and children born out of wedlock.[162] Most relevant to this research, the fourth violation related to a violation of Mali's obligation to resocialise its populace.[163] In its prayers, the applicants asked the Court to order the State of Mali to, amongst others, implement resocialisation programmes on the dangers of early marriage and to educate the population on the Family Code to safeguard the rights of women to equal inheritance, as well as those of children born out of wedlock.

Mali objected to the material jurisdiction of the Court on the grounds that, amongst others, the application turned on "sensitisation and popularisation rather than those of interpretation and application of the Charter and other international instruments ratified by Mali".[164] The terms sensitisation and popularisation are, particularly on these facts, synonymous with resocialisation and the modification of harmful societal and cultural practices that give rise to a violation of rights. Since Mali is a signatory to the CEDAW, as well as a signatory to the Maputo Protocol, both of which contain resocialisation provisions, Mali's argument lacks merit and demonstrates a lack of understanding of its obligations in terms of the Maputo Protocol. The Court dismissed this objection on the ground that the facts of the case related to the human rights guarantees provided for in the African Charter and other instruments ratified by the state.[165]

In its reasoning for the promulgation of the Family Code, the state argued that it was compelled to submit the text for a second reading due to the social upheaval that the initial text elicited. In other words, the state relied on *force majeure* to justify the promulgation of a code containing offending provisions. In this regard, the state conveyed that the opposition was such that it resulted in "a huge threat of social

[161] *ADPF* (n 159) para 9(ii).

[162] *ADPF* (n 159) para 9(iii).

[163] *ADPF* (n 159) para 9(iv).

[164] *ADPF* (n 159) para 24.

[165] *ADPF* (n 159) para 27.

disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion; that the mobilisation of religious forces attained such a level that no amount of resistance action could contain it".[166] The state was, as it suggests, obliged to review the text in a second reading, which reading permitted the involvement and influence of Islamic organisations with the ultimate aim of "garner[ing] consensus and avoid[ing] unnecessary disruptions".[167]

Further, the state asserted that "established rules must not eclipse social, cultural and religious realities".[168] The purpose of provisions relating to resocialisation is to modify societal patterns of thought and behaviour underlying discrimination. The existence of such provisions, thus, implies a dichotomy between laws and societal practices which require bridging. The seriousness afforded to resocialisation is, thus, made that much more visible when a state such as Mali suggests that "it would serve no purpose to enact legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with socio-cultural realities".[169] In further asserting this point, the state notes that its international obligations imply an adaptation of those obligations to the social realities of any given state.[170] As Rudman notes,

> [r]ather than trying to harmonise social and cultural practices with existing legal obligations under the Maputo Protocol, the respondent suggested an approach where existing legal obligations are harmonised with socio-cultural realities. This shows a limited understanding of the position of international obligations, alongside a complete disregard for women's experiences of these socio-cultural realities.[171]

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[166] *ADPF* (n 159) para 64.

[167] *ADPF* (n 159) para 65.

[168] *ADPF* (n 159) para 66.

[169] *ADPF* (n 159) para 66.

[170] *ADPF* (n 159) para 67.

[171] Annika 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, 440.

As noted in Chapter 3, social, cultural, and religious convictions do not allow the violation of women's rights.[172]

The African Court held that the state was in violation of the provisions relating to the minimum age of marriage, the right to consent and the right to equal inheritance. Based on this, the Court also held that Mali had violated articles 2(2) of the Maputo Protocol and article 5(a) of CEDAW, though it does so without delving any further into resocialisation. Thus, in relation to the fourth allegation, the Court found that the state, by adopting the Family Code, was in violation of its commitments to resocialisation in terms of international and regional law.

In its prayers, the applicants sought several orders, including the introduction of sensitisation programmes on the dangers of early marriage, training for religious ministers on the procedure for contracting a marriage, sensitisation and educational programmes for the population on the use of the Family Code to ensure an equal share of inheritance between women and men and a similar sensitisation programme to ensure the equal share of inheritance between children born in and out of wedlock. In assessing the remedy in light of article 27(1) of the Court Protocol, the Court notes, *inter alia*, the state's duty as contained in the African Charter's article 25. As discussed in Chapter 5, article 25 of the African Charter obligates states to advance human rights awareness through education.[173] The Court's award of resocialisation as a remedy is, indeed, significant as it demonstrates the Court's willingness to interpret article 27(1) broadly.[174] However, rather than reinforcing the Maputo Protocol's resocialisation provision, the Court only orders state compliance with article 25 of the African Charter. Such omission arguably undermines the importance of state compliance with the Maputo Protocol.[175] Whether this was intentional or simply an oversight is unclear. However, it remains an opportunity missed to not only draw on the Maputo Protocol itself and to bolster its legitimacy in the view of states, but it also implicates the responsiveness of the Court in dealing with resocialisation as a crucial element to the realisation of the rights of women.

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[172] See Chapter 3 under 3 6 2.

[173] African Charter (n 97) art 25. See Chapter 5 under 5 4 for more on Article 25.

[174] Rudman (n 171) 439.

[175] *ADPF* (n 159) para 135.

Notwithstanding the Court's decision to employ the African Charter rather than the Maputo Protocol's resocialisation provision, it ordered Mali to amend the Family Code and harmonise its law with its international law commitments while requesting it to comply with article 25 of the African Charter. It thus reaffirms the importance of resocialisation in addressing the root causes of discrimination against women and girls, which includes harmful traditional and cultural practices.[176]

7 6 ECOWAS Court of Justice

The ECOWAS Court is the only sub-regional mechanism to have interpreted and applied the Maputo Protocol. The African Court shares jurisdiction over the African Charter and the Maputo Protocol with the ECOWAS Court, and it is the latter that has, to a larger extent, determined cases where questions around gender-based discrimination, culture and resocialisation have surfaced. The ECOWAS Court considers a significant number of cases relating to women's rights because it does not require that applicants exhaust local remedies before approaching the Court.[177] As Rudman notes, "the ECOWAS system is better designed to accommodate victims of sexual and gender-based violence (SGBV) than the continental system headed by the African Court".[178] The following sections analyse the jurisprudence of the ECOWAS Court as it relates to gender-based discrimination and resocialisation.

7 6 1 Hadijatou Mani Koraou v Niger

This case concerns a claim made by Hadijatou Mani Koraou (Mani) who, as a young girl, under the traditional custom "Wahiya" was sold to an adult man, Souleyman. As his slave, she was frequently subjected to SGBV throughout her nine years of

[176] To date the Malian state has yet to file a report on the measures taken to amend the Family Code and harmonise its laws with international instruments. This despite the deadline for its report being 11 August 2020. See 19 of African Union, "Activity Report of the African Court on Human and Peoples' Rights (AfCHPR) 1 January–31 December 2022" (2023) <https://www.african-court.org/wpafc/report-of-the-african-court-on-human-and-peoples-rights-afchpr-2022/> accessed 19 April 2023.

[177] ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol art 10(d). See also *Hadijatou Mani Koraou (Mani) v The Republic of Niger* ECW/CCJ/JUD/06/08 (2008) para 49 and Rudman (n 171) 435.

[178] Rudman (n 171) 432.

enslavement. She eventually managed to escape under the guise of visiting her ill mother.[179]

As cited by an NGO, Mani approached the ECOWAS Court because, despite her attempts at having her right to freedom recognised, the Court of First Instance in Niger held that she was legally married to Souleymane. Mani sought recourse from the ECOWAS Court in the form of, *inter alia*, condemning the State of Niger for violating articles 1, 2, 3, 5, 6 and 18(3) of the African Charter, requesting the state to adopt legislation that effectively protects women against discriminatory customs relating to marriage and divorce and urging the state to abolish harmful customs and practices founded on the idea of the inferiority of women.[180] This case does not reference Maputo Protocol rights because despite having signed the Maputo Protocol, Niger has not yet ratified it.[181]

Mani argued that she was subjected to slavery and gender-based discrimination because she was held in slavery for nearly nine years. Further, she claimed that the sale of women is a practice affecting women only, constituting gender discrimination and that she was denied equal protection of the law and equality before the law as provided in article 3 of the African Charter.[182] While the Court was offered an opportunity to engage with a customary practice harmful to women, it did little in this regard insofar as it related to the allegations of discrimination. Further, while Mani prayed for abolishing harmful customs and practices founded on the idea of women's inferiority, the Court recounted the facts of the case without condemning the harmful cultural practice. Neither did it refer to the adoption of legislation protecting women against discriminatory customs. The Court avoided the issue altogether and, while it found that the claim of discrimination was valid, held that the discrimination and the violation of rights were not attributable to the state but to Souleymane directly.[183] This arguably overlooks the state's due diligence obligations to modify harmful behavioural and cultural practices giving rise to discrimination against women[184] and, as Rudman

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[179] *Mani* (n 177) para 14.

[180] *Mani* (n 177) para 28.

[181] Centre for Human Rights, University of Pretoria, "Niger" <https://www.maputoprotocol.up.ac.za/index.php/niger> accessed 1 September 2022.

[182] *Mani* (n 177) para 62.

[183] *Mani* (n 177) para 71.

[184] See Chapter 6 under 6 2 1 3, 6 3 3 3 & 6 3 4 3.

notes, while its reasoning remains unclear, the Court "viewed this part of Mani's claim as a strictly private matter".[185]

In response, the state notes that while slavery does exist, "this practise has become more discreet and confined to very restricted social circles".[186] The failure of the state to realise its international obligations to women, particularly those relating to resocialisation, demonstrates the extent to which the underlying root causes of discrimination, such as culture and custom, remain unacknowledged and overlooked.[187] The Court, however, did confirm that the facts substantiated the existence of slavery, noting that "the defendant becomes responsible under international as well as national law for any form of human rights violations of the applicant founded on slavery because of its tolerance, passivity, inaction and abstention with regard to this practice".[188] The Court, therefore, acknowledges the harms created by the traditional practice of Wahiya but did nothing to obligate the state to abolish harmful customs and practices that give rise to violations of rights generally and to the practice of Wahiya specifically.

7 6 2 Dorothy Chioma Njemenze v Nigeria

The first case to test the provisions of the Maputo Protocol in an international court is *Dorothy Chioma Njemenze v Nigeria (Dorothy Njemenze)*.[189] In this case, each of the four applicants was at different times abducted and assaulted sexually, physically, and verbally, and unlawfully detained by state officials who believed them to be prostitutes. They requested, *inter alia*, that the Court declare the state in violation of several international and regional obligations, including those relating to resocialisation.[190] Further, the applicants requested an order that a law be enacted to eliminate all forms

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[185] Rudman (n 171) 442.

[186] *Mani* (n 177) para 78.

[187] In this regard, while this case was determined under the African Charter where no explicit resocialisation provision exists, it is subject to Article 5 of CEDAW, which the ECOWAS Court, according to the Supplementary Protocol (n 177), has jurisdiction to consider. Thus, resocialisation aimed at modifying harmful cultural practices underlying discrimination against women, in this case the cultural practice of Wahiya, certainly fell within the ambit of the states' obligations under CEDAW.

[188] *Mani* (n 177) para 85.

[189] *Dorothy Chioma Njemenze v Nigeria* ECW/CCJ/JUD/08/17 (2017). See Rudman (n 171) 443.

[190] In this regard, the applicant referred to articles 2, 4(2), and 5 of the Maputo Protocol, as well as 18(3) of the African Charter.

of violence against women and the "training of police, prosecutors, judges and other responsible Government Agencies on laws on violence against women and gender sensitivity".[191] Additionally, they request[ed] the "development and wide implementation of awareness raising educational and communication strategies aimed at the eradication of beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women".[192]

A pivotal part of this case turns on the fact that the violence meted against the applicants was done so due to assumptions that they were prostitutes. Prevalent stereotypes dictated that women were required to behave in a certain way, with any deviation therefrom an indication of their status as prostitutes. In justifying this assumption, the respondent claimed that "only an insane or an idle person can be in the street at 12 mid-night".[193] As Rudman notes, this case highlights the vulnerability of women "and how the violence that was directed towards these women resulted from a perceived transgression of social norms and *mores*".[194] Indeed, the state averred that the ECOWAS Court lacked jurisdiction to hear the matter because "the Plaintiffs are prostitutes and their action cannot be justified under the African Charter on Human and Peoples' Rights".[195]

The ECOWAS Court concludes that the entire state operation was aimed at targeting women, and where women are the only targets, it is evidence of discrimination based on sex and gender. It further holds that "there is no law that suggests that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes … [i]f it were so, it ought to apply to all persons irrespective of sex".[196] Notwithstanding this and the findings of cruel, inhuman and degrading treatment, the Court neglects any consideration of the resocialisation pleas prayed for by the applicants, as noted above. Indeed, the Court only awards the applicant financial compensation, overlooking a crucial opportunity to engage on issues of resocialisation. Not only does the Court fail to reinforce the rights of the applicants to resocialisation by ordering specific performance such as those prayed

[191] *Dorothy Njemenze* (n 189) 12.
[192] *Dorothy Njemenze* (n 189) 41.
[193] *Dorothy Njemenze* (n 189) 15.
[194] Rudman (n 171) 443.
[195] *Dorothy Njemenze* (n 189) 22.
[196] *Dorothy Njemenze* (n 189) 37.

for, but it also similarly fails to order the state to respect, promote and fulfil its resocialisation obligations by altogether omitting any mention of those remedies. In echoing Rudman, it is indeed "very unfortunate that the court did not react to these essential claims and order appropriate remedies".[197]

7 6 3 Aminata Diantou Diane v Mali

In *Aminata Diantou Diane v Mali (Aminata)*,[198] the applicant's husband was left incapacitated after suffering from a stroke. As a result, a dispute ensued between the applicant (Aminata) and her brothers-in-law regarding her husband's estate. The brothers-in-law initiated divorce proceedings on their behalf and informed debtors that they were managing the estate of Aminata's husband, all without her consent.[199] Further, Aminata claimed that her brothers-in-law physically assaulted her.

Despite seeking domestic relief from the Malian courts, no redress was offered. Aminata approached the ECOWAS Court pleading that the state, *inter alia*, implement resocialisation measures such as the training of police, prosecutors and judges on the effective implementation of laws protecting women from violence and the development and implementation of awareness, educational and communication strategies aimed at the elimination of customs, practices and stereotypes underpinning gendered discrimination and violence.[200] She also pleaded for the adoption of legislative, administrative, social and economic measures necessary for the elimination of violence and all forms of discrimination against women.[201] In this case, the applicant's several resocialisation pleas demonstrate an understanding of the broader implications of her experience, which is not isolated to her experience, and the necessity of resocialisation to address the underlying causes of discrimination and violence so as to prevent future such violations. This is, arguably, why her pleas were so extensive.

In response, the state rejects the notion that the conduct of private persons is directly attributable to the state, thus placing the issue in question within the private

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[197] Rudman (n 171) 446.

[198] *Aminata Diantou Diane v Mali* ECW/CCJ/JUD/14/18 (2018). No official English version of this case is available, and information is, thus, drawn from an unofficial translation provided.

[199] *Aminata* (n 198) para 3.

[200] *Aminata* (n 198) para 11.

[201] *Aminata* (n 198) para 11.

domain. On that basis, together with the non-exhaustion of local remedies, the state raised a plea of inadmissibility. The court held that Aminata was right to allege that her rights to protection were violated and noted the importance of article 18(3) of the African Charter in protecting "this category of people because of their vulnerability".[202] It, however, overlooks the requested remedies entirely while finding the request for the revision of legislation as "irrelevant or unjustified".[203] The ECOWAS Court misses an opportunity to engage with the broader underlying causes for gendered discrimination and to emphasise the utility of resocialisation in the realisation of women's rights.

While the applicant's pleas are positive, the case would have benefited from a more comprehensive engagement with article 2(2) of the Maputo Protocol. It also omits any reference to the elimination of harmful practices, as provided for in article 5 of the Maputo Protocol, which would bolster the resocialisation pleas.

7 6 4 Adama Vandi v Sierra Leone

This case relates to an allegation of rape at the hands of the chief of a secret society. The applicant (Adama) brought a complaint to the ECOWAS Court alleging a violation of her rights to a remedy, access to justice, her rights not to be discriminated against, and her right to freedom from cruel, inhuman, or degrading treatment.[204] While the case does not explicitly refer to resocialisation, the cultural context within which the rape occurred demonstrates the need for resocialisation.

This secret society in question comprised of men only, presided over by a masked man known as the "Poro Devil".[205] In the judgment, the ECOWAS Court notes that in the Mende culture, women are not permitted to see the Poro Devil, and if they do, their ability to have children is compromised. Further, if the Poro Devil catches any woman, it is believed that she disappears forever.[206] Thus, a culture of fear surrounding the presence of the Poro Devil exists within the community, ultimately contributing to a culture of rape and impunity. In this regard, on the night in question, the secret society

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[202] *Aminata* (n 198) para 32.

[203] *Aminata* (n 198) para 48.

[204] *Adama Vandi v Sierra Leone* ECW/CCJ/JUD/32/2022 (2022) para 4.

[205] *Adama* (n 204) paras 10-11.

[206] *Adama* (n 204) para 11.

raided the district in which the applicant spent the night, the Bondo society. However, given that the Mende culture prohibits men from entering the homes of anyone in the Bondo society, the applicant thought she was safe.[207] The chief who led the invasion, however, invaded the homes in the Bondo society despite this cultural norm. Fully cognisant of the cultural beliefs surrounding the Poro Devil, the chief manipulated the applicant by threatening to bring the Poro Devil into the house if she refused to allow him to remove her clothes. She complied out of coercion, and the chief proceeded to rape her.[208]

The applicant approached the ECOWAS Court in part because she was unable to obtain justice through the domestic legal system and in part because she believed that, had she gained access, the chief's position as a powerful traditional ruler allowed for impunity. Adama alleged that,

> by failing to investigate the facts relating to the sexual assault of which she was a victim, in order to allow the perpetrator to be prosecuted and tried, the Respondent has become liable for the violation of her human rights, namely the rights to a remedy and access to justice, not to be discriminated against and not to be offended in her dignity and not to be subjected to cruel and degrading treatment.[209]

On the facts, the ECOWAS Court finds that the state had violated Adama's rights to an effective remedy and access to justice.[210]

Adama further claims that the lack of due diligence on the part of the state for not preventing the violence in the first place was, similarly, a violation of her right to be free from gender-based discrimination. In this regard, it would have been prudent for the applicant to allege a violation of the right to resocialisation as forming part of the state's obligation to protect her rights by preventing violations. Unfortunately, the ECOWAS Court finds that the applicant failed to convince the court that her right to freedom from discrimination was violated in that she failed to "make any comparison of her case with that of another person involved in the same or similar situation of rape

[207] *Adama* (n 204) paras 15 and 16.

[208] *Adama* (n 204) para 17.

[209] *Adama* (n 204) para 62.

[210] *Adama* (n 204) para 90.

or victim sexual crimes, who has been treated differently by the Respondent, to her disadvantage".[211]

Regarding the applicant's claim that a violation of her rights to dignity and to be free from cruel, inhuman or degrading treatment occurred, she notes that regardless of the fact that the violence occurred at the hands of non-state actors, the state should be held liable because it did not prosecute or punish the offender.[212] In this regard, the ECOWAS Court refers to the Niamey Guidelines, as discussed above[213], which notes that,

> States must take the necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source.[214]

This Guideline instructs states to implement resocialisation measures, though the ECOWAS Court does not refer to it as such. The state's failure to do so amounts to a failure to protect the applicant, and the ECOWAS Court, consequently, finds a "violation of her right not to be subjected to torture and her right to dignity, guaranteed by Article 5 of the African Charter".[215]

This case provided much scope for the introduction of resocialisation. In the first instance, the use of culture as a tool for rape – the threat of the Poro Devil – amounts to a violation of her right to resocialisation in that the state failed to implement resocialisation measures to modify the said cultural practice relating to the Poro Devil and to prevent the discrimination averred. Second, a due diligence obligation to prevent the violation of rights existed, triggering resocialisation as an obligation on the state. Further scope existed for the applicant to make resocialisation pleas to prevent its reoccurrence, thereby highlighting this resocialisation obligation. Finally, resocialisation as an obligation is triggered in relation to her right to be free of torture

[211] *Adama* (n 204) para 115.

[212] *Adama* (n 204) para 135.

[213] See Chapter 7 under 7 4 2.

[214] Niamey Guidelines (n 150) 18.

[215] *Adama* (n 204) para 144.

and inhuman or degrading treatment. This is so because the state failed to investigate and prosecute the chief.

7 7 Concluding remarks

This chapter demonstrates how states, the African Commission, the Special Rapporteur, and the regional and sub-regional courts have practically applied several provisions of the Maputo Protocol. It also points out the challenges faced in doing so and the missed opportunities to improve engagement with these provisions. What it similarly demonstrates is that an adequate understanding of the resocialisation provisions has yet to be embedded within the African regional system. Due to its overlooked nature, it remains unsurprising that very little engagement with resocialisation occurs. Indeed, the utility of resocialisation as a tool for altering the underlying determinants to gender inequality has yet to become a dominant narrative on the continent. Given the advanced legislative framework governing women's rights in Africa, the opportunities for resocialisation become underscored. It presents an opportunity for the human rights system to prioritise and lead the global efforts in advancing resocialisation as a prerequisite for realising women's rights. Chapter 8 will consider the practicalities of resocialisation, drawing on the findings of Chapters 4, 5, 6 and 7 to compare the approaches taken in interpreting and applying resocialisation. In doing so, it will highlight good practices, challenges, and opportunities for enhanced engagement with resocialisation.

8 The practicalities of resocialisation

8 1 Introduction

Chapters 4, 5, 6 and 7 have demonstrated how international and African regional law engage with resocialisation. CEDAW Committee's jurisprudence and General Recommendations highlight the importance of resocialisation as foundational to the realisation of women's rights. Meanwhile, the legislative landscape at the African regional level presents opportunities for enhanced engagement by states. However, challenges exist, and identifying them allows for the formulation of recommendations to accelerate substantive transformative gender equality.

Chapter 8 draws on the findings of the previous chapters to compare the approaches taken in interpreting and applying resocialisation. The preceding analyses offer opportunities to develop an appropriate framework for interpreting and applying resocialisation, considering the potential of the African regional system as discussed in Chapters 5, 6 and 7. Such a framework can help emphasise resocialisation as a key right, obligation, and remedy, unlocking all other rights under the African human rights system for the benefit of women on the continent.

This chapter, therefore, highlights good practices and opportunities for an enhanced engagement with resocialisation alongside the existing challenges. It begins with a discussion of the triple approach to resocialisation, followed by a comparative exploration of the approaches taken by the CEDAW Committee, African States and the African Commission regarding resocialisation, its targets, and measures. The discussion about the targets of resocialisation highlights the importance of correctly identifying the harms requiring modification and the recipients of resocialisation. Thereafter, practical resocialisation measures are discussed in light of the findings in the preceding chapters.

8 2 Resocialisation as an obligation, right and remedy

8 2 1 Resocialisation as a standalone provision

As has been maintained throughout, this research is based on the proposition that resocialisation is a necessary tool with which to deconstruct harmful, patriarchal narratives that continue to undermine efforts at advancing gender equality. As discussed in depth in Chapter 2, feminist legal theory asserts that the law is not neutral

and that it sometimes legitimates patriarchal oppression. Viewing the triple approach to resocialisation – as an obligation, right and remedy – through an anti-dominance, anti-essentialist, and intersectional lens provides a perspective within which to view state resocialisation obligations towards women more comprehensively. This, then, ensures that resocialisation as an obligation, right and remedy benefits all women, inclusively defined. As this research focuses on the African regional system, the discourses on whether feminism does or does not belong on the continent, as emphasised in Chapter 2, become a distraction from the overarching concern of patriarchal domination over women in Africa.[1] The above-mentioned feminist legal theories position resocialisation within the African context adequately by focusing on questions of power and domination and a definition of feminism that is inclusive of all women.

Of similar importance are discussions relating to cultural relativism and its associated implications on the rights and freedoms of women. As noted in Chapter 3, the universality of women's rights is frequently denied with the use of culture and religion as shields against the recognition of the rights of women.[2] While both the rights to culture and religion often feature significantly in women's lives, and are emancipatory and empowering in nature, these rights are not generally absolute. A balance, therefore, must be struck to ensure that cultural and religious rights interact with the rights of women in a complimentary way, where the rights of women are not undermined on the basis of cultural and religious rights. Resocialisation as an obligation, right and remedy, therefore, implies that states understand and acknowledge that their role in the realisation of the rights of women requires modifying harmful conceptions and behaviours of both state and private actors, including those acts undertaken in the name of culture and religion.

CEDAW acts as the point of departure insofar as resocialisation is concerned, with the inclusion of article 5(a). This provision requires consideration of the overall object and purpose of CEDAW, which is the elimination of all forms of discrimination against women in a way that establishes not only *de jure* equality but also *de facto* and transformative equality. As noted in Chapter 4, article 5(a) of CEDAW acts as a guide

[1] See Chapter 2 under 2 3 7.

[2] See Chapter 3 under 3 5 and 3 6.

to the implementation of all other substantive provisions.[3] This rights-based approach to article 5(a) is echoed in article 2(2) of the Protocol to the Maputo Protocol, as outlined in Chapter 6.[4] The reach of these primary resocialisation provisions is not, however, limited only to this rights-based approach. As posited in Chapter 4, article 5(a), and similarly article 2(2) of the Maputo Protocol, operate as standalone provisions giving rise to the triple approach to resocialisation as an obligation, right and remedy.[5] Resocialisation is not, therefore, confined only to guiding the implementation and interpretation of other substantive rights contained in international and regional law but has an expanded and more pronounced role to play as a standalone provision.

8 2 2 Resocialisation as an obligation

As discussed in Chapter 4, resocialisation as an obligation mandates states to respect, protect and fulfil the rights of women.[6] This obligates states to refrain from entrenching harmful socio-cultural norms and practices in all facets of society, to implement the necessary steps to pursue *de facto* and *de jure* equality and to protect women from discrimination in the public and private sphere. The due diligence obligation is also importantly implicated in resocialisation as an obligation.[7]

To respect this obligation, states are required to address the socio-cultural norms underlying discrimination against women and to refrain from entrenching such norms through policies, legislation, and practices. State obligation in terms of resocialisation arises, as the CEDAW Committee emphasises, in cases where the judiciary entrenches stereotyped norms about women and how they ought to behave in matters brought before courts. Such stereotypes have the effect of placing inflexible standards on women.[8] The importance of implementing resocialisation measures aimed at

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[3] See Chapter 4 under 4 3.

[4] See Chapter 6 under 6 3.

[5] See Chapter 4 under 4 4.

[6] See Chapter 4 under 4 2.

[7] See Chapter 4 under 4 5 1 4.

[8] See Communication 20/2008, *V.K. v Bulgaria* CEDAW Committee (27 September 2011) UN Doc CEDAW/C/49/D/20/2008 (2011); Communication 47/2012, *Angela González Carreño v Spain* CEDAW Committee (15 August 2014) UN Doc CEDAW/C/58/D/47/2012 (2014); Communication 34/2011, *R.P.B. v The Philippines* Communication CEDAW Committee (12 March 2014) UN Doc

fulfilling the obligation to resocialise is, thus, underscored by the CEDAW Committee. Further pronouncements by the CEDAW Committee emphasise the repeal of discriminatory laws, with the CEDAW Committee cautioning states to guard against allowing dominant cultural and religious norms to sway decisions relating to legislative repeals.[9] Inaction of this nature triggers state responsibility. At the regional level, as discussed in Chapter 7, the African Court in *APDF*[10] accurately implements the state obligation to resocialise by mandating the repeal of the impugned Family Code, which violated several rights of women and girls.[11] In contrast, ECOWAS Court in *Mani*,[12] also discussed in Chapter 7, demonstrates a gap in understanding and implementing resocialisation as an obligation since the court avoids altogether the applicant's prayer relating to the adoption of legislative protections against harmful discriminatory practices.[13] Similarly, the ECOWAS Court in *Aminata*[14] considers the revision of legislative or administrative texts, as prayed for by the applicant, as unjustified, overlooking resocialisation as an obligation.[15]

Fulfilling this obligation entails adopting and implementing resocialisation measures that seek to modify the underlying determinants of gendered discrimination. What those entail and how the CEDAW Committee, states and the African Commission engage with resocialisation measures is discussed below under 8 4.

Finally, the responsibility to protect necessitates that states safeguard women from all forms of discrimination. To achieve this objective, it is crucial to incorporate resocialisation as an essential element in preventing and eradicating all forms of discrimination against women. This includes the need to alter stereotypes, presumptions, and biases that influence law enforcement, the judiciary, and other

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CEDAW/C/57/D/34/2011 (2014) 2003; UN Committee on the Elimination of Discrimination against Women, ''General Recommendation No 33 on Women's Access to Justice'' (3 August 2015) UN Doc CEDAW/C/GC/33.

[9] See Communication 48/2013, *E.S. and S.C. v United Republic of Tanzania* CEDAW Committee (13 April 2015) UN Doc CEDAW/C/60/D/48/2013 (2013).

[10] African Court in *Association Pour Le Progrés et la Défense des droits des Femmes Maliennes (APDF) and The Institution for Human Rights and Development in Africa (IHRDA) v Mali* (merits) (2018) 2 AfCLR 380.

[11] See Chapter 7 under 7 5 1.

[12] *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (2008).

[13] See Chapter 7 under 7 6 1. See also *Mani* (n 12) para 71.

[14] *Aminata Diantou Diane v Mali* ECW/CCJ/JUD/14/18 (2018).

[15] See Chapter 7 under 7 6 3.

public officials. The feminist legal theories discussed in Chapter 2, specifically the anti-dominance, anti-essentialist, and intersectional theories relating to womanhood and the oppression women face, highlight the significance of protecting all women.[16] Furthermore, Chapter 3 emphasised the universality of women's rights and the need to avoid cultural and religious justifications for the violations of rights.[17] Together, these reinforce the importance of providing protection for all women, without exception.

Additionally, this responsibility to protect requires states to exercise due diligence in protecting women from harms caused by private actors. This is particularly significant because rights violations, especially those related to SGBV, often occur in private settings. The CEDAW Committee's decision in *Carreño*,[18] as discussed in Chapter 4, effectively illustrates this point.[19] Conversely, the ECOWAS Court's ruling in *Mani* asserts that the state cannot be held accountable for violations that occur in the private sphere because it is deemed solely the perpetrator's responsibility.[20] Had the ECOWAS Court correctly interpreted resocialisation as a component of the due diligence obligation on the state, it would have held the state accountable for failing to take the necessary measures to safeguard the applicant from the detrimental effects of harmful socio-cultural norms as the CEDAW Committee did in *Carreño*.

8 2 3 Resocialisation as a right

Resocialisation as a right is essential to achieving non-discrimination and equality, as highlighted in Chapter 4.[21] The Optional Protocol[22] makes it possible for individuals to assert their right to resocialisation against the state through the CEDAW Committee's Individual Complaints Mechanism. The existence of state obligations to resocialisation implies that women possess a right to resocialisation, as discussed in Chapter 4, for it is only through the realisation of this right to resocialisation that state obligations are

[16] See Chapter 2 under 2 3.

[17] See Chapter 3 under 3 4, 3 5 and 3 6.

[18] *Carreño* (n 8).

[19] See Chapter 4 under 4 5 1 4.

[20] See Chapter 7 under 7 6 1.

[21] See Chapter 4 under 4 5 2.

[22] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (15 October 1999) 2131 UNTS 83.

discharged, and non-discrimination and equality are achievable.[23] This is evidenced by the jurisprudence of the CEDAW Committee, which documents cases of rights violations.[24] Specifically, the CEDAW Committee employs unambiguous language where it finds violations of resocialisation rights under Article 5 of the CEDAW.[25] The presence of cases asserting violations of resocialisation rights reinforces the position that resocialisation is not only an obligation and remedy but also a distinct right. Thus, women have the right to be protected from harmful practices based on stereotypes, biases, harmful assumptions and other socio-cultural norms, the realisation of which is possible only through resocialisation. Resocialisation as a right is, therefore, embedded in the international legislative framework as well as in the CEDAW Committee's jurisprudence, as discussed in Chapter 4.[26]

E.S.[27] provides an example of the right to resocialisation, as discussed in Chapter 4.[28] This case turns on the domestic court's failure to recognise the rights of daughters to inheritance. The CEDAW Committee found a violation of the Applicant's rights to, *inter alia*, Article 5, in that it "condon[ed] such legal restraints on inheritance and property rights".[29] By refusing to implement resocialisation for the purposes of effecting the requisite change to traditional practices, the state violated the right to resocialisation. This case also demonstrates the importance of recognising the right of women to a positive cultural context in accordance with Article 17 of the Maputo Protocol, as discussed in Chapters 6 and 7.[30] Bound by the Maputo Protocol's provisions, Tanzania is obligated to ensure women's rights to a positive cultural context, which includes cultural contexts allowing for the rights of daughters to inheritance. As discussed in Chapters 6 and 7, both the African Charter and Maputo

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[23] See Chapter 4 under 4 5 2.

[24] See Communication 6/2005, *Fatma Yildirim v Austria* CEDAW Committee (1 October 2007) UN Doc CEDAW/C/39/D/6/2005 (2007); Communication 18/2008, *K.T. Vertido v the Philippines* CEDAW Committee (22 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010); Communication No 138/2018, *SFM v Spain* CEDAW Committee (28 February 2020) UN Doc CEDAW/C/75/D/138/2018 (2018); Communication 5/2005, *Şahide Goekce v Austria* CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007).

[25] *S.F.M.* (n 24) para 7.6; *Vertido* (n 24) para 8.9.

[26] See Chapter 4 under 4 5 2.

[27] *E.S.* (n 9).

[28] See Chapter 4 under 4 5 2.

[29] *E.S.* (n 9) para 7.9.

[30] See Chapter 6 under 6 8 and Chapter 7 under 7 2 6.

Protocol contain several other resocialisation provisions that emphasise the importance of women's rights to resocialisation.

In *APDF*, the African Court considered the allegation of violations of various international law provisions, including those relating to resocialisation.[31] As Chapter 7 notes, while the African Court did not engage with resocialisation as a right in any depth, it found violations of article 2(2) and 5 of the Maputo Protocol because the impugned provisions maintained discriminatory practices undermining the rights of women.[32] In attempting to align the social realities of the country with its laws, which had a discriminatory effect on women, the state overlooked its obligations to refrain from enacting laws that perpetuate stereotypes and harmful socio-cultural narratives about women. In doing so, the right to resocialisation was simultaneously violated. In ordering the state to amend its Family Code to reflect international law standards, the African Court recognised the resocialisation obligations on states and, by implication, the right to resocialisation. The importance of viewing resocialisation through a feminist and universality lens, as discussed in Chapters 2 and 3, was underscored in *APDF*, where the objectives of legislative prohibitions to discrimination were made subject to cultural dictates.

At the sub-regional level, the applicant in *Mani* averred a violation of her rights as contained in articles 2, 3 and 18(3) of the African Charter. The realisation of women's rights in terms of these provisions, as discussed in Chapter 5, remains contingent upon the implementation of resocialisation.[33] As argued in Chapter 4, where state obligations to resocialisation exist, the rights of women to resocialisation are similarly present.[34] Thus, while not explicitly acknowledged as such, resocialisation, as a right, surfaces in this case. Specifically, the applicant's request that the state adopt legislation to protect women against discriminatory customs and to abolish harmful customs and practices founded on the inferiority of women is akin to a request for the fulfilment of her rights to resocialisation of the society around her.

In the case of *Dorothy Njemenze*,[35] the applicants' rights to resocialisation were violated when the state failed to take steps to address the biases of law enforcement

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[31] *E.S.* (n 9) para 9.

[32] See Chapter 7 under 7 5 1.

[33] See Chapter 5 under 5 2 and 5 3.

[34] See Chapter 4 under 4 5 2.

[35] *Dorothy Chioma Njemenze v Nigeria* ECW/CCJ/JUD/08/17 (2017). See Chapter 7 under 7 6 2.

towards women in general and towards women engaging in prostitution specifically to prevent such violations. Similarly, a violation of resocialisation rights is implied in the ECOWAS Court case of *Adama*.[36] However, it arguably missed an opportunity to engage with resocialisation as a right because it failed to recognise the importance of modifying the harmful cultural practices related to the Poro Devil and its accompanying impact on the rights and freedoms of women. Similarly, an opportunity was missed for the applicant to raise and for the ECOWAS Court to engage with a violation of the right to resocialisation arising from the state's failure to uphold its due diligence obligation to protect the applicant from the actions of a private actor.

8 2 4 Resocialisation as a remedy

Chapter 4 provided an in-depth analysis of resocialisation as a remedy, which is prompted by women asserting their right to resocialisation in cases where violations have occurred. The CEDAW Committee's jurisprudence on resocialisation as a remedy indicates a somewhat inconsistent approach, with certain decisions offering detailed remedies[37] while others provide more vague solutions[38] or none at all.[39] Furthermore, in some instances, complainants do not request resocialisation as a remedy, which limits the CEDAW Committee's ability to make rulings in this regard.[40]

Although an awareness of the importance of resocialisation as a remedy exists, the CEDAW Committee could further engage with this issue by providing a General Recommendation that offers guidance on resocialisation in general, as well as on resocialisation as a remedy specifically.[41] This General Recommendation could also guide complainants to effectively include resocialisation as a remedy in their legal pleadings when utilising the individual complaints mechanism. Such guidance would equip complainants and their legal representatives with the necessary knowledge and

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[36] See Chapter 7 under 7 6 4.

[37] *Vertido* (n 24).

[38] Communication 2/2003, *A.T. v Hungary* CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005).

[39] *Goekce* (n 24).

[40] *V.K.* (n 8).

[41] As noted below, a General Comment by the African Commission in this regard would, similarly, provide further clarity and guidance to states on resocialisation in general and resocialisation as a remedy specifically.

tools while also enhancing the CEDAW Committee's own understanding and engagement with resocialisation as a remedy. Furthermore, this has the potential to influence regional engagement, including that of the African Commission, the African Court, and sub-regional courts.[42]

Chapter 7 noted that at the continental level, only one case sheds light on how the court engages with resocialisation as a remedy. In *APDF*, as mentioned above, the applicant sought a court order to implement several resocialisation measures. While this presented a unique opportunity for the African Court to engage with resocialisation as a remedy in accordance with the provisions of the Maputo Protocol, the court did not grant the applicant's requests. Instead, it directed the state to promote human rights education in accordance with Article 25 of the African Charter, as discussed in Chapter 5, omitting any reference to the provisions of the Maputo Protocol.[43] Chapter 7 highlighted the potential consequences of failing to address resocialisation as a remedy, including the undermining of resocialisation provisions of the Maputo Protocol and a potential loss of public confidence in the court's ability to adequately advance resocialisation as a remedy. To address this issue, it would be beneficial for the African Court to gain a deeper appreciation of resocialisation, thereby enhancing its capacity to engage with resocialisation as a remedy.

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[42] The African and ECOWAS Courts have already demonstrated a reliance on soft law in their judgments. For example, The African Court in *APDF* refers to UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 21 on Equality in Marriage and Family Relations" (1994) UN Doc A/94/38 para 70. See also the ECOWAS Court in *Aircraftwoman Beauty Igbobie Uzezi v The Federal Republic of Nigeria* ECW/CCJ/JUD/11/21 para 125 where the ECOWAS Court refers to UNGA "Report on Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court" (6 July 2015) UN Doc A/HRC/30/37 issued by the Working Group on Arbitrary Detention. In *Adama Vandi v Sierra Leone* ECW/CCJ/JUD/32/2022 (2022) para 4 and at para 100, the ECOWAS Court makes references to the OHCHR "CCPR General Comment 18: Non-discrimination", adopted at the 37th Session of the Human Rights Committee (10 November 1989). Similarly, at para 136, the ECOWAS Court refers to the African Commission on Human and Peoples' Rights, "Guidelines on Combating Sexual Violence and its Consequences in Africa" adopted during its 60th ordinary session held in Niamey, Niger (8–22 May 2017) and at para 142 references UN Committee Against Torture, "Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment General Comment 2" (24 January 2008) UN Doc CAT/C/GC/2.

[43] See Chapter 5 under 5 4.

Lastly, the way the ECOWAS Court engages with resocialisation as a remedy is instructive. Despite the applicants' pleadings containing resocialisation pleas, none of the relevant cases that have come before the ECOWAS Court have utilised the opportunities to engage with resocialisation as a remedy.[44] This not only highlights the current gaps in this regard but also underscores the existing opportunities for the court to engage with and understand the implications of resocialisation as a remedy. Further, the provision of a General Comment by the African Commission could equip individuals and human rights mechanisms alike with the necessary capacity to include and engage with resocialisation as a remedy in their pleadings. *Adama*, where the applicant misses an opportunity to raise resocialisation in its pleadings, importantly demonstrates this point, as do the cases brought before the CEDAW Committee as noted above and in Chapter 4.[45] In this regard, as noted in Chapter 7, had the requisite awareness of resocialisation been present by the applicant and her legal representatives, the pleadings would, arguably, have contained resocialisation pleas, including requests for resocialisation as a remedy.[46] Likewise, a General Comment addressing resocialisation could have encouraged the ECOWAS Court to engage with resocialisation comprehensively and to appreciate and emphasise the utility of resocialisation as a remedy to prevent future violations. This could lead to significant and positive changes in the lives of women, effecting real, transformative progress.

The capacity of women, their legal representatives, and human rights mechanisms to accurately identify the harms they have suffered is directly correlated with their ability to attribute blame to the wrongdoer and to request remedies. As discussed below, the correct identification of targets of resocialisation is similarly crucial to realising women's rights. Resocialisation materialises in the form of measures implemented towards these appropriately identified targets.

8 3 Targets of resocialisation

One of the several ancillary research questions posed at the start of this research was the question of the targets of resocialisation. Closely connected to this question are those relating to the universality of human rights in general and women's rights

[44] See *Mani* (12); *Dorothy Njemenze* (n 35); Aminata (n 14).

[45] See Chapter 4 under 4 5 3.

[46] See Chapter 7 under 7 6 4.

specifically, as discussed in Chapter 3.[47] This research avers that women's rights are indeed universal. However, the realisation of these rights is always subject to effective resocialisation, so states must acknowledge the universality of patriarchal domination and the influence of harmful socio-cultural norms that require modification. The universality of women's rights, thus, implies universality in the application of resocialisation. Given that gender equality has not yet been achieved in any state, no state is exempt from the reach of resocialisation obligations.[48]

The following sections consider the targets of resocialisation in two distinct ways. First, identifying the appropriate socio-cultural norms and practices which resocialisation seeks to modify, as discussed in Chapter 3, is critical to successful norm change in favour of women.[49] In other words, if the targeted harm, in the form of behaviours, attitudes, stereotypes, and any harms that prevent the realisation of the substantive rights of women are erroneously identified, resocialisation measures become meaningless and do little to impact the lives of women. Second, the audience itself is critical when considering the implementation of resocialisation measures. In other words, crucial to the realisation of rights is the question of who resocialisation measures should be targeted at to prevent the filtering of laws and policies through existing and harmful socio-cultural norms, biases, and stereotypes. Identifying the harm that resocialisation seeks to alter, as well as considering the target audience, therefore, work in tandem and are addressed in the sections below.

8 3 1 Identification of harms

Chapters 3 and 4 highlight the importance of accurately identifying the harms in need of resocialisation, mindful not to overlook those deemed less egregious in nature.[50] In this regard, the Joint General Recommendation issued by the CEDAW and the CRC Committees provides clarity as to the criteria for such identification.[51] An intersectional lens is essential to identifying the harms impacting women. It recognises the often

[47] See Chapter 3 under 3 4.

[48] United Nations Secretary General, "Secretary-General's Remarks to the Commission on the Status of Women" 6 March 2023 <https://www.un.org/sg/en/content/sg/speeches/2023-03-06/secretary-generals-remarks-the-commission-the-status-of-women> accessed 28 April 2023.

[49] See Chapter 3 under 3 7.

[50] See Chapter 3 under 3 7 and chapter 4 under 4 4 1.

[51] See Chapter 3 under 3 7.

multiple intersecting vectors of discrimination women face and ensures that the notion of womanhood remains flexible, encapsulating the varied experiences and challenges facing women.[52] As the Joint General Recommendation notes, an intersectional lens is inherent to the identification of harms and remains central to resocialisation.[53] Similarly, an anti-essentialist lens allows for the inclusion of all women in identifying harms, while a focus on overthrowing patriarchal dominance through resocialisation and the modification of harmful socio-cultural norms and practices becomes an objective of all who seek equality, African women included.[54]

Chapter 4 highlights the importance of accurately identifying harms, as illustrated by the lack of clear definitions for the terms "stereotype" and "stereotyping".[55] Without the requisite clarity, the risk of resocialisation measures being undermined due to the incorrect identification of harm becomes that much more acute. The impact and influence of stereotypes on the denial of rights underscores the need for precise definitions of the terms "stereotype" and "stereotyping". While such an express statement from the CEDAW Committee would certainly assist in demarcating these concepts, nothing of that nature exists to date. Notwithstanding this lack of clarity, the report issued by the Office of the High Commissioner of Human Rights, as discussed in Chapter 4 serves as an appropriate interim guideline for states to utilise when identifying harms relating to stereotypes and stereotyping.[56] Furthermore, the CEDAW Committee's Concluding Observations to state reports provide guidance relating to the types of stereotyping preventing the realisation of rights in the absence of explicit definitions. The importance of accurately identifying the harms to which resocialisation measures are aimed is comprehensively provided for by the CEDAW Committee and can serve as a point of departure for the African regional system's identification of harms, as discussed below.

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[52] See Chapter 2 under 2 3 6.

[53] UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Rights of the Child, "Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices" (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1=CRC/C/GC/18/Rev.1 (2019) para 6.

[54] See Chapter 2 under 2 3 7 for more on feminism in Africa.

[55] See Chapter 4 under 4 4 1.

[56] See Chapter 4 under 4 4 1.

The analysis of the African Charter focussed on articles 2, 3, 18 and 25, as discussed in Chapter 5. Insofar as articles 2 and 3 are concerned, no challenges relating to the identification of harms were identified in state reports or the African Commission's Concluding Observations.

Insofar as article 18 is concerned, Djibouti's report of 2015 highlights the problematic nature of incorrectly identifying the harms that resocialisation seeks to address. In addressing FGM, the state refers to the socio-cultural norms limiting the reporting of FGM without any reference to its prevention.[57] Resocialisation to *prevent* FGM is not an approach taken by the state, demonstrating an incomplete understanding of the obligations owed to women and girls in terms of article 18.[58] Indeed, resocialisation aimed both at the prevention of and as a deterrence to FGM would serve to strengthen state commitment to the realisation of women's rights, amongst other resocialisation measures aimed at other harms.

Article 18(3) of the African Charter makes provision for the rights of women together with those of children, the elderly and the disabled. As discussed in Chapter 5, when viewed in light of the drafting history, the importance of protecting the rights of women as distinct rights is underscored.[59] This means, therefore, that states should consider its obligations to women as distinct from its obligations towards children, the elderly and the disabled, especially because state obligations towards women differ in content and scope to those of children, the aged and the disabled. The clustering of identities, therefore, serves to conflate challenges and the resultant measures, diminishing the potential results thereof. In this regard, as noted in Chapter 5, Niger's report of 2014 serves as an example of this clustering of identities where the state emphasises efforts made in sensitising its population on women's and children's rights and those of the disabled.[60] While laudable that the state has made sensitisation efforts, the clustering of identities omits due regard to the specificities and needs of each group, and necessarily impacts the development of appropriate measures in response. It remains crucial, therefore, that in identifying harms, states guard against clustering identities,

[57] See Chapter 5 under 5 3 4.

[58] Emphasis added.

[59] See Chapter 5 under 5 3 1.

[60] Republic of Niger Periodic Report of the Republic of Niger (2014–2016) on the Implementation of the African Charter on Human and Peoples' Rights para 423. See also 5 3 3.

especially given that women's rights continue to be afforded lesser priority than other rights.[61]

Chapter 5 observes that in many instances, the identification of harms to which resocialisation is targeted is entirely absent, despite objective evidence that such harms exist.[62] This takes on the form of an outright denial that inequality exists. Thus, the harms that resocialisation must target are overlooked.[63] Also noted in Chapter 5, the African Commission is similarly remiss in failing to address, with any level of specificity and in relation to distinct provisions in the African Charter, the assertions made by states who overlook the existence of harms within their communities. While it cannot be presumed that the African Commission is intentionally derelict in this regard, it does signal the extent to which the capacity of the African Commission requires enhancement. This is true, especially given the promotional and protectional mandate it holds and the influence its Concluding Observations exert on member states. This remains, therefore, a missed opportunity for the African Commission to adequately engage with resocialisation and the harm it seeks to target.

Indeed, the African Commission is generally consistent in highlighting the role that deep-seated prejudices, traditional practices and attitudes have on the rights of women, noting these as an area of concern or a factor impeding the enjoyment of rights.[64] Statements of such a general nature, however, do little to guide states in identifying what those deep-seated prejudices, traditional practices and attitudes are, leaving its determination to the discretion of those who have, themselves, been influenced by patriarchal norms and standards. Without the necessary guidance from the African Commission, it remains unlikely that the correct identification of harms can

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[61] Federal Democratic of Ethiopia Fifth and Sixth Periodic Country Report (2009–2013) on the Implementation of the African Charter on Human and Peoples' Rights in Ethiopia (April 2014) provides another example of the clustering of identities where the state notes, on page 101, awareness raising measures to "promote the welfare of women and children". The report comments on its efforts in terms of article 18 by separating out the rights of children, persons with disabilities and the elderly, with the rights of women discussed, at page 100, under "Measures taken to prevent harmful traditional practices, female genital mutilation, abduction and early marriage".

[62] See Chapter 5 under 5 3 4.

[63] See for instance, The State of Eritrea Initial National Report (1999–2016) Prepared on the African Charter on Human and Peoples' Rights (ACHPR) para 307 and Federal Republic of Nigeria 5th Periodic Country Report: 2011–2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria 55.

[64] See Chapter 5 under 5 3 4.

take place. Much like the CEDAW Committee did with its Joint General Recommendation, a General Comment by the African Commission would enhance the capacity of states to identify the harms in need of resocialisation. In this regard, it is pertinent to note that the African Commission has provided some guidance by way of its General Comments, Niamey Guidelines and Resolutions, as discussed in Chapter 7.[65] These currently serve as guidance to states on resocialisation, though in a limited form. A General Comment engaging solely with resocialisation generally and on the identification of harms specifically, therefore, is likely to signal the utility of resocialisation across the continent and afford it the requisite priority that brief mention in the guidelines and resolutions may not. The African Commission has yet to engage meaningfully so as to guide states on their interpretation and application of resocialisation.

Article 25 of the African Charter provides for the resocialisation of the populace on the rights and freedoms contained in the African Charter, including those of women. The implication, therefore, is that resocialisation must be targeted at promoting and ensuring the respect of women's rights alongside all other rights. Chapter 5 highlights that state reports often omit reference to the details of resocialisation measures taken, making it challenging to ascertain whether initiatives encompass all the rights and freedoms or only select ones.[66] History has demonstrated that issues concerning the rights of women have often been afforded lesser priority, underscoring the importance of ensuring more detailed information in relation to the implementation of resocialisation measures pursuant to article 25 are provided by states. This is true, too, of the General Comments of the African Commission, which provide no specificity at all regarding the identification of harms which human rights education ought to target. The role that the African Commission plays in identifying the harms in need of resocialisation in terms of this provision is significant. While the suggestion is not for the African Commission to provide a closed list of harms to target, reiterating the need for the education of everyone on gender equality in express terms ensures that education on the rights of women is not placed in abeyance.

The identification of harms in relation to the Maputo Protocol is similarly instructive. Pursuant to article 5, Kenya's report of 2020 identifies FGM as a harmful practice in

[65] See Chapter 7 under 7 3 and 7 4.

[66] See Chapter 5 under 5 4 4.

need of attention. Though brief in mention, the report does expand its identification of harms beyond FGM to identify the need to end harassment and negative stereotyping.[67] While this identification itself is limited, such an expanded view not only serves to demonstrate good practice but demonstrates an understanding on the part of the state of the need for resocialisation to target other harms.

Cameroon's report of 2019 provides further insight into the manner in which states identify the harms in need of resocialisation. In this regard, while the state points to the necessity of awareness-raising for parents and traditional leaders, its emphasis on the implementation of campaigns to effect behavioural changes in parents for the purposes of capacitating them to raise girls properly is misguided.[68] This is particularly so given the absence of any explanation as to what constitutes 'proper' and the absence of similar initiatives, even if incomplete in nature, directed at boys. Additionally, its focus on the education of the wives of traditional leaders on the protection and education of girls, to the exclusion of others within the broader society, is similarly limited.[69] While a laudable initiative, the education of wives is too limited. In this regard, Cameroon would do well to draw on article 12(e) of the Maputo Protocol more comprehensively to ensure that resocialisation in the form of education targets everyone. South Africa's report of 2015, as noted in Chapter 7, also demonstrates a misguided approach to determining harms in need of resocialisation.[70] In this regard, its legislative provision relating to virginity testing for girls over 16 years of age falls foul of South Africa's obligation to eliminate harmful practices.

The African Commission, in its Concluding Observations of 2019 to Rwanda, shows promise in its recommendation to Rwanda to identify other forms of harmful behaviours over and above those stipulated in the report.[71] In doing so, the African Commission arguably prompts the state to delve further into developing its capacity, in line with the provisions of the Maputo Protocol, in particular the definition of harmful practices, to identify harmful practices more broadly. This is, indeed, a good practice

[67] See Chapter 7 under 7 2 2.
[68] See Chapter 7 under 7 2 5.
[69] See Chapter 7 under 7 2 5.
[70] See Chapter 7 under 7 2 2.
[71] See Chapter 7 under 7 2 2.

emanating from the African Commission, whose responsibility it is to guide states in identifying the targets of resocialisation and implementing the necessary measures. [72]

State engagement with article 17 on the rights of women to a positive cultural context provides another example of the challenge that exists with states incorrectly identifying the harms that resocialisation must target. Generally, state understanding of this provision is lacking across the board.[73] As discussed in Chapter 7, current state engagement with article 17 operates within the bounds of cultural heritage sites, its preservation, and the assertion that women are generally granted the right to participate in the cultural life of their communities.[74] While this provision refers to the rights of women to positive cultural contexts, these contexts extend beyond the limits of libraries, events advancing culture and the preservation of cultural sites, as important as those are, to contexts in which women are not only afforded an opportunity to participate and thrive but also to contribute to the creation of positive cultural contexts. In this regard, state reports demonstrate a gap in the appropriate identification of the cultural contexts to which women have a right, arguably because culture is viewed narrowly.[75]

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[72] Concluding Observations and Recommendations on the Combined 11th, 12th, and 13th Periodic Report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 64th ordinary session para 89.

[73] This is based on the limited available reports in terms of the Maputo Protocol.

[74] See Chapter 7 under 7 2 6. See also The Kingdom of Lesotho Combined Second to Eighth Periodic Report Under the African Charter on Human and Peoples' Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa (April 2018) para 489, where the state suggests that "women and girls in Lesotho do not face any major barriers to participate in the cultural life of their communities". See also, Angola Sixth and Seventh Report on the Implementation of the African Charter on Human and Peoples; Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011–2016 para 110; Burkina Faso Periodic Report of Burkina Faso Within the Framework of the Implementation of Article 63 of the African Charter on Human and Peoples' Rights (January 2015) para 349; The Republic of Namibia 7th Periodic Report (2015–2019) on the African Charter on Human and Peoples' Rights and the Second Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) 124; Republic of Rwanda 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights & The Initial Report on the Implementation Status of the Protocol to The African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol): Period Covered by the Report 2009–2016, 96-97; and Republic of Seychelles Country Report 2019 on the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa para 17.1.

[75] See Chapter 3 under 3 6 for more on culture.

The Democratic Republic of Congo's report of 2015 arguably provides the most accurate account of the nuances of article 17 and correctly identifies the influence of harmful socio-cultural norms and culture on society's perception of women, noting, amongst others, that its society possesses a culture of hostility towards the advancement of women.[76] Thus, a positive cultural context within which women can operate does not, according to the state, exist. This description by the state of the cultural barriers to gender equality, as well as its report on sensitisation efforts aimed at ensuring non-discrimination, is the closest a state has come thus far in accurately interpreting and applying article 17 and demonstrates promising state practice.[77]

Malawi's Periodic Report of 2015 similarly provides a promising practice of correctly identifying culture as directly contributing to harmful cultural practices, norms, and stereotypes, which restrict the enjoyment of women's rights. In this regard, it notes the provision of legislative guarantees to the creation of a positive cultural context through resocialisation.[78] Insofar as the right to culture creation is concerned, Namibia's 6th Periodic Report of 2015 offers a promising practice where it notes the influence of women traditional leaders in government decision making and in the determination of cultural policies, though the state cites this practice without any accompanying commentary on article 17.[79] On its own, this does not fulfil the obligations of the state in terms of this provision. Furthermore, the state is not consistent in its engagement with article 17, with its subsequent report emphasising the preservation of cultural heritage, thereby missing the mark as far as the object and purpose of article 17 is

[76] Democratic Republic of Congo Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights, from 2008–2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005–2014 (Initial Report and 1st, 2nd and 3rd Periodic Reports) para 292.

[77] 11th, 12th and 13th Periodic Reports and 1st, 2nd and 3rd Periodic Reports of the Democratic Republic of Congo (n 76) para 291. Note that the state sensitisation efforts noted are targeted at non-discrimination within the context of its article 17 obligations.

[78] Republic of Malawi Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (2005–2013) para 225. See also Chapter 7 under 7 2 6.

[79] The Republic of Namibia 6th Periodic Report on the African Charter on Human and Peoples' Rights (2015) para 47.

concerned.[80] Given that this resocialisation provision is crucial to providing women with the necessary enabling environments which would allow for equal participation in society, a General Comment by the African Commission may provide the necessary framework within which states are better able to engage with this provision over and above their recognition of cultural and heritage sites and harmful practices.[81] This is especially pertinent given that the African Commission has, thus far, engaged with this right in its Concluding Observations on one occasion only, as noted in Chapter 7.[82]

8 3 2 Recipients of resocialisation

As suggested in Chapter 1, who resocialisation measures target is crucial to the realisation of rights.[83] Both women and men throughout society must be the targets of resocialisation if changes in societal behaviours towards women are to be seen. This is so because, as this research argues, all human beings possess intrinsic, unconscious biases and perpetuate harmful stereotypes, whether consciously or unconsciously, with these dominant biases and harmful culture continuing to influence the conceptualisation and implementation of the law as well as the continued discrimination against women. Thus, the target audience, as specified in article 5(a), is broad in scope to include everyone within its ambit. This is echoed in article 2(2) of the Maputo Protocol.

As discussed in Chapter 4, the CEDAW Committee's General Recommendation 25 specifies that a joint reading of articles 1 to 5 suggests the realisation of formal, substantive and transformative equality.[84] The realisation of transformative equality remains contingent upon the implementation of resocialisation, and since

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[80] 7th Periodic Report of the Republic of Namibia (n 74) 124.

[81] The Republic of Gambia Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, for instance, at 160, provides a single paragraph relating to this right noting that "[s]ection 32 of the Constitution guarantees the right to culture in The Gambia. The Government of the Gambia has taken several measures to promote and preserve the cultural heritage of its people. The National Centre for Arts and Culture is tasked with amongst others, the promotion and development of Gambian arts and culture". This demonstrates a lack of understanding of this provision. See also Report of the Republic of Malawi (n 78) para 225 and Country Report of the Republic of Seychelles (n 74) 42.

[82] See Chapter 7 under 7 2 6.

[83] See Chapter 1 under 1 2.

[84] See Chapter 4 under 4 3.

transformative equality requires, as the General Recommendation notes, an overhaul of the current systems of power at institutional, community and individual levels, resocialisation must be aimed at everyone. The CEDAW Committee reaffirms this in its General Recommendation 19 where it highlights the increasing importance of states engaging in *public* information and education programmes to modify harmful mentalities on the role and value of women in society.[85] General Recommendation 35, updating General Recommendation 19, further confirms the broad target of resocialisation by underscoring the necessity for changes in patriarchal attitudes and stereotypes, those of which are held by all human beings, also implying that everyone be subject to resocialisation.[86]

The CEDAW Committee's jurisprudence, as discussed in Chapter 4, provides further insight into the target audience of resocialisation.[87] In this regard, the CEDAW Committee emphasises the direct link that exists between traditional attitudes about women's subordinate status to men and incidences of domestic violence.[88] As argued, resocialisation is key to modifying harmful traditional attitudes and, by implication, the CEDAW Committee's reference to traditional attitudes of women's subordination to men calls for resocialisation of everyone as a means to addressing them. These traditional attitudes similarly exist beyond domestic violence and as argued, extend to issues relating to the gender pay gap and the motherhood penalty, to name a few.[89]

Certain circumstances might dictate the provision of resocialisation measures aimed at a specific grouping of individuals. A narrow focus insofar as the recipients of resocialisation are concerned is not problematic *per se* if implemented as part of a broader programme of resocialisation. The nature of the CEDAW Committee's individual complaints often requires specificity insofar as the targets of resocialisation are concerned and often do not include more general targets. These may include the judiciary, law enforcement and the like and are determined by the facts of each case. However, the totality of the CEDAW Committee's jurisprudence demonstrates that resocialisation is necessary across the board. While everyone must be targeted, implementing resocialisation measures in more narrowly defined spaces within society

[85] See Chapter 4 under 4 4 1. Emphasis added.

[86] See Chapter 4 under 4 4 1.

[87] See Chapter 4 under 4 5 1 2.

[88] See Chapter 4 under 4 5 1 4.

[89] See Chapter 4 under 4 5 1 4.

is often necessary and in line with state resocialisation obligations when coupled with several other resocialisation measures aimed at all other pockets of society.

In this regard, much of the CEDAW Committee's jurisprudence highlights the shortcomings of law enforcement and the judiciary insofar as their interactions with women's rights violations are concerned. As discussed in Chapter 4, the inflexible standards placed on women and girls in situations of sexual and gender-based violence by the judiciary, as well as the gendered stereotyping that informs the judiciary's approach to women and girls, are violations of the right of women to resocialisation and triggers state obligations.[90] This is reinforced by the CEDAW Committee's General Recommendation 33 on women's access to justice.[91] Similarly, the Committee observes the importance of implementing resocialisation to prevent violations of rights in the private sphere[92], highlights the power dynamics prevalent in employer-employee relationships, which often give rise to sexual harassment in the workplace,[93] and notes failures of medical health professionals in treating women as capable decision-makers[94], amongst others.[95] While specific in nature insofar as the targets of resocialisation are concerned, when viewed in totality, the CEDAW Committee's jurisprudence implies a broad target of resocialisation. The only exception to this is resocialisation as a remedy, which, as observed in Chapter 4, is an area where the CEDAW Committee omits recommending resocialisation targeted at the generality of the population.[96] This is unfortunate, though the fact that the CEDAW Committee does not provide clear guidance as to resocialisation as a remedy for the generality of the population and directs its remedies at select pockets of society, as determined by the facts of the case, does not detract from the necessity of resocialisation for everyone as stipulated in article 5(a) and its General Recommendations.[97] The CEDAW Committee's approach to resocialisation, while not

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[90] See Chapter 4 5 1 1.

[91] UN Committee on the Elimination of Discrimination against Women (n 8).

[92] See Chapter 4 under 4 5 1 3.

[93] See Chapter 4 under 4 5 1 3.

[94] See Chapter 4 under 4 5 1 1.

[95] See Chapter 4 under 4 5 1 1.

[96] See Chapter 4 under 4 5 3.

[97] See UN Committee on the Elimination of Discrimination against Women "General Recommendation No 19: Violence against Women" (1992) para 24(t); UN Committee on the Elimination of Discrimination

complete, nevertheless provides an appropriate benchmark from which to compare the targets of resocialisation within the context of the African regional system.

Article 2 of the African Charter guarantees the enjoyment of all rights and freedoms contained in the Charter to all individuals.[98] This implies the resocialisation of everyone to ensure that the rights of women are respected by all. Article 3 guarantees that all are equal before the law and entitled to equal protection of the law, again implying resocialisation as a means to accomplish this.[99] The reach of article 3, however, is confined to those intimately connected with law enforcement and access to justice generally, excluding the generality of the population. Notwithstanding, as noted above in relation to CEDAW, the resocialisation of select pockets of society is not, in and of itself, problematic where states implement resocialisation measures in the generality alongside this narrowly defined segment of society. However, when read together with Article 8 of the Maputo Protocol, the target expands.[100]

In this regard, state reports relating to articles 2 and 3 could benefit from a more enhanced engagement with resocialisation. Indeed, as noted in Chapter 5, often state efforts to advance Articles 2 and 3 of the African Charter are limited to legislative and constitutional protections only.[101] Botswana's report of 2015, for instance, highlights the influence of gendered stereotypes on women's rights to equality before the law but does not stipulate any measures it might take to remedy this challenge or the population it seeks to target.[102] The African Commission, in its Concluding Observations of 2017 to Botswana, however, recommends the implementation of awareness-raising measures to address gender-based violence, guiding that the state target the public.[103]

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against Women, "General Recommendation No 35 on Gender-based Violence against Women, Updating General Recommendation No 19" (26 July 2017) UN Doc CEDAW/C/GC/35.

[98] See Chapter 5 under 5 2 1.

[99] See Chapter 5 under 5 2 1.

[100] See Chapter 6 under 6 6.

[101] See Chapter 5 under 5 2 4.

[102] Botswana Second and Third Report to the African Commission on Human and Peoples' Rights (ACHPR): Implementation of the African Charter on Human and Peoples' Rights (2015), 28. See Chapter 5 under 5 2 4.

[103] Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Botswana on the Implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 26th extra-ordinary session para 73.

The African Commission specifies the need to implement temporary special measures to improve women's involvement in government and eliminate discrimination against indigenous women.[104] Recommendations to implement temporary special measures, which necessarily include resocialisation measures, are notable. However, the African Commission's scant reference to temporary special measures as a recommendation is unfortunate. So too, is the lack of direct reference to distinct provisions of the African Charter and its omission of the targets of resocialisation. These all point to an opportunity for the African Commission to enhance its capacity insofar as its engagement with resocialisation generally, resocialisation within the context of articles 2 and 3 specifically, and the targets of resocialisation are concerned. This oversight is not, however, indicative of a lack of understanding or awareness on the part of the African Commission on the utility of resocialisation or on the broad scope of the target. Indeed, its Concluding Recommendations of 2018 to Niger recommends the implementation of resocialisation measures for all, including traditional and religious leaders, thereby ensuring that those who have historically undermined the rights of women in the name of culture and religion are specifically targeted, together with the generality of the populace.[105] This demonstrates good practice by the African Commission and the presence of a basic understanding of the utility of resocialisation, though there remain opportunities for enhanced engagement.

Lesotho's report of 2018 provides an example of a good practice insofar as the state's engagement with resocialisation in terms of articles 2 and 3 is concerned. As noted in Chapter 5, the state highlights efforts made at resocialisation targeted at changing people's mindsets.[106] Notwithstanding this and the broad target audience, the legislative authority given to customary law to trump women's rights demonstrates an incoherence in the state's approach to resocialisation. It implies that the state's reference to "people's mindsets" excludes the mindsets of those who operate within

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[104] See Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Benin, African Commission on Human and Peoples' Rights, adopted at the 45th Ordinary Session paras 30 & 33 and Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon, African Commission on Human and Peoples' Rights, adopted at its 47th Ordinary Session para 24 in Chapter 5 under 5 2 4.

[105] Concluding Observations relating to the 14th Periodic Report of Niger (2014–2016) on the Implementation of the African Charter of Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at its 23rd extra-ordinary session 24. See also Chapter 5 under 5 2 4.

[106] See Chapter 5 under 5 2 4.

the boundaries of customary law, limiting the target audience of resocialisation. Lesotho would do well to address this dichotomy by repealing the impugned provision and condemning discrimination in all forms, for it is this dichotomy which undermines the universality of women's rights and the impact of resocialisation on the lives of women.

Insofar as article 18 and the target audience of resocialisation are concerned, the preceding chapters demonstrate a trend amongst African states to focus their efforts on the modification of women's behaviours in society.[107] States placing the onus on women to alter the circumstances in which they find themselves represents a misunderstanding of the role that systemic inequality plays in producing environments that exclude women. Thus, to suggest that women "minimise their vulnerability", as Niger's report of 2019 suggests, demonstrates a lack of appreciation of the causes of women's vulnerability.[108] Gabon's report of 2012 similarly places the onus on women to increase their participation in leadership roles, failing to recognise the power imbalances resulting in the denial of rights, including the right of women to participate in all levels of society.[109] Other state reports indicate similar burdens on women and girls, such as their sensitisation on school enrolment and pregnancy-related risks,[110] a general promotion of mindset change amongst girls and women,[111] and awareness-raising campaigns on sexual and reproductive rights aimed at women.[112]

Similarly, the African Commission's Concluding Observations often fail to address this narrow view of states regarding the targets of resocialisation, demonstrating a lack of appreciation on the part of the African Commission of the need to address the overarching, systemic nature of gendered inequality, and by implication targeting

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[107] See Chapter 5 under 5 3.

[108] Republic of Niger Fifteenth (15th) Periodic Report of the Republic of Niger on the Implementation of the African Charter on Human and Peoples' Rights Covering the Period 2017–2019, Presented Pursuant to Article 62 of Said Charter para 541.

[109] Initial Report by The Gabonese Republic on Implementation of the African Charter on Human and Peoples' Rights 1986–2012, 94.

[110] Republic of Cameroon 3rd Periodic Report of Cameroon Within the Framework of the African Charter on Human and Peoples' Rights, April 2013. See chapter 5 under 5 3 4.

[111] Fifteenth Periodic Report of the Republic of Niger (n 108) para 277; Initial Report of the Gabonese Republic (n 109) 93.

[112] Djibouti Combined Initial and Periodic Report under the African Charter on Human and Peoples' Rights para 211.

resocialisation to everyone.[113] As noted in Chapter 5, while the African Commission provides general statements of concern about deep-seated prejudices, practices and assumptions as noted above, it does so without the necessary acknowledgement that resocialisation targeted at everyone is an obligation on states.[114] States and the African Commission must not lose sight of the fact that the existing systems of disadvantage within which women are required to operate in were constructed by men for the benefit of men. Viewing resocialisation within the context of anti-dominance feminist legal theory, as discussed in Chapter 2, reinforces the importance of understanding the influence that systemic inequality has on socio-cultural norms and behaviours.[115] The African Commission's disconnect observed above presents a missed opportunity for the African Commission to directly implicate the resocialisation of everyone as a means to the realisation of women's rights in terms of Article 18 of the African Charter.

In this regard, Niger demonstrates good practice when highlighting the need for a change in the mentalities of women and men and the provision of sensitisation programmes for the entire population.[116] This, however, is adapted in its report of 2019, where it refers to the implementation of resocialisation measures that seek to only empower women and girls to minimise their vulnerability.[117] The disconnect apparent in Niger's state reports in compliance with their African Charter obligations signals an opportunity for capacity raising on the targets of resocialisation to ensure consistency in this regard. It is unfortunate that Niger does not stay the course with its target audience of resocialisation as provided for in its earlier report. Gabon's report of 2012 also serves as an example of a good practice. It highlights the need for resocialisation, and while it omits a specific target audience, this audience is implied

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[113] See Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights (1986–2012), adopted at its 15th extra-ordinary session 93; Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon, adopted at its 15th extra-ordinary session para 27 in Chapter 5 under 5 4.

[114] See Chapter 8 under 8 3 1.

[115] See Chapter 2 under 2 3 3.

[116] See Chapter 5 under 5 2 2 4 and Republic of Niger Combined Periodic Report of the Republic of Niger 2003–2014 on the Implementation of the African Charter on Human and Peoples' Rights para 360.

[117] Fifteenth Periodic Report of the Republic of Niger (n 108) para 541.

by its acknowledgement that a change in the mentalities of men and women is needed to effect the necessary change.[118]

The African Commission, in its Concluding Observations of 2014 to Niger, provides an example of good practice in relation to resocialisation in terms of article 18. In this regard, it recommends sensitisation of all stakeholders, including religious and traditional authorities, for the purposes of effecting a change in mentality towards gender equality.[119]

Article 25 does not provide for targets of resocialisation. While a specified target audience is omitted, the object and purpose of this provision imply a broad view of who measures are aimed at. Notwithstanding, states who report on this obligation emphasise human rights education within schools, universities and law enforcement and the judiciary, limiting the reach of article 25.[120]

The African Commission's interpretation of the target audience has notably progressed over the years. Twenty years ago, the African Commission's resolution on human rights education limited the target to select pockets of society; this despite the broad scope of article 25.[121] Progressively, however, an analysis of the African Commission's Concluding Observations indicates a broadened view of the targets of resocialisation.[122] Good practices drawn from Concluding Observations include those in response to Gabon's report of 2012, where the African Commission specifies the need for human rights education at all levels of school, for law enforcement *and* the entire population.[123] A focus on specified segments of society, specifically those tasked with protecting the rights and freedoms of women, such as law enforcement and the judiciary, signals to states the critical need to focus resocialisation on those groupings. It does not, however, stop there. The African Commission's inclusion of resocialisation for the generality serves to ensure that states view this obligation as ongoing and broad in scope. The African Commission's Concluding Observations of

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[118] Initial Report of the Gabonese Republic (n 109) 93.

[119] See Chapter 5 under 5 3 4.

[120] See Chapter 5 under 5 4 4.

[121] See Chapter 5 under 5 4 3.

[122] See Chapter 5 under 5 4 4.

[123] Emphasis added. See African Commission Concluding Observations of the Gabonese Republic (n 113) 10.

2017 to Burkina Faso similarly serves as good practice.[124] The African Commission's capacity to direct states towards a broader vision of resocialisation in terms of article 25 has notably progressed.

At times, states describe the overarching patriarchal domination in a manner where the target audience is, arguably, implied. For instance, South Africa's report of 2015 presents the good practice of correctly identifying the influence of socio-cultural norms on the persistence of gendered discrimination and violence.[125] In other words, the report presents a well-articulated understanding of the underlying determinants of gendered discrimination. While it presents the challenge without any accompanying solution, the state's understanding of the challenge identified implies that if it were to implement resocialisation, at a minimum, the understanding exists that measures should target everyone. Its emphasis on the belief systems, cultural norms, and socialisation processes inherent to the current structures of inequality signals a consciousness of the fact that such belief systems, norms, and socialisation processes influence every individual in society and that modification requires targeting everyone. Later, within the context of Article 12 of the Maputo Protocol, the state highlights the provision of "Life Orientation", a school subject that all children are required to study, which includes content relating to pregnancy, its prevention and sexual violence.[126] While limited in the harms the course addresses as well as the target audience, it

[124] Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011–2013), adopted at its 21st extra-ordinary session para 16-18. See also Chapter 5 under 5 4 4. See also Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995–2013), adopted at its 57th ordinary session para 133; Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' rights, adopted at its 17th extra-ordinary session, 10; Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011–2014), African Commission on Human and Peoples' Rights, adopted at its 57th ordinary session para 129; Concluding Observations and Recommendations on the Combined 3rd, 4th and 5th Periodic Report of the Republic of Togo, adopted at its 51st ordinary session 11.

[125] Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in African of the Republic of South Africa, adopted at its 20th extra-ordinary session 172.

[126] African Commission Concluding Observations Republic of South Africa (n 125) para 308, 213.

provides an example of a good practice of targeting all children of school-going age if implemented in conjunction with other measures targeting other pockets of society.[127] Similarly, The Gambia's report of 2018, in reference to patriarchal constraints to women's participation in leadership roles, observes the influence of culture on the creation and perpetuation of stereotypes and that of socialisation in creating perceptions of male superiority over women.[128] Again, without specifying the target audience or any accompanying resocialisation strategies to counter the dominant socio-cultural norms, an understanding of these influences signals an understanding that resocialisation targeted at everyone is necessary.

Togo's report of 2017 is an example of an incomplete view of the targets of resocialisation. Within the context of access to justice, though without noting the provision in question, the state reports on the establishment of a legal unit aimed at training women on access to justice and their accompanying rights in this regard.[129] While an important initiative, it omits reference to educating men and boys on the rights and freedoms of women. The state, in limiting its target to women only, despite the provisions of article 8(c) of the Maputo Protocol providing for an expanded view of resocialisation, is limiting the success of its efforts. The state does not go far enough in its efforts and should direct resocialisation at preventing the harms that lead women to require access to justice by including everyone within its target; this is in tandem with the training referred to above, as well as several other measures pursuant to the resocialisation provisions contained in the Maputo Protocol. In terms of the target audience, Zimbabwe's report of 2019 demonstrates a promising practice of including traditional leaders in campaigns relating to the transformation of masculinity and rigid socio-cultural norms, though, on its own, the scope is too narrow. Notwithstanding, the importance of including role players historically known to undermine the rights of women must be underscored, as discussed in Chapter 5.[130]

The African Commission's Concluding Observations of 2022 to Malawi misses an opportunity to identify the target audience for programmes aimed at preventing early

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[127] In this regard, while a good practice, the fact that school is not compulsory beyond the age of 15 necessarily reduces the target audience even further.

[128] Combined Report of the Republic of Gambia (n 81) 62.

[129] State of Togo 6th, 7th and 8th Periodic Reports of the State of Togo on the Implementation of the African Charter on Human and Peoples' Rights (August 2017) para 509.

[130] See Chapter 5 under 5 2 4.

marriages and reproductive health rights.[131] Highlighting the necessity of including boys and men in its target audience ensures that measures are not aimed exclusively at girls and women, a trend seen amongst many states thus far. Given that structural inequality pervades every aspect of societal functioning, the likelihood that states will also adhere to existing norms and standards when determining resocialisation measures and its target audience remains high. It is for this reason that the African Commission's role in highlighting the universality of resocialisation is so crucial. Its frequent omission in this regard presents opportunities for the African Commission to place greater emphasis on resocialisation and, in this case, its targets.

8 4 Resocialisation measures

8 4 1 Introduction

The following section pertains to the resocialisation methods employed to meet the goals of resocialisation. The feminist legal theories posited in this research allow for a deeper understanding of and engagement with the intersecting vectors of discrimination women face, ensuring that resocialisation measures view womanhood beyond the narrow conception posited by liberal feminists.[132] Thus, altering the socio-cultural norms underpinning discrimination against women requires a broad and inclusive understanding of womanhood and the associated and intersecting ways in which discrimination occurs. Only then is it arguably possible to adequately consider what shape resocialisation measures must take.

The methods employed in pursuit of resocialisation are varied. What might be suitable in one context might not suit another. While article 5 of CEDAW does not contain explicit reference to the measures states must implement in pursuit of their obligations, much can be gleaned in this regard from the jurisprudence of the CEDAW Committee. However, article 2(2) of the Maputo Protocol is explicit in the measures that states must implement, stipulating the use of public education, information, education, and communication strategies as requisite measures. Given the broad

[131] Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (2015–2019) and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005–2013), adopted at its 70th ordinary session para 88.

[132] See Chapter 2 under 2 3.

scope of the above strategies, this provision allows states to determine the specificities of the measures implemented, mindful of the ultimate objective, and based on an adequate understanding of the realities of women, the identified harms, and its target audience.

The CEDAW Committee provides guidance on the types of measures that states should implement in realising their resocialisation goals. These include the review of school curricula to eliminate gendered stereotyping,[133] capacity building and training for media and public officials on the use of gender-sensitive language,[134] preventative educational programmes to modify attitudes concerning the roles and responsibilities of women,[135] and targeted training for judges, lawyers, law enforcement and medical personnel with a view to understanding gender-based violence, responding in a gender-sensitive manner and avoiding the revictimisation of women,[136] to name a few. The CEDAW Committee also emphasises the value of state collaboration with relevant stakeholders, such as women's rights organisations, often better placed to develop and implement the required resocialisation measures. Thus, education aimed at altering gendered power dynamics and challenging gender roles serves as the foremost strategy of resocialisation, along with awareness-raising and collaboration with key role players.

8 4 2 Education

While article 5(a) of the CEDAW does not make explicit reference to education as a resocialisation tool, article 5(b) of CEDAW refers to education in the context of the family. As discussed in Chapter 4, this provision underscores the value of education for the purposes of ensuring an equality-centred understanding of the family, where the roles and responsibilities apportioned to women and men are no longer based on harmful assumptions and stereotypes.[137] Furthermore, the CEDAW Committee

[133] UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Combined Eighth to Tenth Periodic Reports of Egypt" (2021) UN Doc CEDAW/C/EGY/CO/8-10 para 22(b).

[134] UN Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Sixth Periodic Report of the Republic of Moldova" (2020) UN Doc CEDAW/C/MDA/CO/6 para 21(d).

[135] General Recommendation 19 (n 97) para 24(t).

[136] *Vertido* (n 24) para 8.9(b)(iv).

[137] See Chapter 4 under 4 4 2.

reiterates the value of education for the purposes of ensuring the elimination of stereotypes and harmful assumptions in matters relating to sexual offences.[138] Its General Recommendations 19 and 35 similarly highlight the importance of education in altering harmful attitudes towards women.[139]

As noted in Chapter 6, education plays a prominent role in the African human rights system, particularly within the Maputo Protocol. Chapter 5 highlights Article 25 of the African Charter as the point of departure insofar as human rights education is concerned and reinforces the importance of education as a means to advancing human rights on the continent.[140] *APDF*, as discussed in Chapter 7, demonstrates the weight given to education for resocialisation purposes by the African Court.[141]

Given that the objective of article 25 is to ensure that individuals are sufficiently educated on *all* rights and freedoms, the measures implemented must correspond with the objective of this obligation.[142] State practice, however, suggests the implementation of non-specific measures by states. Resocialisation measures are more than the mere implementation of workshops, for example. They are methodical, well thought out and based on international law standards, not on individual notions of the value and role of women. Caution ought to be exercised by those developing such measures so that their own biases and assumptions do not filter into the content being developed, making such measures pointless. Further, as noted below in relation to the evaluation of resocialisation measures, given that compliance with article 25 requires education on all human rights amongst the population, states would do well to disaggregate data according to each of the human rights it provides education on and to evaluate the success of its endeavours according to targeted sectors of society, for instance, the judiciary, police force or schools, to name a few.[143] This would further bolster state efforts at ensuring that article 25 is adequately fulfilled, particularly insofar as women's rights are concerned. The regularity of measures as well as the content of educational initiatives, lend further impetus to the adequate fulfilment of this obligation.

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[138] See Chapter 4 under 4 5 3.

[139] See Chapter 4 under 4 4 1.

[140] See Chapter 5 under 5 4.

[141] See Chapter 7 under 7 5 1.

[142] Emphasis added.

[143] See under 8 5 5 below.

Throughout the Maputo Protocol, education remains the primary resocialisation tool. For instance, article 2(2) refers to public education and education generally as resocialisation measures, an expansion on CEDAW's article 5 resocialisation provision, as discussed in Chapter 6.[144] Article 4(2)(d) of the Maputo Protocol mandates peace education through curricula and social communication. As also discussed in Chapter 6[145], this entails the development of programmes in various educational settings such as schools, universities, training centres and the like, as well as a formality to its content creation to avoid haphazard attempts that yield little benefit.[146] Education features again in article 8(c) with the provision of education in the context of access to justice as well as in article 12 with the obligation on states to provide education and training generally to women. Measures pursuant to article 12(b) of the Maputo Protocol include developing curricula that include women and girls as main protagonists in text and storybooks, normalising the presence and contribution of girls and women in society.[147]

As noted in Chapter 6, the term education is broad in scope and can take the form of formal and informal education, education by example, capacity building training for select parts of society such as the judiciary and law enforcement, education through the prioritisation of gender equality at every level of government, including the equal participation and representation of women. Furthermore, it includes education by way of eliminating gendered stereotypes in textbooks as per article 12(b) of the Maputo Protocol. It is not, however, limited to formal academic programmes and can be extended to informal educational settings such as vocational education settings. The broad scope of education, therefore, allows states to implement resocialisation in all arenas of society, formulated in consideration of age and literacy.

8 4 3 Awareness-raising

Synonymous with sensitisation, awareness-raising is often employed as a catch-all phrase by states to describe efforts made in terms of the modification obligations with

[144] See Chapter 6 under 6 3 3.

[145] See Chapter 6 under 6 5.

[146] See under 8 5 for more.

[147] As discussed in Chapter 7, the African Commission has yet to issue comments in relation to resocialisation in terms of article 12. It remains to be seen what good practices emanate from the work of the African Commission in this regard.

little to no specificity as to what such measures consist of. The CEDAW Committee has highlighted specific issues requiring awareness-raising, such as gender-based violence,[148] the elimination of harmful stereotypes,[149] non-discrimination generally,[150] freedom from harmful practices and the causes and consequences thereof,[151] as well as the importance of the awareness-raising of front-line personnel encountering incidences of harmful practices,[152] to name a few.

Chapter 5 notes that several state reports refer to awareness-raising, though any real engagement with the specificities of such initiatives is lacking.[153] In relation to the targets of resocialisation,[154] Lesotho's report of 2018 attempts to remedy the gap between constitutional guarantees to non-discrimination and customary law by embarking on awareness-raising campaigns. However, besides the state noting that the objective of the campaign was to promote the recognition of the inherent dignity of women, the equality of persons and a change in the mentality of the people about the value and role of women in society, no further details were made available as to what such campaigns comprise of, their regularity and target audience.[155] Similarly, Angola's report of 2017 notes the implementation of awareness-raising on violence against women,[156] while Djibouti's report of 2015 commits to awareness-raising to address the influence of socio-cultural norms on the low reporting rates of FGM.[157] Several states also report on their obligations in terms of Article 25 of the African Charter as awareness-raising endeavours.[158]

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[148] General Recommendation 35 (n 97) para 30(b)(ii).

[149] See Chapter 4 under 4 5 1 2.

[150] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28 para 17.

[151] Joint General Recommendation 31 (n 53) paras 48 and 56.

[152] Joint General Recommendation 31 (n 53) para 70. See also paras 74–81 where the Committees refer to the importance of awareness-raising.

[153] See Chapter 5 under 5 4 4.

[154] See 8 3 above.

[155] See Chapter 5 under 5 2 4.

[156] See Chapter 5 under 5 3 4.

[157] See Chapter 5 under 5 2 2 4.

[158] Kingdom of Eswatini Formerly Known as the Kingdom of Swaziland Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa para 303; Fifth and

Within the context of article 4(2), Togo notes efforts undertaken by way of awareness-raising campaigns to alter socio-cultural determinants underlying discrimination and the "emergence of their talents and their empowerment".[159] Like the examples provided by the CEDAW Committee, awareness-raising is highlighted in the context of violence against women,[160] FGM, human trafficking, and other harmful practices both under article 18 of the African Charter and article 5 of the Maputo Protocol,[161] on the importance of the right to education[162] and on mindset changes.[163] While the state reports demonstrate an understanding of the need to engage in awareness-raising initiatives aimed at resocialisation, it remains unclear what the initiatives involve and whether they meet the standards required by law. As noted above, in some instances, states utilise the phrase without clarity, making it challenging to discern the objectives

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Sixth Periodic Country Report of Ethiopia (n 61)126; Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and The Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (April 2020) para 205; Combined Second to Eighth Periodic Report of Lesotho (n 74) para 277; Combined Periodic Report of Niger (n 116) para 423; Fifteenth Periodic Report of Niger (n 108) para 343; 11th, 12th and 13th Periodic Reports of the Republic of Rwanda (n 74) 61; Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 139.

[159] 6th, 7th and 8th Periodic Report of Togo (n 129) 153.

[160] See Sixth and Seventh Report of Angola (n 74) para 106; Fifth and Sixth Periodic Report of Ethiopia (n 61) 102; Combined Report of Gambia (n 81) 138; 11th, 12th and 13th Periodic Report of Rwanda (n 74) 76–77.

[161] Sixth and Seventh Report of Angola (n 74) para 38 and 44; Burkina Faso Periodic Report of Burkina Faso Within the Framework of the Implementation of Article 63 of the African Charter on Human and Peoples' Rights (January 2015) 80; Combined Report of Gambia (n 81) 137; Combined Second to Eighth Periodic Report of Lesotho (n 74) para 346; Combined Second Periodic Report of South Africa (n 158) 116 and 179; Periodic Report of Niger (n 60) para 61. Here the state, in response to a recommendation by the African Commission that it ensure the effective implementation of laws against FGM, and the implementation of measures to combat early marriage, highlights the retraining of female excision practitioners and awareness-raising activities conducted in over 3000 villages. What retraining implies, or what the awareness-raising activities involved is unclear.

[162] Periodic Report Burkina Faso (n 161) 83; Cameroon Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon Relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention para 764.

[163] Republic of Mauritius Ninth to Tenth Combined Periotic Report of the Republic of Mauritius on the Implementation of the African Charter on Human and Peoples' Rights (January 2016–August 2019) para 269. This example demonstrates a lack of information in relation to how awareness-raising aims to change mindsets.

of the awareness-raising programmes noted.[164] The African Commission similarly recommends awareness-raising without any accompanying specificity as to what such campaigns might entail.[165]

8 4 4 Collaboration

Chapter 2 emphasises the importance of acknowledging the role that several feminist legal theories play in adequately interpreting and applying resocialisation provisions, as well as the development of resocialisation measures.[166] Consciousness-raising highlights the importance of creating and implementing measures based on the realities of the women for whom measures are intended. Collaboration with affected women, therefore, forms an integral part of the development of resocialisation measures, as discussed in Chapter 6.[167] Like that of the position taken by the CEDAW Committee[168], the African Commission emphasises stakeholder collaboration, with specific attention placed on collaboration with traditional and religious leaders to eliminate the root causes of gender discrimination through resocialisation measures.[169] This, in and of itself, is a crucial resocialisation strategy, as it is often in the name of culture and religion that women's rights are curtailed.[170] The African

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[164] 4th, 5th and 6th Periodic Report of Cameroon (n 162) para 762. Here the state notes that "[t]he fight against cultural barriers was carried out within the framework of awareness raising among communities and community leaders as well as setting up community watchdog bodies". See also Report of Malawi (n 78) para 225 where the state notes the implementation of public awareness on the promotion of gender equality within the context of its article 17 obligations. What this entails, particularly within the context of the rights of women to a positive cultural context, is unclear.

[165] See for instance Initial Report of The Gabonese Republic (n 109) 9; Combined Second to Eighth Periodic Report of Lesotho (n 74) para 71.

[166] See Chapter 2 under 2 3.

[167] See Chapter 2 under 2 3 4 for more on consciousness raising and see Chapter 6 under 6 3 3. In this regard see Second and Third Report of Botswana (n 102) 28, where it notes collaborative efforts, including the writing of stories by survivors of gender-based violence. While no further information is provided, this example does highlight a good practice of bringing the voices of women to the fore. On its own, however, it is insufficient if not accompanied by measures to prevent future violations of rights.

[168] See above under 8 4 1.

[169] African Commission on Human and Peoples' Right, "General Comment Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (General Comment 1), adopted at the 52nd ordinary session of the African Commission, 9–22 October 2012 para 46.

[170] See Chapter 3 under 3 5 and 3 6.

Commission, in its General Comment 1, as discussed in Chapter 6, mandates that the state collaborate with traditional and religious leaders, civil society and other organisations in an effort to eliminate barriers to the exercise of sexual and reproductive health rights.[171]

A promising practice enumerated by Kenya in its report of 2020 is that of collaboration with and development of programmes for key stakeholders such as law enforcement and 'community elders as champions of girls rights'.[172] Such collaboration is necessary for the effective implementation and development of resocialisation measures, as discussed in Chapter 2.[173] The African Commission confirms the importance of such collaboration with its Concluding Observations of 2015 to Burkina Faso, where it emphasises the necessity of collaboration with traditional leaders in the form of awareness-raising campaigns.[174] Collaboration with traditional leaders appears as a resocialisation measure again, this time within the context of article 8(c). The Democratic Republic of Congo's report of 2015 highlights collaboration with traditional chiefs on harmful practices, and with police services on the rights of women to access to justice.[175]

8 4 5 Other types of measures

The CEDAW Committee notes the value of temporary special measures in the realisation of gender equality, a provision contained in article 4(1) of CEDAW. As discussed in Chapter 4 and above, the implementation of temporary special measures forms an important component of resocialisation as an obligation.[176] To give effect to the obligation to eliminate all forms of discrimination against women, the CEDAW Committee underscores the utility of addressing the underlying determinants of gender

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[171] See Chapter 6 under 7 3 2.

[172] Combined Report of the 12th and 13th Periodic Report of Kenya (n 158) para 249.

[173] Combined Report of the 12th and 13th Periodic Report of Kenya (n 158). In this regard, at para 251, the state notes that "[t]he involvement of elders in the fights against FGM has brought on board more men in the fight against FGM who have become champions for the protection of the rights of girls and their education". See also Periodic Report of Burkina Faso (n 161) 80. See Chapter 2 under 2 2 and 2 3 4 on Consciousness raising as a means to hearing the voices of women impacted by discrimination.

[174] Periodic Report of Burkina Faso (n 161) para 45.

[175] See Chapter 7 under 7 2 4.

[176] See Chapter 4 under 4 4 and 8 2 2.

inequality.[177] In this regard, it highlights the objectives of temporary special measures being "to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women".[178] The adoption of temporary special measures, including resocialisation measures, therefore, assists in accelerating the realisation of substantive equality. As the CEDAW Committee notes, "these measures shall be discontinued when the objectives of opportunity and treatment have been achieved".[179] Thus, some measures are, by their very nature, temporary with an end in duration. Notwithstanding the nature of temporary special measures, states must exercise caution not to consider resocialisation as an isolated effort or, worse, to consider their obligations met with the end of temporary special measures. As discussed in Chapter 2, resocialisation will take considerable time and effort to yield results. It is an ongoing process that requires regular adaptation to address the exigencies at hand.[180] The existence of resocialisation provisions in CEDAW, the African Charter and the Maputo Protocol signal the importance of viewing resocialisation as an ongoing effort.

Other resocialisation measures include what the UNDP describes as incentives. In addition to education, awareness-raising and collaboration is another dimension of resocialisation in the form of incentives. While incentives are mostly provided for in legislation, the role that resocialisation plays in informing the content of the incentivising legislation is noteworthy. As the UNDP suggests, the provision of paternity leave could serve as a measure implemented by the state. A study undertaken by the UNDP demonstrated that the provision of non-transferrable parental leave for fathers had the effect of reducing the gendered norm of mothers as primarily responsible for child rearing and a reduction in the burden of housework on women.[181] Another example of incentives includes the provision of adequate

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[177] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 25: Article 4, paragraph 1 on the Convention (Temporary Special Measures)" (2004) UN Doc HRI/GEN/1/Rev.1 para 7.

[178] General Recommendation 25 (n 177) para 15.

[179] General Recommendation 25 (n 177) para 14.

[180] See Chapter 2 under 2 2 1.

[181] United Nations Development Programme, "Tackling Social Norms: A Game Changer for Gender Inequalities" (UN 2020) 6 <https://www.un-ilibrary.org/content/books/9789210051705> accessed 5 July 2021, 14. This information is presented with the understanding that very few countries have adequate parental leave policies to date. This does not, therefore, serve as a realistic measure in most countries.

childcare, allowing for greater participation of women in the workforce. This has the potential knock-on effect of shifting the norms away from assumptions of women as full-time parents and allowing women the benefit of choosing work based on their own desires and not the often prohibitively high costs of childcare. Within the context of the African regional system, an example of an incentive gleaned from state reports includes the provision of alternative income-generating opportunities for those reliant on FGM as a source of income.[182] Regardless of the types of legislatively mandated incentives, without accompanying awareness-raising or educational measures providing clarity and understanding of the value of the incentivising legislation, the potential of such measures will remain limited.

Finally, article 5 of the Maputo Protocol dictates the prohibition and condemnation of harmful practices, as discussed in Chapter 6.[183] Condemnation as a resocialisation measure emphasises the position of states in relation to the role and value of women in society. Generally, the form that measures take is often not provided for by states in their reports or by the African Commission. For instance, the Democratic Republic of Congo's report of 2015, as discussed in Chapter 7, notes that strategies had been implemented to target stereotypes and sexist prejudices.[184] It does not, however, stipulate what those strategies are. The state would do well to clearly elucidate the measures taken as without specificity, the African Commission, in undertaking its oversight and monitoring role, is unable to adequately gauge the effectiveness of state efforts.[185] Similarly, it would be useful to other states to gain an appreciation of the differing measures implemented and to consider its utility in their own contexts.[186]

8 5 Evaluation

Evaluating the success of initiatives serves as a vital component of resocialisation. As noted above, given that resocialisation is an ongoing process, the measures

[182] See for example, Combined Periodic Report of Kenya (n 158) para 251.

[183] See Chapter 6 under 6 4.

[184] Report of the Democratic Republic of Congo (n 76) para 164. See also Chapter 7 under 7 2 3.

[185] See 8 5 in relation to the evaluation process of resocialisation measures.

[186] As discussed in Chapter 7, the African Commission has yet to issue comments in relation to resocialisation in terms of article 4(2). It remains to be seen what good practices emanate from the work of the African Commission in this regard.

implemented require ongoing reflection and revisiting.[187] The provision of indicators with which to evaluate the prevalence of harmful socio-cultural patterns of conduct underlying discrimination against women among the population over a specified period, together with results-based evaluation, provide necessary oversight over the success of resocialisation measures.[188] It is worth emphasising the urgent implementation of measures, as highlighted in Chapter 6, may not be delayed for any reason, including "political, social, cultural, religious, economic, resources or other considerations or constraints within the state".[189] The evaluation and urgent implementation of resocialisation measures highlighted by the CEDAW Committee serve as guidance on the implementation of resocialisation provisions within the African regional system and are equally applicable within the African context.

8 6 Concluding remarks

This chapter has shed light on both the positive aspects and challenges associated with resocialisation while emphasising the crucial role of the CEDAW Committee, the African Commission and the African and ECOWAS Courts in guiding the interpretation and application of this important issue. The research has demonstrated the immense potential for increased awareness, understanding and application of resocialisation across the continent and has underscored the positive impact such progress would

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[187] General Recommendation 28 (n 150) para 24 emphasises a "movement forward: from the evaluation of the situation to the formulation and initial adoption of a comprehensive range of measures, to building on those measures continuously in light of their effectiveness and new or emerging issues".

[188] In this regard, General Recommendation 28 (n 150) para 24, highlights the importance of states developing the necessary policies that are well formulated and implemented in pursuit of their general obligation to eliminate all forms of discrimination against women. This policy, as noted in para 28, must "establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals". Given that these instructions are made in the context of article 2's non-discrimination provision, it applies to all succeeding provisions, including article 5's resocialisation provision, and the manner in which states are required to approach their resocialisation measures. See also para 38 where the CEDAW Committee notes that the implementation of appropriate measures requires "[d]eveloping and establishing valid indicators of the status of and progress in the realization of human rights of women, and in establishing and maintaining databases disaggregated by sex and relation to the specific provisions of the Convention".

[189] General Recommendation 28 (n 150) para 29. See also Joint General Recommendation 31 (n 53) para 31.

have on the lived realities of women. While it is important to acknowledge the limitations and challenges that exist, this research has sought to also demonstrate the significant opportunities that exist for the development of resocialisation as an obligation, right and remedy by highlighting good practices and recommending others.

Chapter 9 summarises the findings of this research and presents recommendations and areas for further research.

9 Conclusions

9 1 Introduction

As presented in Chapter 1, the question regarding the role of resocialisation as an obligation, right and remedy under international law in the realisation of substantive equality and the human rights of African women is central to this research.[1] Where resocialisation remains overlooked, the obligation of African states to respect, protect and fulfil gender equality is hindered. Thus, how resocialisation is defined, interpreted, and applied in the context of international and African regional law by international and regional adjudicatory and quasi-judicial bodies is, therefore, of importance.

Socio-cultural patterns of thought and behaviour expressed through biases, assumptions, stereotypes, harmful practices, and other such manifestations continue to undermine efforts at the realisation of the rights of women across the globe. Because, as discussed in Chapters 2 and 3, society's ordering has largely been determined by men for the benefit of men, assumptions and biases about the role and value of women in society are internalised, to some or other extent, by everyone. Thus, the conceptualisation and implementation of the law will always be filtered through those ingrained assumptions and biases, limiting its effectiveness.

The international and African regional legislative frameworks confirm the importance of resocialisation through the "modification" provisions outlined in Chapters 4, 5, 6 and 7. As has been demonstrated throughout, resocialisation forms the basis upon which the realisation of other rights becomes a reality. Notwithstanding its importance and presence in law, resocialisation, as is evident in the discussions in Chapters 4, 5, 6 and 7, remains relatively unexplored as compared to other substantive provisions. At the international level, the CEDAW Committee has provided guidance through its General Recommendations and Concluding Observations to state reports on resocialisation, specifying that measures be targeted at everyone.[2] As noted in Chapter 4, the CEDAW Committee regularly emphasises the necessity of resocialisation as a precursor to gender equality. Despite this, states and scholars overlook its utility, presenting opportunities for greater engagement with resocialisation. The relative lack of engagement with resocialisation is striking at an

[1] See Chapter 1 under 1 3.

[2] See Chapter 4 under 4 4, as an example.

African regional level, despite the strong legal basis, as concluded in this research, upon which the African system operates. As confirmed throughout this analysis, resocialisation is largely overlooked by states and human rights mechanisms alike, and where recognition is given, these are scant and lacking in real depth, as discussed in Chapters 5 and 7. Given that all but two African states are party to CEDAW, overlooking resocialisation despite the CEDAW Committee emphasising its import is also problematic, signalling the limited extent to which this topic has garnered interest.

9 2 Findings

9 2 1 Theoretical framework

Chapter 2 presented the concept of resocialisation in terms of its objectives and legislative embeddedness within the context of societal norms and practices governing human behaviour. It provided a working definition utilised throughout this research.[3] Resocialisation recognises the significance of viewing the process of re-learning within the framework of international human rights law, its principles, and values. Thus, resocialisation within the context of human rights law serves as a tool to achieve substantive and transformative equality. It questions the status quo, subjects people to human deliberation, and makes possible the disregarding of societally constructed norms harmful to women.

Achieving women's rights requires a theoretical framework within which to consider resocialisation, its target audience, and the violations of rights it seeks to correct.[4] No single feminist legal theory provides a perfect lens through which to consider resocialisation, and it is for this reason that several theories were highlighted as important to this research. Of primary concern is overcoming the subordination and oppression of women, inclusively defined.[5] Thus, the early form of feminism, liberal feminism, which focussed on formal equality only, did little to effect meaningful change in the lives of women.[6] In other words, substantive change remains a crucial component of achieving gender equality. As discussed in Chapter 2, the radical feminist agenda, which places emphasis on overthrowing the domination of women,

[3] See Chapter 2 under 2 2.

[4] See Chapter 2 under 2 3.

[5] See Chapter 2 under 2 3 5 and 2 3 6 for more on womanhood as an inclusive concept.

[6] See Chapter 2 under 2 3 2 for more on liberal feminism.

in contrast, presents a holistic lens and provides scope for substantive gender equality to meaningfully expand towards impacting the lived realities of women.[7]

The violation of women's rights can be characterised as universal in nature.[8] Violence against women, the gender pay gap, harmful cultural practices, sexual harassment and the like all feature across the globe. What progress and development in this regard look like, therefore, is, broadly speaking, similar across the board. The specificities on how to address gender inequality, however, are unique and discernible only by allowing the voices of women to emerge. Consciousness-raising, therefore, features as an important lens within which to view resocialisation's role in overthrowing gendered domination.[9] The extraction of information regarding the distinct realities of women *vis-á-vis* the violations suffered then informs the feminist theory that resocialisation operates within. This is especially underscored when an analysis of resocialisation measures and the targets of resocialisation become a matter of consideration, for it is only when women's voices are heard that the appropriate measures and targets are accurately identified.[10] An anti-essentialist and intersectional framework, therefore, emerges when all voices are heard and serve to reinforce the positioning of resocialisation within more than one feminist theory.[11] Thus, resocialisation serves to overcome the prevalent patriarchal domination that women experience.

The reception of feminism, as a concept, in Africa was importantly considered in this research because of the embeddedness of resocialisation within the African legislative framework and the potential it holds for the acceleration of gender equality.[12] The controversies surrounding the appropriateness of feminism in the African context and the resistance to its acceptance because of its imperialistic origins are, as the research established, not unfounded. However, this research maintains that when engaging with feminist agenda, defined as advocating for gender equality, the anti-essentialist and intersectional lenses guard against narrowly misconstruing womanhood and the associated concerns. These lenses can similarly guard against

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[7] See Chapter 2 under 2 3 3 for more on radical feminism.

[8] See Chapter 3 under 3 4.

[9] See Chapter 2 under 2 3 4 for more on consciousness-raising.

[10] See Chapter 8 for the analysis on targets of resocialisation and its measures.

[11] See Chapter 2 under 2 3 5 and 2 3 6.

[12] See Chapter 2 under 2 3 7.

distracting focus away from the primary concern of overthrowing domination to issues such as terminology change or the adaptation of feminism to suit (uniquely) African problems.[13] As argued in Chapter 2, anti-essentialism, intersectionality, and consciousness-raising can adequately account for the oppression of African women when appropriately utilised.[14] Thus, feminisms and feminist legal theories and methodologies are appropriate tools for exploring the power of resocialisation in Africa.

9 2 2 Cultural rights, universality, and the rights of women

As discussed in Chapter 3, while international human rights law seeks to accelerate all forms of equality across the world, the parameters in which it operates are, in itself, gendered.[15] The elevation of human rights norms to the status of peremptory norms or *jus cogens* is a case in point.[16] As a symbolic representation of norms of greater significance in international law, the absence of the prohibition against all forms of discrimination against women implicitly signals an acceptance of the *status quo*. Thus, resocialisation holds significance in its potential to alter harmful socio-cultural dictates determining which norms are elevated to *jus cogens*.

Reservations to treaties are similarly implicated in the gendered nature of international law.[17] While reservations permit greater state participation, they often come at the expense of the rights of women. The ease with which some states enter reservations implies a rejection of the notion of the universality of the rights of women by reserving states. Often based on beliefs and practices maintained in the name of culture and religion, reservations undermine the rights of women and question the universal nature of women's rights. Because universality is a feature of human rights law, the ability of states to enter into reservations effectively diminishing the rights of women presents a dichotomy in the recognition of women's rights. Simply put, it either is or is not true that women's rights are universal. Notwithstanding this seeming contradiction, resocialisation importantly plays a role in garnering a greater acceptance of the universality of women's rights.[18] This, together with the potential

[13] See Chapter 2 under 2 3 7.
[14] See Chapter 2 under 2 4.
[15] See Chapter 3 under 3 1.
[16] See Chapter 3 under 3 2.
[17] See Chapter 3 under 3 3.
[18] See Chapter 3 under 3 4.

resocialisation holds for gendered discrimination to be considered a breach of *jus cogens* norms, resocialisation holds promise for the development of international law away from unequal gendered lines, paving the way for an even greater recognition of women's rights in international law.

Cultural relativism features prominently in the discourse on gender equality. Practices in the name of culture[19] and religion[20] frequently serve to undermine the rights of women, with these presenting significant barriers to the acceleration of gender equality. Culture and religion are terms often employed interchangeably and were, therefore, referred to in this research under the singular umbrella of culture. While CEDAW's modification obligation does not refer to religion explicitly, this research demonstrated an overlap between the two. Importantly, it was argued that both international and regional law intentionally omit reference to practices in the name of religion as identifiable sources of oppression in a bid to ensure maximum treaty participation and reduce reservations. Notwithstanding such omission, article 5 of CEDAW mandates the elimination of all practices based on the notion of women's inferiority to men. These naturally include all practices undertaken in the name of religion. This is exemplified in *APDF*, where practices in the name of religion were employed as justification for discriminatory legislation.[21]

The notion of culture and cultural rights is similarly complex.[22] Cultural rights are notably significant and are often positive features of any given community. The right to culture, however, involves the right to decide to participate in any given culture. Forceful participation in cultural practices is not protected by international and regional law. Culture is often conceived of as practices of a traditional nature, tracing the expanse of many years, and passed on from generation to generation. Harmful cultural practices, therefore, are often conceived of as solely comprising those that emanate from traditional societies. Those that emerge in other "Western" nations are, therefore, overlooked as falling within the ambit of harms in need of resocialisation. In contrast, this research has underscored the importance of acknowledging the often-overlooked practices, such as the gender pay gap, street harassment, toxic masculinity, and other

[19] See Chapter 3 under 3 6.

[20] See Chapter 3 under 3 5.

[21] See Chapter 3 under 3 5 and Chapter 7 under 7 5 1.

[22] See Chapter 3 under 3 6.

cultural practices in equal need of resocialisation, to guard against developing a siloed view of culture.[23]

Importantly, the Maputo Protocol highlights the obligation on states to ensure a positive cultural context for women.[24] Culture, when viewed broadly, implicates all harmful practices, practices that must, by virtue of the legislative mandate, be modified to those that recognise the right to a positive cultural context and the inherent dignity and value of women. Since culture is a naturally fluid concept, its adaptation to suit the exigencies of the community – the acceleration of substantive equality – should be seen as a natural evolution too. Acknowledging the nuances of cultural rights and the need to balance those rights against competing rights becomes possible with resocialisation. It ensures that positive features of culture remain, often emancipatory in nature for women, while harmful elements are eliminated.[25]

As established in this research, appropriate identification of harms becomes central to the goal of resocialisation.[26] Failure to do so renders resocialisation efforts meaningless. Guided by the CEDAW Committee, the most egregious forms of harm are easily discernible. What is not as easily detected are those harms considered comparatively minor in nature or the "lesser infringements". This, as discussed in Chapter 3, includes harms such as catcalling and assumptions of women solely as caregivers and only suited to the home.[27] The effect of incorrect categorisation, therefore, is the positioning of some cultural practices, and by implication its people, as superior or inferior to others, as noted above and overlooking the need for resocialisation to address very real harms. The identification of harmful practices, therefore, does not stop at those most egregious in nature and implicates all harms, including those considered as "lesser infringements". The feminist legal theories posited above also assist in identifying the harms in need of resocialisation, together with the development of measures to be implemented.

9 2 3 CEDAW

[23] See Chapter 3 under 3 7.

[24] See Chapter 3 under 3 6.

[25] See Chapter 3 under 3 6 and Chapter 7 under 7 2 6.

[26] See Chapter 3 under 3 7.

[27] See Chapter 3 under 3 7.

Within the context of international law, as discussed in Chapter 4, resocialisation finds its origins in article 5(a) of CEDAW.[28] It gives effect to the goal of substantive and transformative equality inherent to CEDAW.[29] The triple approach to resocialisation in the form of resocialisation as an obligation, right and remedy provides further depth to article 5(a), with its practical application traceable through the CEDAW Committee's decisions.[30] As this research has demonstrated, resocialisation is not merely a state obligation. The scope of resocialisation is broadened by including, in its conceptual framing, resocialisation as a right and remedy. This, then, begs the question of the extent to which resocialisation is adequately understood for it to be utilised as a right and remedy by women. This research suggests that unlike other substantive provisions contained in CEDAW, the significance of the modification provision is yet to be understood beyond simple theoretical acknowledgements of its import. Its implications, where properly understood, are, as argued in this research, broad in scope and have the potential to alter the socio-cultural norms underpinning gendered discrimination and contribute to the acceleration of gender equality.

9 2 4 African regional human rights system

As discussed in Chapters 5, 6 and 7, both the African Charter and the Maputo Protocol contain resocialisation provisions that state parties must adhere to. An analysis of state reports and the accompanying Concluding Observations issued by the African Commission provide insight into the manner in which resocialisation is interpreted and applied. Article 2 of the African Charter provides a general non-discrimination clause prohibiting discrimination on any of the enumerated grounds, including sex, while article 3 provides for equality before the law.[31] Resocialisation, which remains unrecognised as such, is implicated in giving effect to non-discrimination against women and equality before the law. While these provisions have been viewed as pursuing formal equality only, this research suggested that an expansive reading of the African Charter allows for the more purposeful interpretation of its provisions to

[28] See Chapter 4 under 4 1.

[29] See Chapter 4 under 4 3 on CEDAW and transformative equality.

[30] See Chapter 4 under 4 5.

[31] See Chapter 5 under 5 2.

include substantive and transformative equality too.[32] Thus, the utility of the African Charter is not confined to interpretations giving effect to formal equality only, thereby extending its reach beyond traditional concepts.

Article 18(3) gives effect to this view with its directive that the rights of women be protected.[33] As a benchmark, the CEDAW Committee has demonstrated that formal equality alone is ineffective and that substantive and transformative equality is necessary to give effect to legal obligations. This is bolstered by the provision itself, which obligates states to respect, protect and fulfil the rights of women in accordance with international law. This can only be done by effecting resocialisation, as argued throughout this research. Similarly, the educational mandate in article 25 is a form of resocialisation in that states are required to educate the populace on the rights and freedoms contained in the African Charter, including the rights of women.[34]

The Maputo Protocol is clear in its substantive and transformative equality aims. It encapsulates the need for substantive and transformative equality within the African context, with the African Commission confirming this characterisation of the Maputo Protocol in its General Comment 6.[35] As a precursor to transformative equality, resocialisation plays a prominent role. The Maputo Protocol encapsulates resocialisation in several of its provisions, the primary being article 2(2), which largely echoes article 5(a) of CEDAW, though it is broader in scope.[36] State engagement with this primary resocialisation provision of the Maputo Protocol, viewed through the state reports, remains minimal, demonstrating a lack of appreciation of its implications.

As noted in this research, few states have complied with their reporting obligations in terms of the Maputo Protocol.[37] Thus, the sample size available for this analysis is limited. Within this limited sample, even fewer states have engaged with the resocialisation provisions of the Maputo Protocol, thereby limiting the sample size for analysis that much further. Given that states have yet to effectively engage with their reporting in terms of the Maputo Protocol in general, it is unsurprising that state engagement with the resocialisation provisions – articles 2(2), 4, 5, 8, 12 and 17 – is

[32] See Chapter 5 under 5 2 2.
[33] See Chapter 5 under 5 3.
[34] See Chapter 4 under 5 4.
[35] See Chapter 7 under 7 3 4.
[36] See Chapter 6 under 6 3.
[37] See Chapter 7 under 7 1.

even less prominent. This demonstrates a lack of appreciation of the utility of resocialisation as a tool for modifying the underlying determinants of gender inequality. Notwithstanding this scant engagement by states, the discourse on harmful practices and the impact thereof on the rights of women is not new and has been raised as areas of concern by states and the African Commission alike within the context of the African Charter and beyond.

The African human rights system has a long history of engaging in harmful practices on the continent. The existence of the IAC, for instance, underscores the importance placed on addressing harms ordinarily conceived of as most egregious in nature.[38] These include prevalent practices such as FGM, child marriages, honour killings and widowhood rituals. The inclusion of article 5 into the Maputo Protocol, dedicated entirely to the elimination of harmful practices, further advances the importance of eliminating such practices on the continent. However, while harms of such nature must be eliminated, this research has demonstrated a prioritisation of discrimination of an egregious nature over those deemed less egregious. This is established by states largely reporting on efforts made to eliminate harmful practices, such as FGM and gender-based violence, without the accompanying report on modifying other harmful socio-cultural practices undermining women's rights.[39] With the expansive legislative landscape relating to resocialisation, overlooking resocialisation in instances beyond the most egregious harms becomes that much more pronounced. Little exists to indicate an adequate understanding that harmful practices, beyond those most egregious in nature, play a prominent role in the denial of rights. When an enhanced understanding of resocialisation is lacking, the implementation of measures will always remain targeted to select practices only, allowing others to continue to operate. As this research has demonstrated, the Maputo Protocol amplifies the necessity of modifying all forms of harmful socio-cultural practices by emphasising the need for resocialisation in several of its provisions.[40]

Engagement, or lack thereof, at the level of the judiciary, is similarly instructive. In this regard, the African and the ECOWAS Court provide useful examples of cases where violations have occurred but where the courts miss opportunities for

[38] See Chapter 6 under 6 4.

[39] See Chapter 7.

[40] See Chapter 8 under 8 3 1.

engagement with resocialisation at greater depth.[41] In *APDF*, the court overlooked the resocialisation provisions in the Maputo Protocol, opting to utilise the educational obligation under Article 25 of the African Charter instead, arguably limiting the reach of the substantive provisions of the Maputo Protocol.[42] Similarly, in the four cases discussed, the ECOWAS Court arguably misunderstood the utility of the resocialisation provisions, which demonstrates the need for the court to enhance its own understanding and capacity in this regard.[43]

9 2 5 Resocialisation in practice

As set out in Chapter 1, the significance of this research lies not only in highlighting the underutilised legal nature of the resocialisation provisions as rights, obligations, and remedies but similarly on the accompanying importance of resocialisation in more practical terms.[44] Although the main emphasis of this research was on establishing the theoretical and legal scope of the relevant provisions, as is evident in Chapters 2, 3, 4, 5, 6 and 7, a purely theoretical engagement with resocialisation does little to impact the lived realities of women. As highlighted in Chapter 8, it remains crucial to consider what resocialisation looks like in practice.[45] Thus, the targets of resocialisation, both in the form of the identification of harms and the audience to which measures are targeted, is an important consideration.[46] Of similar import is an analysis of what constitutes effective resocialisation measures.[47]

Chapter 8 noted the Joint General Recommendation of the CEDAW Committee and the CRC Committee and the importance of identifying harms to women and girls.[48] In recognising the intersecting forms of harms women experience, it underscores the importance of maintaining a feminist lens when considering the harms in need of resocialisation. Where harms are incorrectly identified, the sources of gendered discrimination remain intact, diminishing the prospects for accelerated gender

[41] See Chapter 7 under 7 6.
[42] See Chapter 7 under 7 5 1.
[43] See Chapter 7 under 7 6.
[44] See Chapter 1 under 1 2.
[45] See also Chapters 5 and 8.
[46] See Chapter 8 under 8 3.
[47] See Chapter 8 under 8 4.
[48] See Chapter 8 under 8 3 1. See also Chapter 1 under 1 5.

equality. Similarly, clustering identities, as article 18 of the African Charter demonstrates, risk developing and implementing measures that fail to address issues of specific concern to each grouping.[49]

Identifying the correct recipients of resocialisation is, similarly, crucial to the success of resocialisation measures.[50] If the targets omit certain pockets of society, it not only falls foul of the resocialisation provisions in international and regional law, efforts at the realisation of gender equality will remain limited. It is, therefore, important, as established in this research that resocialisation targets everyone. While measures aimed at pockets of society are often necessary, it must be accompanied by other measures targeted at the rest of society. Thus, targeting law enforcement and the judiciary as one strategy, for instance, fulfils the resocialisation obligation if accompanied by other strategies that target the rest of the population. This research has shown that the primary forms of resocialisation measures include, for example, education, awareness-raising and collaboration with traditional leaders and civil society.[51] Notwithstanding these findings, it is important to note that the measures highlighted do not comprise a closed list. Indeed, as discussed at length in Chapters 2 and 8, what measures are implemented and how they are implemented must be informed by the realities of the women concerned.[52]

9 3 Recommendations

State reports provide insight into the interpretation and application of the African Charter and Maputo Protocol. Considering the analysis undertaken in Chapters 5 and 7, it is apparent that states have yet to meaningfully engage with the rights and freedoms in both instruments, much less those relating to a relatively unexplored concept such as resocialisation. The state reports demonstrate that states often overlook resocialisation provisions entirely,[53] do not adequately understand and engage with the provisions in question,[54] and fail to identify its actions in direct

[49] See Chapter 8 under 8 3 1.

[50] See Chapter 8 under 8 3 2.

[51] See Chapter 8 under 8 4.

[52] See Chapter 2 under 2 3.

[53] See Chapter 7 under 7 2 1, as an example.

[54] See Chapter 7 under 7 2 3 to 7 2 6. See also Chapter 5 under 5 2 4, 5 3 4 and 5 4 4.

reference to the provisions in law.[55] Similarly, states often point to problem areas without any accompanying solutions it intends to take.[56] Equally problematic is that not all member states have reported on the obligations contained in the Maputo Protocol, and where states have, those are few in number and in regularity.

The seriousness afforded to state reporting through its irregularity and its inadequate engagement with substantive rights signals deficiencies in state reporting. While it was beyond the scope of this research to delve into the reasons behind inadequate state reporting in general, it has become apparent that the capacity of states to engage with resocialisation in the reporting process requires significant development. As a first step, states must regularly report, as prescribed, on their obligations in terms of the African Charter and the Maputo Protocol, as it is only with regular reporting that the African Commission is able to exercise its oversight responsibility. Similarly, it is only through reporting that gaps in interpretation and application are identifiable. Crucially for the purposes of resocialisation, states must report more adequately on the efforts made in terms of the resocialisation provisions, highlighting the legal provisions underscoring their efforts while noting opportunities for future engagement. Furthermore, states must understand that highlighting problematic areas comes with attempts at providing accompanying solutions. The objective of state reporting is to gain insight into the realisation of rights and not simply an acknowledgement that violations occur.

It is arguable that resocialisation is an overlooked and underemphasised obligation because of its complex and unexplored nature. The fact that the African Commission similarly pays little attention to resocialisation means that states are not prompted to re-direct efforts towards the necessary socio-cultural modifications. In this regard, not only is the state responsible for prioritising its engagement with its resocialisation mandate, but so is the African Commission, which has an important role to play in supporting, guiding, and reminding states of their resocialisation responsibilities.

The African Commission's Concluding Observations form an integral part of member states' engagement with the provisions of the African Charter and Maputo Protocol. The African Commission's role in guiding states on the interpretation and application of its provisions is crucial to the effectiveness of both instruments. Despite

[55] See Chapter 7 under 7 2 1, 7 2 2.

[56] See Chapter 7 under 7 2 2 and 7 2 3, as an example.

this, the African Commission's own capacity has yet to be developed. This is evident not only in the cursory references it makes to the obligations on states, but similarly in the haphazard manner in which it formats its Concluding Observations. In this regard, the African Commission does not respond to state reports with any direct reference to the provisions of the African Charter or Maputo Protocol. Instead, it formats its observations in sections entitled "positive aspects", "factors restricting the enjoyment of rights", "areas of concern" and "recommendations". Within these groupings are subsections relating to civil and political rights, freedom of association, reporting obligations and the elimination of discrimination against women, to name a few. Clustering its recommendations in relation to women in one section without identifying the specific legal provisions giving rise to those recommendations risks undermining the breadth of the provisions discussed in Chapters 5, 6 and 7. This arguably presents a missed opportunity for the African Commission to discharge its oversight and monitoring role. Were the African Commission to provide more elaborate and complete Concluding Observations, with specific reference to the relevant provisions of the law, it could serve to guide states on the interpretation and application of resocialisation, thereby eliminating the underlying determinants of gender inequality and discrimination. This is even more pronounced insofar as they pertain to the obligations in the Maputo Protocol, as the interpretation and application of the resocialisation provisions have much scope for enhancement.[57]

Notwithstanding these challenges, an awareness of the importance of resocialisation and its importance in accelerating gender equality does exist. This can be seen in the African Commission's General Comment 2.[58] This research has demonstrated the African Commission's growing awareness of the need to reference the relevant provisions, specifically Articles 2 and 5 of the Maputo Protocol.[59] The

[57] See Chapter 7 under 7 3 1 regarding the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), "Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage" (2017) (Joint General Comment). This Joint General Comment's omission in making direct reference to resocialisation provisions, as a means to enhancing State engagement and understanding of said provisions, is indeed a missed opportunity.

[58] See Chapter 7 under 7 3 3.

[59] See also General Comment 6 in Chapter 7 under 7 3 4 where the African Commission makes direct reference to Article 2(2) of the Maputo Protocol.

Niamey Guidelines, discussed in Chapter 7, follows suit by referencing the relevant resocialisation provisions in both the African Charter and the Maputo Protocol.[60] Although General Comment 2 represents a step forward, the African Commission's measures remain narrowly targeted at women, girls and young people rather than at everyone.[61]

Given the importance of resocialisation to the realisation of the substantive rights contained in the African Charter and the Maputo Protocol, it is recommended that the African Commission develop a General Comment dedicated entirely to resocialisation, the legislative framework, its interpretation, and application. As noted throughout this research, the benchmark provided by the CEDAW Committee provides a significant starting point from which to consider resocialisation in the African context and necessarily underscores the importance of viewing resocialisation as an obligation, right and remedy. Furthermore, the process of developing a General Comment has implications for the African Commission's own understanding of this crucial precursor to gender equality. Indeed, an enhanced appreciation of resocialisation would, then, permeate the African Commission's analysis of state reports and the development of its accompanying Concluding Observations to states. The dialogue between states and the African Commission inherent to the reporting mechanism is, thereby, enhanced where the African Commission provides more guidance on concepts such as resocialisation through the state reporting process.

The role and responsibility of the African and ECOWAS Courts have also been highlighted in this research. The triple approach to resocialisation as an obligation, right and remedy implicates the African and ECOWAS Courts as upholder of rights. Understanding how resocialisation operates as a right and remedy in the context of claims made by women against states is a prerequisite to adequately upholding the rights and freedoms of women in the court system. The African and ECOWAS Courts, therefore, must consider ways in which to enhance its understanding, interpretation, and application of resocialisation as an obligation, right and remedy where such claims are brought before them. Indeed, this is equally applicable to other adjudicatory fora on the continent. A General Comment by the African Commission could also be beneficial to the courts' understanding of resocialisation in the same manner as it could

[60] See chapter 7 under 7 4 3.

[61] See chapter 7 under 7 3 3.

enhance that of states. Crucially, the role of the courts in preventing future violations is underscored in relation to resocialisation as a remedy, and in this regard, courts ought to understand their role in providing resocialisation as a remedy in a bid to prevent future violations of women's rights. It is, thus, insufficient for courts to simply operate within the confines of resocialisation as an obligation on states where no accompanying directives recognising the violation of women's rights to resocialisation exist or where resocialisation as a remedy is not explored.

9 4 Areas for further research

The focus of this research, as described in the introduction, was limited to the international and African regional human rights mechanisms.[62] Given that resocialisation is an underdeveloped and underapplied concept, a comparative analysis across other regional mechanisms could provide more insight into resocialisation as a right, obligation, and remedy. This would be valuable not only in underscoring the importance of resocialisation, but in providing a contrast to the approach taken on the African continent. A comparative study contrasting the African system with the inter-American and European systems, thus, has the potential to add to this area of the law.[63]

Finally, as noted throughout this research, resocialisation is a legal imperative embedded in international and regional law. The methods employed to achieve the goals of resocialisation are not, however, legal in nature. Thus, the practical application of resocialisation is extra-legal in nature. The shape of resocialisation measures will require frequent adaptation over time, informed by relevant learnings from such implementation. Much scope exists, therefore, for the development of appropriate resocialisation measures, tailored to suit different target audiences, aimed

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[62] See Chapter 1.

[63] At the European level see European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221 art 14; The Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence, November 2014 arts 12(1), 12(3), 13 and 14. At the Inter-American level see American Convention on Human Rights (Pact of San Jose), 22 November 1969 arts 1 and 3; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), 9 June 1994 art 8(b) & (c).

ultimately at modifying the underlying socio-cultural determinants of gender inequality and discrimination, and for its appropriate implementation across society.

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