

A New Hope for African Women: Overview of Africa's Protocol on Women's Rights

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ABSTRACT

There can be no doubt today that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. However, for long African women have been suffering several human rights abuses, both in the private and public spheres. For instance, denial of inheritance rights and exclusion from participation in the governance of their countries. Remarkably, this is so despite the existence of several international instruments on the rights of women, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), of which most African countries are States Parties. This was the situation when the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women was adopted recently at Maputo, Mozambique. This article seeks to provide an overview of this important Protocol, and to show the new hope it holds for African women.

Keywords: Africa, Women, Women's Rights, Protocol, Discrimination

INTRODUCTION

African women, perhaps more than women in other parts of the globe, have for long been suffering a great deal of human rights abuses. Essentially, this is due to various customary practices (such as female genital mutilation) and custom-oriented stereotypes which see women as being subordinate to men. Additionally, they are under-represented in governmental organs and, therefore, hardly participate in the governance of their countries. Although many African countries are States Parties to various international and regional instruments on human rights and women's rights (such as the 1966 Covenants,¹ Convention on the Political Rights of Women,² and the Convention on the Elimination of All Forms of Discrimination Against Women³), the status of African women over the years has largely remained the same – with only a little improvement in recent years. This informed the recent adoption of a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the 'Protocol'). As the States Parties to the Protocol noted in its preamble, 'despite

¹ That is the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights.

² 1952 (193 UNTS 135).

³ Adopted in 1979 by the UN General Assembly.

the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by majority of Member States, and their solemn 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'.

The aim of this short article is to provide a brief overview of this new Protocol, which holds a new hope for African women when it enters into force, provided it is well-implemented.

1. HIGHLIGHTS OF THE PROTOCOL

The African Protocol on the Rights of Women was adopted on 11 July 2003, at Maputo, Mozambique (negotiations for the Protocol started in 1995).⁴ It is a Protocol to the African Charter on Human and Peoples' Rights adopted in 1981. Essentially, it seeks to improve on the status of African women by bringing about gender equality and eliminating discrimination. In fact, it can be said that its guiding philosophy is that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights, in line with Paragraph 18 of the Vienna Declaration and Programme of Action of the World Conference on Human Rights 1993.

For the sake of clarity, the Protocol commenced with the definition of terms. For example, 'discrimination against women' is defined to mean 'any distinction, exclusion or restriction based on sex, or any other differential treatment whose objective or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life'. Further, the expression 'harmful practices' is defined 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'. Lastly, 'violence against women' is defined as 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat of such acts; or to undertake the imposition of arbitrary restrictions on

⁴ The original draft Protocol was amended/revised before the adoption. The full text of the draft Protocol can be found at:

http://www.hrea.org/erc/Library/display.php?doc_id=806&category_id=31&category_type=3

For the full text of the official document as revised, see

http://portal.unesco.org/shs/en/ev.php@URL_ID=3963&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Apart from improvements on the drafting style, the revised document includes new measures that were not there in the original document. Compare, for example, the provisions dealing with 'right to abortion' (article 14(2) (c)). Further, the language of the final document is, generally, more cautious, and this may help to appeal to a wider African audience. Even so, there are some who may think that the new language is not strong enough in some places as it should be.

or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or war'.⁵

Article 2 enjoins States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Specifically, the measures should ensure the principle of equality between men and women, and prohibit all forms of harmful practices which endanger the health and general well-being of women and girls. To be sure, the principle of equality should be included in the Constitution or statutes of States Parties that have not already done so. Furthermore, States Parties are obliged to take positive (affirmative) actions in those areas where discrimination against women in law and in fact continues to exist, and modify the social and cultural patterns of conduct of men and women through specific actions (such as public education, with a view to achieving the elimination of harmful cultural and traditional practices).

As an aspect of the rights to life, integrity and security of the human person, States Parties are required, among others, to enact and enforce laws to prohibit all forms of violence against women (including unwanted or forced sex, whether the violence takes place in private or public); to adopt necessary measures to ensure the prevention, punishment and eradication of all forms of violence against women; and to punish the perpetrators of violence against women, while rehabilitating the victims (Article 4). In times of armed conflicts or war, States Parties undertake to protect women against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity, and bring their perpetrators to justice before a competent criminal tribunal (article 11(3)).

Article 5 deals with elimination of harmful practices against women. It obligates States Parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and are contrary to recognized international standards. Specifically, States Parties should take all necessary legislative and other measures to eliminate such practices, including the creation of public awareness about the adverse effects of harmful practices, and the prohibition through legislative measures backed by sanctions, of all forms of female genital mutilation (FGM), scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them. Currently, FGM is still practiced in most African countries.

Women's rights regarding marriage and related issues are largely dealt with in articles 6 and 7. The minimum age of marriage for women is fixed at 18 years (Art. 6(b)). Article 6(d) requires that every marriage be recorded, and article 6(c) enjoins States Parties to encourage monogamy as the preferred form of marriage, while protecting the rights of women in polygamous marriages. Interestingly, this is one of the issues where the final document improved on the original draft Protocol. Originally, it was provided that 'polygamy shall be

⁵ See article 1. Article 1 also defines 'women' to mean 'persons of female gender, including girls'.

prohibited',⁶ a situation which was unlikely to have been easily achieved. Furthermore article 6(j) requires that States Parties should ensure that during marriage, a woman has the right to acquire her own property and to administer and manage it freely. Under most African customs, women, regarded as perpetual minors and as having no separate identity from their husband, could not acquire any property in their own name.

In matters of separation, divorce or annulment of marriage, States Parties shall ensure by appropriate legislation that such situations shall only be possible by judicial order and that woman and men have the same rights to seek judicial order for separation, divorce or annulment of marriage. Furthermore, in the event that an order of separation, divorce or annulment is made, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage (article 7). Before this Protocol, women married under customary/religious law in many African societies have no right to divorce; the right was only available to men, and divorce can be for any reason whatever or for no reason at all. Also, before the Protocol, African women married under customary/religious law had no right to any property acquired during marriage, even if they had contributed financially to its acquisition.

Where a woman becomes a widow – by the death of her husband – she shall have the right to an equitable share in the inheritance of her husband's property (Art. 21(1)). Still on right to inheritance, women and men shall have the right to inherit, in equitable shares, their parents' properties (Art. 21(2)). This is a revision of the custom of several African communities, which deny women inheritance rights.

On health and reproductive rights of women, States Parties are obligated to ensure that women have the right to be informed on their health status and on the health status of their partners (or would-be partners), particularly if infected with sexually transmitted infections (including HIV/AIDS), in accordance with internationally recognised standards and best practices (Art. 14(1) (e)). Moreover, States Parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus (Art. 14(2) (c)).

At the public level, article 9 provides for the right of women to participate in political and decision-making processes. To guarantee this, States Parties shall take positive action to promote participative governance and equal participation of women in the political life of their countries through affirmative action, enabling legislation and other measures. Specifically, women should be enabled to participate without discrimination in all elections, and they should be represented equally at all levels with men in all electoral processes (Art. 9(1)). States Parties are required to ensure increased and effective representation and participation of women at all levels of decision-making (Art. 9(2)).

⁶ See article 7(c).

In the event of breach of any of the rights of women recognised in the Protocol, States Parties undertake to provide appropriate remedies to any woman whose rights have been violated (Art. 25(a)), and to ensure that such remedies are determined by competent judicial or other authority provided for by law (Art. 25(b)).

To ensure implementation, States Parties are required by article 26 to submit periodic reports in accordance with article 62 of the African Charter, indicating the legislative and other measures undertaken for the full realization of the rights recognised in the Protocol.

On the whole, the African Protocol on Women's Rights is largely in line with pre-existing instruments on human rights generally and women's rights in particular. It contains some important provisions (such as the provisions on affirmative action, divorce, inheritance rights, and right to abortion). In fact, the provision for a right to abortion is the first of its kind in any international human right instrument.

It is notable that some of its provisions, before its recent adoption, have already influenced developments in some African countries as well as within the recently established African Union⁷ (which replaces the Organization of African Unity, established in 1963). For instance, consistent with its provisions, Uganda adopted a gender-sensitive Constitution in 1995.⁸ Section 21 of this new Constitution of the country provides for equality before the law as follows:

1. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
2. Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.
3. For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

Furthermore, the Constitution forbids violence. Section 24 provides that 'no person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment'. With specific regard to family life, section 31(1) provides that 'men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage,

⁷ Officially established on 9 July 2002.

⁸ The Constitutions of Seychelles, Ethiopia, Eritrea, Namibia, Morocco, Guinea-Bissau, Madagascar and Rwanda (Rwanda adopted its new Constitution in May 2003) are also gender sensitive in varying degrees.

during marriage and at its dissolution'. Section 31(2) enjoins Parliament to make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses. Moreover, section 32(1) specifically provides for affirmative action to be taken in favour of women, including affirmative action designed to address historical inequality. In more specific terms, section 33 it states:

1. Women shall be accorded full and equal dignity of the person with men.
2. The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.
3. The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
4. Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
5. Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
6. Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution.

Although section 37 provides that 'every person has a right to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others', this must be read holistically with other provisions of the Constitution (particularly section 33(6)) and it would not be an authority to continue traditional/customary or cultural practices which are harmful to women (for instance, FGM).

It is equally important to refer to the National Objectives and Directive Principles of State Policy contained in the Constitution. The principles are designed to guide all organs of the State in the implementation of the Constitution. Some of its gender-related provisions include principle VI, which provides that 'the State shall ensure gender balance and fair representation of marginalized groups on all constitutional and other bodies', and Principle XV which enjoins the State to 'recognize the significant role that women play in society'.

No doubt, these are progressive provisions on the rights of women in Uganda, and indications are that they are proving useful to women. For instance, as of 2001, out of seven members of the Electoral Commission, three were women, and one of them was the Vice-Chairperson. The seven-person Human Rights Commission had three women and its Chairperson was a woman. The Vice-Chairperson to the Judicial Service Commission was also a woman. Moreover, a woman occupied the office of Deputy Speaker of the Parliament

and Deputy Chief Justice of the Federation (Matembe 2001), and until May 2003 a woman, Dr Speciosa Wandira Kazibwe, was the Vice-President of the country.⁹

In South Africa there is now a legal right to abortion under the *Choice on Termination of Pregnancy Act* 1996.¹⁰ During the first 12 weeks, a pregnancy may be terminated upon the request of a woman. From the 13th up to and including the 20th week of the gestation period, a pregnancy may be terminated for reasons including the fact that the pregnancy resulted from rape or incest. After the 20th week, it could be terminated on grounds including the need to save the woman's life.

Moreover, in 1998 South Africa enacted a law on family affairs called *Recognition of Customary Marriages Act*,¹¹ although the law came into effect only in November 2000. In its recital, it is stated that it is an Act, *inter alia*, 'to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; and to regulate the dissolution of customary marriages'.

Among other important provisions, the Act has changed the former customary law position where there was no specific ground for divorce relating to a customary law marriage. Under section 8(1) a customary marriage 'may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage'. To issue the decree, the court must be 'satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them' (s.8 (2)). Presumably this right is available to both man and woman, unlike the previous position where only men had a right to divorce. Surely, this is an aspect of equality between man and woman, which women have for long been longing for.¹²

Zambia has also taken some steps in conformity to the provisions of the Protocol. In its concluding observations and comments published in 2002 on Zambia's periodic report, the Committee on the Elimination of Discrimination Against Women noted positively, *inter alia*, the country's efforts to strengthen the national machinery on women and the introduction of gender mainstreaming; the adoption of several policies and programmes to eliminate discrimination against women (for example, the National Gender Policy and the

⁹ Dr Kazibwe was Africa's first woman to attain such high political office, and served from November 1994 – May 2003. She resigned in order to pursue a PhD degree in medicine at Harvard University, USA. She was a committed campaigner for women's rights. While accepting her resignation, President Museveni thanked her for her 'extra-ordinary mobilization skills especially among the women and youths'. See reports in *My Uganda, Former Vice President*, available at: <http://www.myuganda.co.ug/govt/kazibwe.php>.

¹⁰ No. 92 of 1996.

¹¹ No. 120 of 1998.

¹² For an incisive critique of the Recognition of Customary Marriages Act, see Pillay 2001.

establishment of the Gender in Development Division, under the Office of the President; efforts to review existing laws that discriminate against women; the enactment of the Marriage Act and the Intestate Succession Act; the introduction of the Programme for the Advancement of the Girl Child Education; the reservation of 25 per cent of government scholarships exclusively for women who qualify for entry into universities and the lowering of cut-off points for girls to qualify for entry to grades 8 and 10 in schools).¹³

There is no doubt that no African customary practice affecting women has received so much international condemnation and sustained campaign against it than the practice of FGM. Happily, many African countries have responded to the campaign against FGM and have legally prohibited the practice in line with international-regional instruments – particularly, the new Protocol on women's rights. Such countries include Burkina Faso, Egypt, Ghana, Kenya, Sudan and Tanzania.¹⁴ In the countries where the practice is banned, those who perform the operation may face jail sentence. For instance, in Tanzania section 169A (1) of the Sexual Offences (Special Provisions) Act 1998 provides that anyone having custody, charge, or care of a girl under eighteen years of age who causes her to undergo FGM commits the offence of cruelty to children, and will be liable on conviction to a term of imprisonment from five to fifteen years, a fine of up to 300,000 Shillings, or both imprisonment and fine. Additionally, the law provides for the payment of compensation by the perpetrator to the person against whom the offence was committed.¹⁵

Importantly, domestic courts are helping to eliminate the practice by imposing criminal sanction against offenders. For instance, in November 2003 a court in Ghana's Upper West Region jailed a 45-year woman for five years for circumcising three girls, including a three-week old baby. More recently, in February 2004, another court in the Upper East Region of the country slammed a five-year jail term on a 70-year woman for circumcising seven girls.¹⁶ In Egypt, the highest court of the country has upheld the ban imposed by the Health Minister in 1996 against the practice of FGM by health workers. In a ruling delivered on 28 December 1998, the court held against a group of plaintiffs, including doctors and Islamist leaders who advocate the practice. The court noted that FGM is not sanctioned by Islam, and concluded:

With this ruling everybody is banned from performing FC [FGM], even with the proven consent of the girl or her parents, except in cases of medical necessity, which must be determined by the director of the gynecology department in one of the hospitals. Otherwise, all those who

¹³ See *Reports to Treaty Bodies: Zambia* (A/57/Part II, paras. 225-261), available at: <http://www.hri.ca/fortherecord2002/engtext/vol2eng/zambiatb.htm>.

¹⁴ Altogether, at least 14 African countries have officially and legally banned FGM.

¹⁵ In Burkina Faso, the offender may be jailed up to ten years if the victim bleeds to death.

¹⁶ See *Female Genital Mutilation in Ghana*, available at: <http://www.medicalnewstoday.com/index.php?newsid=5681#>.

do not comply will be subjected to criminal and administrative punishments.¹⁷

A few more countries, such as Nigeria, are in the process of formally prohibiting the practice by law. Already, some component states of the Federation of Nigeria (such as Bayelsa and Delta) have passed laws abolishing the practice.

In the political/public sphere, indications are that African women are making inroads – they are increasingly been allowed the right to participation. A few examples will bear out this fact.

In South Africa, the present speaker of the country's Parliament (National Assembly) is a woman, Frene Ginwala, and there is a strong presence of women in the country's legislative houses.¹⁸ Very recently, President Mbeki has appointed several women into important ministerial offices in his (second term) government. Women now make up 43 per cent of the national cabinet. Specifically, there are 12 women ministers, and half of 20 deputy ministers are women. According to informed commentators, 'the representation of women in cabinet is now the highest it has ever been in this country [South Africa] and in Africa' (Sefara and Monare 2004).

More importantly, 'read together with the representation of women in the national and provincial legislatures, as well as the diplomatic corps, the presence of women in top positions is historic...' (Sefara and Monare 2004). In a speech relating to the appointments, President Mbeki pointedly remarked that 'we...sought to further increase the number of women to increase the gender balance' (Sefara and Monare 2004). Similarly, since 1999 President Obasanjo has appointed women into political offices much more than ever before in Nigerian history.

Perhaps as an indication of continent-wide determination to move towards gender equality, non-discrimination, and participatory democracy, the Constitutive Act of the African Union (AU)¹⁹ and related protocols formally and explicitly guarantee women a place in the governance of continental affairs. For instance, article 4(2) of the *Protocol to the Treaty Establishing the African*

¹⁷ Reproduced in Equality Now, *Egypt: Highest Court Upholds Minister's Ban on Female Genital Mutilation (FGM)* (available at:

http://www.equalitynow.org/english/actions/action_0804_en.html.

¹⁸ In post-genocide Rwanda, women now have 49 per cent representation, thus topping a world average of 15.1 per cent. Under the country's new (2003) Constitution, 24 out of 80 seats in the lower house of parliament are reserved for women, and 6 out of 20 seats in the upper house are reserved for women. Significantly, during the country's September 2003 general election, an additional 15 women were voted into non-reserved seats – thus bringing 39 into the lower house. However, this gain has been attributed to the role of women during and after the country's civil war, and not necessarily a direct response to the country's international obligations (Mutume 2004).

¹⁹ See Constitutive Act of the African Union (adopted by the Thirty-Six Ordinary Session of the Assembly of Heads of State and Government on 11 July 2000, at Lome, Togo).

*Economic Community Relating to the Pan-African Parliament*²⁰ provides that 'each Member State shall be represented in the Pan-African Parliament by five (5) members, at least one of whom must be a woman'.²¹ Interestingly, a woman, Tanzanian Member of Parliament Gertrude Mongella, was elected the first President of the Pan-African Parliament at its inaugural session at Addis Ababa, Ethiopia, on 18 March 2004. Moreover, evidence indicates that some countries appointed more than one woman into the Pan-African Parliament, and also half of the present 10 members of the African Union Commission are women.²²

CONCLUSION

African women have for long suffered human rights abuses of various kinds, and have been under-represented in decision-making bodies in their countries. The adoption of the Protocol has certainly rekindled hope for the respect of the human rights of women in Africa. Responding to the adoption of the Protocol, the UN High Commissioner for Human Rights rightly observed that 'the adoption by the African Union of a specific treaty on the rights of women reinforces the message that women's rights require priority attention in the protection of universal and inalienable rights...The women of Africa have demonstrated their strength and resilience; they deserve and are entitled to full recognition as equal partners – both in private and family life and in their participation in economic, social and political activities'.²³

On the whole, although many international instruments on the rights of women binding on African countries have existed over several years, African women have largely remained unequal with men and continued to suffer discrimination in all ramifications and human rights abuses.²⁴ However, the recent adoption of an African Protocol on Women's rights as well as recent developments in some African countries in the field of women's rights, which were apparently influenced by the Protocol (even before its formal adoption; while it was still a draft), give an indication that the women of Africa have a

²⁰ Adopted at Sirte, Libya, 2 March 2001.

²¹ Women's representation in parliaments is one aspect of women's opportunities in political and public life, and it is therefore linked to women's empowerment: UN Millennium Development Goals 2000, para. 12.

²² See *Africa Union Puts Women First Once Again* (news by allAfrica.com, 18 March 2004), available online at: <http://allafrica.com/stories/200403180381.html>.

²³ Statement issued 14 July 2003, available at: <http://www.hshr.org/july72003auenglish.htm>.

²⁴ In contrast, women in Nordic/Scandinavian countries have long enjoyed respect for their rights, including right to participate in the public affairs and governance of their countries (well ahead other countries in Europe and most parts of the world).

new hope for the respect of their human rights in all ramifications – social, economic as well as political.²⁵

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²⁵ It is hoped that African governments will quickly ratify the Protocol and bring into force without delay. (As of June 2004 only The Gambia has ratified the Protocol).