

A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women

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1 Introduction

The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Draft Women's Protocol) is aimed at protecting the rights of women.¹ It is not a final document and African states might still suggest some changes to it. African states have realised that human rights instruments at the international level do not always address the unique problems of the continent. Africa has at times had to supplement the protection mechanisms at the international level so that they meet the needs of its own unique conditions.²

This article first traces the history of the Draft Women's Protocol. This is followed by an analysis of some of its pertinent provisions. Problems that may be associated with the Draft Women's Protocol will then be identified. Lastly a conclusion is drawn.

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1 Organisation of African Unity (OAU) Doc CAB/LEG/66.6 of 13 September 2000. Attached as Annex A.

2 For example, the African Charter on the Rights and Welfare of the Child (adopted in July 1990 and entered into force on 29 November 1999 CAB/LEG/153/Rev 2) and the OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa (adopted on 10 September 1969 and entered into force on 20 June 1974 CAB/LEG/24.3) reprinted in C Heyns (ed) *Human rights law in Africa 1997 (1999)* 34–46.

2 Background to the Protocol

The history of the Draft Women's Protocol is quite a long one. The African Charter on Human and Peoples' Rights (African Charter) was intended to guarantee the rights of all individuals, men and women alike.³ Therefore there had to be strong reasons for having a protocol to the African Charter that specifically dealt with women's rights. The African Charter already contains provisions which protect women.⁴ However, these are now considered as lending insufficient protection to women, who make up the majority of Africa's population.⁵ It has been argued that article 18(3) of the African Charter protects women in the context of the family and that outside this arena there is not much protection afforded to women.⁶ There is also the problem of the African Charter having failed to address numerous issues affecting the rights of women such as female genital mutilation (FGM), inheritance by women, and forced marriages.⁷

The African Commission on Human and Peoples' Rights (African Commission), working together with Women in Law and Development in Africa (WILDAF), organised a seminar on women's rights in 1995.⁸ It was decided that an additional protocol to the African Charter should be drawn up to address women's rights.⁹ The OAU Assembly of Heads of State and Government in July 1995 affirmed the need to have an additional protocol to the African Charter.¹⁰ Experts were appointed to draft the protocol, working together with African non-governmental organisations (NGOs) and various other interested parties. In 1998 the Draft Protocol to the African Charter on the Rights of Women in Africa (Draft Kigali Protocol) was approved by the African Commission during

3 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986; reprinted in C Heyns (ed) *Human rights law in Africa 1996* (1996) 7–16.

4 Art 2 provides for equal enjoyment of all rights in the African Charter regardless of sex. Art 3 provides that all individuals shall be equal before the law and be entitled to equal protection. Art 18(3) indicates that there should be elimination of discrimination against women and also the need to protect the rights of women.

5 WILDAF 'The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights' <<http://www.wildaf.org.zw/news4.html>> (accessed 25 January 2001).

6 As above.

7 As above. See also L Kois 'Article 18 of the African Charter on Human and Peoples' Rights: A progressive approach to women's human rights' (1997) 3 *East African Journal of Peace and Human Rights* 92–5. See also M Mubiala 'Le projet de Protocol a la Charte Africaine des Droits de l'homme et des Peuples relatif aux Droits de la Femme en Afrique' (2000) *Human Rights Droits de l'homme* 23.

8 n 5 above 2–3. The seminar was held in March in Lomé, Togo.

9 As above.

10 31st Ordinary Session Resolution AHG/Res 240 (XXXI).

its session held in Kigali, Rwanda, and this draft was subsequently sent to the OAU for further action.¹¹

At the same time that the Draft Women's Protocol was being drafted, the Women's Unit within the OAU together with the Inter-African Committee on Harmful Traditional Practices Affecting the Health of Women and Children (IAC) were working on the Draft OAU Convention on the Elimination of All Forms of Harmful Practices (HPs) Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention).¹² In order to avoid duplication, the OAU suggested that there should be closer collaboration between the African Commission and the Women's Unit.¹³

The Women's Unit together with the Legal Division of the OAU made a few suggestions to be considered in order to improve the Draft Kigali Protocol.¹⁴ The OAU Legal Counsel suggested that a meeting of government experts should be convened to further discuss the instrument before it could be forwarded to the Council of Ministers and the Summit of Heads of State and Government.¹⁵ It was also suggested that for strategic and substantive reasons the Draft OAU Convention should be integrated as a chapter in the Draft Kigali Protocol.¹⁶

In September 2000 an integrated document was finalised.¹⁷ The Draft Women's Protocol is a longer document in comparison to the other two documents, namely the Draft Kigali Protocol and the Draft OAU Convention.¹⁸ The Draft Women's Protocol is a more thorough document that combines the concerns that were raised in both the Draft Kigali Protocol and Draft OAU Convention. The Draft Women's Protocol may be considered an African instrument which has gone further than the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Draft Women's Protocol still has to go through some procedures before it is presented to OAU member states for adoption. It is unlikely that it will be adopted before the year 2002. This is because there are time frames which it has to meet. For instance, governments have to be given time to study the document. It is already too late to meet these

11 26th Ordinary Session of the African Commission on Human and Peoples' Rights 1-15 November 1999 'Final Communiqué' <http://www1.umn.edu/humanrts/africa/african_charter26f.html> (accessed 20 January 2001) para 16.

12 CAL Johnson (OAU — ESCAS Department) 'Draft Protocol to the African Charter on Women' File No ES/WU/RW/51.OO (25 February 2000) 1-2.

13 As above.

14 T Maluwa (OAU — Legal Counsel) Letter to Chairman of the African Commission CAB/LEG/72.20/27/VOL.11 (7 March 2000).

15 As above.

16 As above.

17 n 1 above.

18 The Draft Women's Protocol has 27 articles whereas the Draft Kigali Protocol and the Draft OAU Convention have 23 and 13 articles respectively.

time frames before the next Summit of Heads of State and Government usually meeting in June.

3 An overview of the Draft Women's Protocol

3.1 The Preamble

The Draft Kigali Protocol has extensively influenced the Preamble to the Draft Women's Protocol. The Preamble recalls and notes various human rights instruments directed at ensuring equality of the sexes.¹⁹ The Draft Women's Protocol intends to address discrimination against women. The issue of the elimination of harmful practices that was included in both the Draft OAU Convention and the Draft Kigali Protocol is also raised in the Draft Women's Protocol. The Preamble of the Draft Women's Protocol is clearer and covers those issues that are of concern in a direct manner.

3.2 The definitional section

The Draft Women's Protocol has an article dedicated to definitions.²⁰ It defines terms such as 'discrimination against women', 'harmful practices', and 'violence against women'.²¹

The definition of 'discrimination against women' has been approached differently in the Protocol.²² Under the Draft Kigali Protocol discrimination against women dealt with 'differential treatment of which the effects compromise or destroy the recognition, enjoyment or the exercise by women of human rights and fundamental freedoms'.²³ The Draft Women's Protocol deals not only with the effect of such treatment but also with the objective of such treatment.²⁴ This therefore gives a wider definition to discrimination against women. Violence against women is defined to include physical, sexual and psychological harm. The mere threat to commit such violence is also regarded as part of the definition.²⁵ This definition is wide enough to cover any of these acts in private or public life. In effect domestic violence is included under the definition. Under this section the definition of harmful practices is not limited to acts only, but includes attitudes which negatively impact on among other things the rights to life, health and bodily integrity of women and girls.²⁶ This means that negative mindsets need to be changed.

19 Preamble para 5 Draft Women's Protocol.

20 Art 1 Draft Women's Protocol.

21 Art 1(d), (e) and (h) Draft Women's Protocol.

22 Art 1(d) Draft Women's Protocol.

23 Art 1 Draft Kigali Protocol.

24 n 22 above.

25 Art 1(h) Draft Women's Protocol.

26 Art 1(e) Draft Women's Protocol.

3.3 Emphasis on state parties to act

Right from the onset it is important to note that the Draft Women's Protocol places an obligation on the state to help women achieve their rights. Only two out of the 21 articles do not put such a direct duty on the state parties.²⁷

The Draft Women's Protocol is quite succinct in addressing the issue of discrimination against women. State parties have to embody the principle of equality between sexes in their national constitutions and legislative instruments.²⁸ This is a big challenge for many countries. However, some countries have already gone a long way in trying to ensure that such provisions exist in their constitutions and that legislation is in place to this effect. South Africa is a good example.²⁹

3.4 Protection of dignity and physical security

The respect for dignity aimed at ensuring that women enjoy equal human rights is upheld in the Draft Women's Protocol.³⁰ This provision is taken largely from the Draft Kigali Protocol and improved upon by requiring that measures be taken to prohibit the exploitation and degradation of women.³¹ The Draft Kigali Protocol seems to embody a mere statement of a principle but the Draft Women's Protocol requires that positive action be taken to achieve this principle.

A new approach on the subject of women's rights to physical and emotional security is evident from the Draft Women's Protocol. In an effort to protect the physical and emotional security of women, pregnant women are not to be sentenced to death, and experiments are not to be carried out on women without their consent. Women and girls are supposed to be protected from rape and all forms of violence.³²

3.5 Exploitation and violence

Exploitation such as commercial sexual exploitation or exploitation at work affects the dignity of women. States are therefore supposed to take measures to ensure that exploitation and degradation of women do not happen.³³ This will be part of the way to ensure that respect for the dignity of women is upheld.

27 Arts 21 and 22 Draft Women's Protocol.

28 Art 2(1)(a) Draft Women's Protocol.

29 For example, the Domestic Violence Act 116 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

30 Art 3 Draft Women's Protocol.

31 Art 3(b) Draft Women's Protocol.

32 Art 4(c) Draft Women's Protocol.

33 n 31 above.

Article 4(d) of the Draft Women's Protocol has brought about a more positive and welcome approach to the issue of treating rape and sexual abuse during conflict as war crimes. Such acts are to be considered war crimes without the prosecution having to prove that they were carried out with a political motive.³⁴ It will consequently be easier to prosecute persons who commit such acts.

The Draft Women's Protocol has dedicated an article to the need to eliminate violence against women.³⁵ This is a detailed article, as it does not merely cover the elimination of violence but also looks at how to deal with those who have been victims of violence. It requires that compensation be paid to victims.³⁶ This will act both as a deterrent to those who commit such violence and also as a way of helping women who have been victims of violence to normalise their lives. The same article requires that both rehabilitation and reparation for victims be undertaken.³⁷ This means that greater attention will be paid to victims of violence. Such attention is often lacking in legal systems in Africa. The focus is usually on punishing offenders and nothing is done for the benefit of the victims.

The most important contribution by the Draft OAU Convention to the Draft Women's Protocol is found in article 6 which deals entirely with harmful practices. For practices to be harmful they must not only affect the fundamental human rights of women and girls but they must also be contrary to recognised international standards. This could be interpreted to mean that these standards are flexible, classifying certain activities as harmful. Public awareness campaigns through formal and informal education have to be undertaken.³⁸ The issue of medicalisation and para-medicalisation of FGM victims is addressed, as is the rehabilitation of such victims.³⁹ The article also recognises the need to grant asylum to women who face the danger of these harmful practices.⁴⁰ In recent years a number of women have sought asylum for fear that harmful practices will be performed on them.⁴¹ Harmful practices remain one of the subjects that affects the lives of many women. The Protocol is looking not only at preventing these activities but also at the same time it seeks to encourage countries to assist those who have already

34 In the Draft Kigali Protocol art 5(f) had indicated that there must be a political motive for these acts to be considered war crimes.

35 Art 5 Draft Women's Protocol.

36 Art 5(c) Draft Women's Protocol.

37 Art 5(d) Draft Women's Protocol.

38 Art 6(a) Draft Women's Protocol.

39 Art 6(b) and (c) Draft Women's Protocol.

40 Art 6(d) Draft Women's Protocol.

41 Washington Post 'Deportation halted for woman fleeing mutilation' <<http://www.washingtonpost.com/wp-srv/national/daily/july99/abankwah21.htm>> (accessed 22 January 2001).

been victims. By encouraging the granting of asylum to women and girls who are in danger of being subjected to these harmful practices, the Protocol has taken a revolutionary step in this direction.

3.6 Marriage and related aspects

The issue of marriage is dealt with under the Draft Women's Protocol. Owing to the many inequalities that characterise marriages in Africa, the Protocol pays attention to establishing equality within the marriage union. Such equality would be aimed at consent to marriage, rights governing property, responsibilities for children, and the right of a woman to retain her nationality. Child marriages are prohibited under the Draft Women's Protocol as they are under the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁴²

The Protocol requires polygamy to be prohibited.⁴³ Some have argued that polygamy is not really a human rights issue, but a social issue.⁴⁴ It may also be said that women in a polygamous relationship should rather be empowered so that they are able to extricate themselves from such a relationship. It may further be argued that even if polygamy is prohibited, a husband could have extramarital affairs which have the same negative effect on the marriage as polygamy.

The polygamy clause was regarded as one that may cause difficulty in the adoption of the Draft Women's Protocol.⁴⁵ The adoption of the Draft Women's Protocol may be hindered because some member states of the OAU have large populations that either belong to religions that permit polygamy or where customary law has recognised this practice for centuries. Islam is one of the major factors in political and social development in many parts of Africa and its teachings cannot be suddenly changed or ignored.⁴⁶ Islamic countries would probably be reluctant to adopt a stance against polygamy because marrying more than one wife is generally permissible under Islam.⁴⁷

42 Art 21(2) African Children's Charter. See also F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199-209.

43 Art 7(c) Draft Women's Protocol.

44 OC Eze *Human rights in Africa: Some selected essays* (1984) 149-50.

45 Commission for Gender Equality 'Consultative Workshop on Gender Issues' of 16 October 2000, University of Pretoria, South Africa. Some participants at the workshop raised some of these arguments on the subject of the polygamy clause being included in the Draft Kigali Protocol.

46 AA El Naeim 'A modern approach to human rights in Islam: Foundations and implications for Africa' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 75.

47 Eze (n 44 above) 151-2. See also MZ Ibn'Yahya 'Women, polygamy and Islam' <<http://members.tripod.com/islamiczone/women.htm>> (accessed 22 January 2001).

One could argue that countries opposing the inclusion of the polygamy clause are free to make a reservation on this issue. On the other hand, one should not forget that reservations to a treaty should not be contrary to the object and purpose of the treaty.⁴⁸ The question would arise as to whether the subject of polygamy is vital to the Draft Women's Protocol as a whole. If not, countries could easily make reservations. Some reservations to CEDAW caused controversy, such as the reservation by the Maldives to the effect that it would not be bound by any provision requiring it to change its Constitution or laws.⁴⁹ Some states made reservations to the effect that they would not be bound by provisions contrary to Islamic Shari'a.⁵⁰

The Draft Women's Protocol requires state parties to enact legislation regarding separation and termination of marriage. Issues such as women's right to choose their place of residence or retain their nationality are very important. In the past women have been discriminated against on matters concerning the right of their children to acquire their mothers' nationality, especially where they have a foreign father, or even in matters concerning women wishing to live with their husbands in the woman's country of citizenship.⁵¹

The article in the Protocol governing separation and termination of marriages raises some issues that could cause difficulties.⁵² For instance, the issues of divorce and the annulment of marriage by a judicial officer present problems. Not all marriages are entered into by judicial process. Some are conducted by religious clerics. Others are conducted through traditional mechanisms.⁵³ There is no place for a judicial officer in such cases and consequently judicial officers may not be the appropriate persons to annul such unions.

3.7 Women and decision making

The importance of access to information and legal aid is recognised through a separate provision on the right to information and legal aid.⁵⁴ However, the Draft Women's Protocol should have contained a provision requiring women to be represented in the judicial system, as women

48 Art 19(c) of the Vienna Convention on the Law of Treaties (23 May 1969 1155 UNTS 331). See also L Lijnzaad (1995) *Reservations to UN-human rights treaties: Ratify and ruin?* (1995) 136.

49 C Chinkin 'Reservations and objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in JP Gardner (ed) *Human rights as general norms and states' right to opt out* (1997) 64 68.

50 n 49 above 69.

51 *Aumeeruddy Ciffra v Mauritius* (1981) 62 ILR 285 286. See also *Dow v Attorney General* (1992) LRC (Botswana CA) 623.

52 Art 8 Draft Women's Protocol.

53 JC Bekker *Customary law in Southern Africa* (1989) 105.

54 Art 9 Draft Women's Protocol.

comprise the majority of citizens on the continent.⁵⁵ Women need access to information and they also need legal assistance in areas such as marriage, inheritance and accessing finance. Various rights have been set out in the Protocol and there is a need to provide women with the necessary legal support. In order to ensure that women may claim and enforce their rights, the need for legal aid has been given prominence.⁵⁶

Under the Protocol, women are guaranteed the right not just to participate in the political process but also to take part in decision making.⁵⁷ This is a positive development. In fact, the Protocol requires women to be represented equally on electoral lists.⁵⁸ It was probably realised that decision making often excludes women, especially at the level of government. The right to participate in the decision-making process is extended to matters involving the right to peace.⁵⁹ This is also a positive step, given the fact that women comprise the largest group of refugees, returnees, and displaced persons.⁶⁰

3.8 Other important issues

In order to achieve the right to peace, state parties are required to take special measures to ensure that women and children are protected in conflict situations.⁶¹ This also extends to refugees, returnees and displaced women and children. There is no elaboration on the special measures that must be taken; therefore each case may be dealt with according to its merits.

Economic and social welfare rights are all well protected.⁶² Equal access to employment, equal pay and work, protection from sexual harassment, the right to choose one's occupation, and support for women in the informal sector are some of the issues being addressed.⁶³

Women's health is also given attention. The Draft Women's Protocol stipulates that women ought to have greater control over their reproductive rights.⁶⁴ Women should be able to determine the number of children that they have and the spacing of such children.⁶⁵ Many of Africa's problems may be attributed to its high rate of population growth. Giving women greater control over reproduction will not only ensure

55 n 5 above 1.

56 Art 9 Draft Women's Protocol.

57 Art 10 Draft Women's Protocol.

58 Art 10(1)(b) Draft Women's Protocol.

59 Art 11(2) Draft Women's Protocol.

60 Kois (n 7 above) 107.

61 Art 11(4)(a) Draft Women's Protocol.

62 Art 13 Draft Women's Protocol.

63 As above.

64 Art 14 Draft Women's Protocol.

65 Art 14(1)(a), (b) and (c) Draft Women's Protocol.

women better health but also help the continent to tackle the problem of rapid population growth.

The Draft Women's Protocol places great emphasis on the role of the state in ensuring that women enjoy their human rights.⁶⁶ Important rights such as the right to food security, adequate housing and the right to a positive cultural context are all included.⁶⁷ Participation by women in determining cultural policies is being encouraged.⁶⁸ This implies that women would help to eradicate the negative cultural practices and help in promoting positive ones. This may not be easy to achieve, especially in very traditional societies. Nevertheless, it is important to include such provisions because in some societies women have played a role in the continuation of negative practices that affect them.⁶⁹

Other matters that would help in the development of society as a whole are advanced in the Draft Women's Protocol. The promotion of a healthy and sustainable environment is provided for as a human right to be enjoyed by women.⁷⁰

The Draft Women's Protocol ought not to be viewed as merely advancing the rights of women, but rather as advancing the interests of society in general. This is because the whole of society gains if a healthy and sustainable environment is attained. The right to sustainable development through access to land and credit is advanced.⁷¹ If achieved, this would help millions of women who are locked in the vicious cycle of poverty and as a result it would help them to uplift the lives of their dependants.

Under the Draft Women's Protocol provision is made for the protection of widows.⁷² The Draft Women's Protocol requires that widows be protected from inhuman, degrading and humiliating practices.⁷³ In order to ensure the continuation of a family life, widows should be able to remarry and be allowed to be guardians of their children.⁷⁴ The right of widows to inherit property and the right of girls to inherit are emphasised in the Draft Women's Protocol.

An important but at the same time vague inclusion in the new draft is the 'right to specific measures of protection' for elderly women and disabled women.⁷⁵ One may argue that the 'specific measures' have

66 Arts 2–20 Draft Women's Protocol do have provisions where direct state action is mandatory. Only arts 21 and 22, which confer the right to inheritance and special protection to be accorded to elderly and disabled women, do not make the direct statement of putting the duty on the state.

67 Arts 15–17 Draft Women's Protocol.

68 Art 17(1) Draft Women's Protocol.

69 T Masland 'The ritual of pain' *Newsweek* (5 July 1999) 45–6.

70 Art 18(1) Draft Women's Protocol.

71 Art 19 Draft Women's Protocol.

72 Art 20 Draft Women's Protocol.

73 Art 20(a) Draft Women's Protocol.

74 Art 20(b) and (c) Draft Women's Protocol.

75 Art 22 Draft Women's Protocol.

been deliberately left vague so that states have leeway to act according to the prevailing conditions in their separate territories.

3.9 Interpretation

Article 23 of the Draft Women's Protocol presents some problems. It stipulates that the interpretation of the Draft Women's Protocol will be done by the African Court on Human and Peoples' Rights (African Court). This court has not yet come into existence.⁷⁶ The Protocol setting up the court requires fifteen ratifications for it to come into being and it will take some time before the court is set up and becomes functional.⁷⁷ Similarly, the Draft Women's Protocol needs fifteen ratifications before it enters into force.⁷⁸

However, one must not forget that a protocol is an addition to an already existing treaty. In this case the Draft Women's Protocol is an addendum to the African Charter. Therefore this Protocol does not exist on its own and must be interpreted with due regard to the African Charter. The African Charter already has mechanisms for its interpretation.⁷⁹ These mechanisms can be extended to also cater for the interpretation of this Protocol.

On the subject of interpretation another question needs to be considered. A situation may arise where a country has ratified the Draft Women's Protocol but not the Protocol setting up the African Court. Article 23 would have a far-reaching effect on that country in such a situation. It would mean that for purposes of the Draft Women's Protocol that particular state party would be under the jurisdiction of the African Court.

The final article of the Draft Women's Protocol is one of the most significant articles in the document.⁸⁰ This article provides that the provisions in the Protocol will not affect more favourable provisions already in existence in legislation at the domestic level or even in other conventions to which state parties have committed themselves. This means that if a complaint arises, the body interpreting the Protocol will not be limited to the Protocol but should establish the most favourable protection that can be afforded to the women. This will be done by taking into consideration other human rights instruments and the domestic law which bind the state.

76 As at July 1999 only Burkina Faso, Senegal and The Gambia had ratified the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (Protocol on African Court). Since then Mali has also ratified this Protocol. See 'Status of Ratification' <<http://www.up.ac.za/chr/ahrdb/ahrdb.html>> (accessed 3 January 2001).

77 Art 34(3) Protocol on the African Court.

78 Art 25(1) Draft Women's Protocol.

79 Art 62 African Charter.

80 Art 27 Draft Women's Protocol.

4 Some problematic aspects of the Draft Women's Protocol

4.1 Duplication

It is clear that the Draft Women's Protocol is intended to be a supplement to the African Charter. The African Charter applies to everyone.⁸¹ The Draft Women's Protocol pays attention to women only. One could argue that the African Charter does not distinguish between the sexes when it guarantees the various rights and freedoms. The problem is with the implementation of the African Charter which lies with state parties. It is up to state parties to the African Charter to ensure that the rights set out in the African Charter are enjoyed by all individuals. If this is achieved, both women and men should be able to enjoy a more humane life.

4.2 Inconsistency and overambitiousness

The Draft Women's Protocol may also be said to fluctuate between setting out general principles and providing detail. There is a lack of consistency. For instance, article 3 indicates that states should 'ensure that women enjoy rights and dignity inherent in all human beings', and the article then states that 'appropriate measures to prohibit' degradation and exploitation of women should be taken. On the other hand, article 4 gives details by stating the exact treatment which women should be protected from. Article 4 therefore goes beyond a mere statement of principle.

The Draft Women's Protocol may also be said to set out goals that are difficult to attain, and for this reason it may not be ratified by some countries as they may not be in a position to attain the goals it sets out to achieve. The end result would be that the Protocol would become yet another addition to the existing body of human rights instruments meant rather for academic discourse than for practical enforcement.

The issue of child marriage is one example. It is difficult to outlaw child marriages, especially once girls reach the age of puberty. The issue of requiring states to enact legislation to ensure that through mutual agreement children can use their mother's maiden name is part of the overambitious approach portrayed by some articles in the Protocol. What happens if there is no mutual agreement, considering that mutual agreement cannot be forced on people?

4.3 Controversial provisions

The Draft Women's Protocol has created controversy on certain issues. For example, article 10(1)(b) requires that women be equally represented

⁸¹ Numerous articles in the African Charter indicate that the rights in the Charter apply to every individual.

in all elections. This does not take into consideration issues such as women's qualifications and availability as office-bearers. It rather aims at achieving a balance based on the sex of individuals. Because of this, article 10(1)(b) would be seen as controversial in many countries. While the problems of women need to be addressed, caution has to be exercised in the approach that is used. Attention should rather be focused on ensuring that people in offices of authority are gender sensitive and aware of the problems that women face. Other controversial aspects such as the prohibition of polygamy and child marriages have been discussed earlier.⁸²

5 Conclusion

Certain countries may be unwilling to ratify the Draft Women's Protocol. This does not mean, however, that the principles enunciated in this Protocol cannot be used when interpreting other human rights instruments on the continent.

An institution such as the African Commission may use this document as a guide when interpreting the African Charter. This is acceptable mainly because the African Charter itself allows the African Commission to go beyond the African Charter when interpreting the rights set out in it.⁸³ In this way the African Charter will be interpreted progressively and will include new approaches such as those raised in the Draft Women's Protocol. The African Commission has a good number of women members and they should lead the way in helping to interpret the African Charter progressively.⁸⁴

The Draft Women's Protocol has come a long way. In general it is a fair document that sets out some of the problems that affect women in Africa. It is a good starting point for countries that want to address the problems facing women.

One hopes that the Draft Women's Protocol will not become just another document that states ratify to show that they are progressive while in reality they fail to implement its provisions. There are areas in the Protocol which may still be improved. The document can still be revised so that problematic areas are adequately addressed. This discussion is aimed at contributing to the debate about the resolution of these issues.

82 See 3.6 above.

83 Arts 60 and 61 African Charter.

84 Of the 11 members 4 are women. These are Ms Florence Butegwa, Ms Jainaba Johm, Dr Vera Chirwa, and Ms Julienne Ondziel-Gnelenga. See 'African Commission on Human and Peoples' Rights — Commissioners' lists and addresses' <<http://www.up.ac.za/chr/ahrd/ahrd.html>> (accessed 23 January 2001).

ANNEX A:
**DRAFT PROTOCOL TO THE AFRICAN
CHARTER ON HUMAN AND PEOPLES'
RIGHTS ON THE RIGHTS OF WOMEN IN
AFRICA***

The State Parties to this Protocol,

CONSIDERING that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the OAU Assembly of Heads of State and Government meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

CONSIDERING that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

FURTHER CONSIDERING that Article 18 of the African Charter on Human and Peoples' Rights calls on all Member States to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

NOTING that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and

* CAB/LEG/66.6; final version of 13 September 2000.

Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and all other international conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

NOTING that women's rights and women's essential role in development have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

FURTHER NOTING that the Plans of Action adopted in Dakar and in Beijing call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions and other Conventions aimed at eliminating all forms of discrimination and at promoting equality between men and women;

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the 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;

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls should be condemned and eliminated, and **DETERMINED** to ensure that the rights of women are protected in order to enable them to enjoy fully all their human rights;

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

For the purpose of the present Protocol

- a) **'African Charter'** shall mean the African Charter on Human and Peoples' Rights;
- b) **'African Commission'** shall mean the African Commission on Human and Peoples' Rights;

- c) **'Assembly'** shall mean the Assembly of Heads of State and Government of the OAU;
- d) **'Discrimination against women'** shall mean any distinction, exclusion or restriction based on sex, or any 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.
- e) **'Harmful Practices (HPs)'** shall mean all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health and bodily integrity.
- f) **'OAU'** shall mean the Organization of African Unity.
- g) **'State Parties'** shall mean the State Parties to this Protocol.
- h) **'Violence against women'** shall mean all acts directed against women which cause or could cause them physical, sexual, or psychological harm, including the threat of such acts; or the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of conflict/war.

Article 2

Elimination of Discrimination against Women

1. State Parties shall combat all forms of discrimination against women through appropriate legislative measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments the principle of equality between men and women and ensure its effective application;
- b) enact and effectively implement appropriate national legislative measures to prohibit all forms of harmful practices which endanger the health and general well-being of women and girls;
- c) integrate a gender perspective in their policy decisions, legislation, development plans, activities and all other spheres of life;
- d) take positive action in those areas where discrimination against women in law and in fact continues to exist.

2. State Parties shall modify the social and cultural patterns of conduct of men and women through specific actions, such as:

- a) public education, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women;
- b) support local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

Article 3
Respect of Dignity

Women contribute to the preservation of those African values that are based on the principles of equality, dignity, justice and democracy. In this regard, the State Parties shall:

- a) ensure that women enjoy rights and dignity inherent in all human beings;
- b) adopt appropriate measures to prohibit any exploitation and degradation of women.

Article 4
Right to Physical and Emotional Security

Women shall be entitled to respect of their lives and the integrity of their person. Accordingly, the State Parties shall:

- a) not pronounce or carry out death sentences on pregnant women;
- b) prohibit medical or scientific experiments on women without their informed consent;
- c) protect girls and women against rape and all other forms of violence, including the trafficking of girls and women;
- d) ensure that in times of conflict and/or war, rape, sexual abuse and violence against girls and women are considered a war crime and are punished as such.

Article 5
Elimination of Violence against Women

State Parties shall take appropriate measures to:

- a) prohibit all forms of violence against women whether physical, mental, verbal or sexual, domestic and family, whether they take place in the private sphere or in society and public life;
- b) identify the cause of violence against women and take appropriate measures to prevent and eliminate such acts of violence;
- c) punish the perpetrators of such violence committed against women and ensure that the perpetrators pay adequate compensation;
- d) establish mechanisms to ensure effective rehabilitation and reparation for victims of such violence.

Article 6
Elimination of Harmful Practices

State Parties shall condemn all harmful practices which affect the fundamental human rights of women and girls and which are contrary to recognised international standards, and undertake to take all the necessary measures, *inter alia*:

- a) to create public awareness regarding harmful practices through

- information, formal and informal education, communication campaigns and outreach programmes targeting all stakeholders;
- b) to prohibit the amelioration or preservation of harmful practices such as the medicalisation and para-medicalisation of female genital mutilation and scarification, in order to effect a total elimination of such practices;
 - c) to rehabilitate victims of harmful practices by providing them with social support services such as health services to meet their health-care needs, emotional and psychological counselling and skills training aimed at making them self-supporting in order to facilitate their reintegration into their families, communities and in other sectors of the society;
 - d) to protect and grant asylum to those women and girls who are at risk of, have been, or are being subjected to harmful practices and all other forms of intolerance.

Article 7 Marriage

State Parties shall ensure that men and women enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to ensure that:

- a) no marriage shall take place without the informed consent of both parties;
- b) the minimum age of marriage for men and women shall be 18 years;
- c) polygamy shall be prohibited;
- d) every marriage shall be recorded where possible in writing, as soon as possible, and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall by mutual agreement choose their place of residence;
- f) a married woman shall have the right to keep her maiden name, to use it as she pleases, jointly or separately with her husband's surname. By mutual agreement the children of a married couple may use their mother's maiden name either separately from or jointly with that of their father's;
- g) a married woman shall have the right to retain or change her nationality;
- h) a man and a woman shall have the same rights and responsibilities towards their children;
- i) during her marriage, the women shall have the right to acquire her own property and to administer and manage it freely; and in cases of joint ownership of property the husband and wife shall have the same rights.

Article 8**Separation and Termination of Marriage**

State Parties shall enact appropriate national legislative measures to ensure that men and women enjoy the same rights in case of separation and termination of marriage. In this regard, they shall ensure that:

- a) divorce and annulment of a marriage shall be effected only by judicial order;
- b) women and men shall have the same rights to seek divorce or annulment of a marriage;
- c) after divorce or annulment, women and men shall have the same rights and responsibilities with respect to the children and property of the marriage;
- d) in the event of separation women and men shall have equal rights and responsibilities with respect to the children and property of the marriage.

Article 9**Right to Information and Legal Aid**

Women shall have the right to have their cause heard and State Parties shall have the duty to promote and ensure that the rights of women are protected in this respect. They shall:

- a) take all appropriate measures to facilitate the access of women to legal aid services;
- b) support local, national, regional and continental initiatives directed at giving women access to legal aid services;
- c) put in place adequate structures including appropriate education programmes to inform women and make them aware of their rights.

Article 10**Right to Participation in Political Process and Decision Making**

1. State Parties shall take specific positive action to promote the equal participation of women in the political life of their countries, ensuring that:

- a) women do participate without any discrimination in all elections;
- b) women are represented equally at all levels with men in all electoral and candidate lists;
- c) women are partners with men at all levels of development and implementation of state policy;

2. State Parties shall ensure women's effective representation and participation at all levels of decision making.

Article 11
Right to Peace

1. Women shall have the right to participate in the promotion and maintenance of peace, and to live in a peaceful environment.

2. State Parties shall take all appropriate measures to involve women:

- a) in programmes of education for peace and a culture of peace;
- b) in the structures for conflict prevention, management and resolution at local, national, regional, continental and international levels;
- c) in the local, national, sub-regional, regional, continental and international decisionmaking structures to ensure physical, psychological, social and legal protection of refugee, returnee and displaced women;
- d) in all levels of the structures established for the management of camps and asylum areas.

3. State Parties additionally shall reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources.

4. State Parties shall take special measures to ensure:

- a) effective protection of women and children in emergency and conflict situations;
- b) effective protection of refugee, returnee and displaced women and children.

Article 12
Right to Education and Training

1. State Parties shall take all appropriate measures to:

- a) eliminate all forms of discrimination against women and girls in the sphere of education and training;
- b) eliminate all references in textbooks and syllabuses to the stereotypes which perpetuate such discrimination.

2. State Parties shall take specific positive action to:

- a) increase literacy among women;
- b) promote education and training for women and girls at all levels and in all disciplines;
- c) promote the retention of girls in schools and other training institutions.

Article 13
Economic and Social Welfare Rights

1. State Parties shall guarantee women equal opportunities to work. In this respect, they shall:

- a) promote equality in access to employment;

- b) promote the right to equal remuneration for jobs of equal value for men and women;
- c) ensure transparency in employment and dismissal relating to women in order to address issues of sexual harassment in the workplace;
- d) allow women freedom to choose their occupation, and protect them from exploitation by their employers;
- e) create conditions to promote and support the occupations and economic activities dominated by women, in particular, within the informal sector;
- f) encourage the establishment of a system of protection and social insurance for women working in the informal sector;
- g) introduce a minimum age of work and prohibit children below that age from working, and prohibit the exploitation of children, especially the girl-child;
- h) take the necessary measures to recognise the economic value of the work of women in the home;
- i) guarantee adequate pre- and post-natal maternity leave;
- j) ensure equality in taxation for men and women;
- k) recognise the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l) recognise motherhood and the upbringing of children as a social function for which the State, the private sector and both parents must take responsibility.

Article 14

Health and Reproductive Rights

1. State Parties shall ensure that the right to health of women is respected and promoted. These rights include:

- a) the right to control their fertility;
- b) the right to decide whether to have children;
- c) the right to space their children;
- d) the right to choose any method of contraception;
- e) the right to protect themselves against sexually transmitted diseases, including HIV/AIDS;
- f) the right to be informed on one's health status and on the health status of one's partner.

2. State Parties shall take appropriate measures to:

- a) provide adequate, affordable and accessible health services to women especially those in rural areas;
- b) establish pre- and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- c) protect the reproductive rights of women particularly by authorising medical abortion in cases of rape and incest.

Article 15
Right to Food Security

State Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b) establish adequate systems of supply and storage to ensure food security.

Article 16
Right to Adequate Housing

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing.

Article 17
Right to Positive Cultural Context

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

2. State Parties shall take all appropriate measures to enhance the participation of women in the conception of cultural policies at all levels.

Article 18
Right to a Healthy and Sustainable Environment

1. Women shall have the right to live in a healthy and sustainable environment.

2. State Parties shall take all appropriate measures to:

- a) involve women in the management of the environment at all levels;
- b) promote research into renewable energy sources and facilitate women's access to them;
- c) regulate the management, processing and storage of domestic waste;
- d) ensure that proper standards are followed for the storage, transportation and destruction of toxic waste.

Article 19
Right to Sustainable Development

1. Women shall have the right to fully enjoy their right to sustainable development.

2. State Parties shall take all appropriate measures to:

- a) ensure that women participate fully at all levels in the conceptualisation, decisionmaking, implementation and evaluation of development policies and programmes;

- b) facilitate women's access to land and guarantee their right to property, whatever their marital status;
- c) facilitate women's access to credit and natural resources through flexible mechanisms;
- d) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- e) ensure that in the implementation of trade and economic policies and programmes such as globalisation, the negative effects on women are minimised.

Article 20

Widows' Rights

State Parties shall take appropriate measures to ensure effective implementation of the following provisions:

- a) Prohibit that widows be subjected to inhuman, humiliating and degrading treatment;
- b) Widows shall become the guardians of their children, after the death of the husband;
- c) Widows shall have the right to marry a person of their choice.

Article 21

Right to Inheritance

1. A widow/widower shall have the right to inherit each other's property. In the event of death, the surviving spouse has the right, whatever the matrimonial regime, to continue living in the matrimonial house.

2. Women and girls shall have the same rights as men and boys to inherit, in equal shares, their parents' properties.

Article 22

Special Protection of Elderly Women and Women with Disability

Elderly women and women with disability have the right to specific measures of protection commensurate with their physical and moral needs.

Article 23

Interpretation

The African Court on Human and Peoples' Right shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Article 24

Signature, Ratification and Accession

1. This Protocol shall be open to signature, ratification and accession

by the State Parties, in accordance with their respective constitutional procedures.

2. The instruments of ratification or accession shall be deposited with the Secretary General of the OAU.

Article 25

Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.

2. For each of the State Parties that accedes to this Protocol after its coming into force, the Protocol shall come into force at the date of deposit of the instrument of accession.

3. The Secretary General of the OAU shall inform the State Parties of the coming into force of this Protocol.

Article 26

Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.

2. Proposals for amendment or revision shall be submitted, in writing, to the Secretary General of the OAU who shall transmit same to the State Parties within thirty (30) days of receipt thereof.

3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of State Parties, in accordance with the provisions of paragraph 2 of this article.

4. Amendments or revision shall be adopted by the Assembly by consensus or, failing which, by a simple majority.

5. The Commission may also, through the Secretary General of the OAU, propose, amendments to this Protocol.

6. The amendment shall come into force for each State Party which has accepted it thirty (30) days after the Secretary General of the OAU has received notice of the acceptance.

Article 27

Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of rights of women contained in the national legislation of State Parties or in any other regional, sub-regional, continental or international conventions, treaties or agreements applicable in these State Parties.