POLICY BRIEF

REVISITING SOUTH AFRICA'S RESERVATIONS TO THE MAPUTO PROTOCOL

LEVERAGING ARTICLE 31 OF THE PROTOCOL FOR REMOVAL OF SOUTH AFRICA'S RESERVATIONS

Tshwaranang Legal Advocacy Centre

in partnership with

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Introduction

The Protocol to the African Charter on Human and People's Rights (henceforth ACHPR) on the Rights of Women in Africa, also known as the Maputo Protocol, was adopted by the Assembly of the African Union on 11 July 2003. This Protocol entered into force on 25 November 2005 after securing 15 ratifications from African Union Member States. The landmark adoption and ratification of the Maputo Protocol was a culmination of dedicated advocacy efforts of African women, who worked closely with the African Union Commission's Women, Gender and Development Directorate, the African Commission on Human and People's Rights (ACHPR)'s Special Rapporteur on Women's Rights, and the coalition Solidarity for African Women's Rights (SOAWR). The Maputo Protocol is referred to as the "African women's Bill of Rights", in recognition of its comprehensive provisions that address African women's challenges and struggles, and its acknowledgment of their contributions to and potentials for social, political, cultural, and economic life.

South Africa was amongst the first countries that committed to be bound by this regional instrument, ratifying the protocol on 17 December 2004 and depositing the signed Instrument of Ratification with the secretariat of the African Union on 14 January 2005. This was in accordance with Article 28 of the protocol.[1] The preamble of the ratification certificate provided that the "[…] ratification of the Protocol was approved by the South African Parliament in accordance with the requirements of South African law, subject to […] reservations and declarative interpretations." South Africa is one of the six[2] countries that have asserted reservations regarding the Maputo Protocol. The reservations made pertain to Article 4(2)(j), Article 6(d), and Article 6(h). Article 4(2)(j) addresses the issue of subjecting pregnant women and nursing mothers to the death penalty. Article 6(d) calls for registration of customary marriages, and Article 6(h) concerns the issue of nationality or citizenship for children born to non-nationals. The two interpretative declarations were made to Article 1(f) on the definition of "discrimination against women" and Article 31, which

[2] The other 5 countries are Cameroon, Kenya, Mauritius, Namibia, and Uganda.

deals with the question of whether the South African Constitution offers human rights protection that is more favourable than what the Maputo Protocol provisions.

This policy brief makes a case for South Africa to lift its reservations to the Maputo Protocol. South Africa, together with other African Union Members, committed to the universal ratification, full domestication and implementation of the Maputo Protocol by 2020. This policy brief justifies the proposed lifting of South Africa's reservations through interpretation of Article 31 of the Maputo Protocol that gives precedence to national laws in instances where such laws provide more favourable protection of women's rights than the Protocol provisions. South Africa has fully complied with the Maputo Protocol provisions and, on some rights, has gone beyond the Protocol provisions. As such, the reservations made by the government of South Africa do not serve the purport of reservations in terms of international treaty law.

South Africa's reservations to the Maputo Protocol

Definition of reservations in the Vienna Convention

The Vienna Convention on the Law of Treaties (VCLT) defines a reservation as "a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".[34] The Convention also outlines the requirements for reservations that can be made by Member States. For example, reservations should not be prohibited by the treaty or incompatible with the object and purpose of the treaty.[5] In the event that a reservation made by a State is considered by other Member States to be incompatible with the object and purpose of the treaty, such States can object to such a reservation.[6] Furthermore, a reservation must be formulated in writing.[7]

[3] *The Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series,* vol 1155, p 331, avaliable from https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[4] Art 1(d) Ibid.
[5] Art 19 Ibid.
[6] Art 20 Ibid.
[7] Art 23 Ibid.

An analysis of South Africa's reservations

Article 4(2)(j) of the Maputo Protocol

Article 4(2)(j) of the Maputo Protocol requires Member States to the Protocol that still enforce the death penalty to take appropriate measures to ensure that the death penalty is not imposed on pregnant or nursing mothers. South Africa's reservation to the Protocol reads as follows:

> Article 4[2](j) of the Protocol does not find application in the Republic of South Africa as the death penalty has been abolished. Inasmuch as the existence of Article 4[2](j) may be construed to be an inadvertent sanctioning of the death penalty in other States Parties, this may conflict with section 2 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996). South Africa is in principle opposed to the application of the death penalty and no adverse legal consequences, including any conflict with section 2 of the Constitution of the Republic of South Africa, may be visited upon the Parliament and the Government of the Republic of South Africa pertaining to the ratification of the Protocol.

South Africa's interpretation of Article 4(2) (j) of the Maputo Protocol is that the article provisions contravene section 2 of the South African Constitution. The argument presented by the South African government is premised on section 11 of the Constitution that protects the right to life of everyone in South Africa across sex and gender. Mujuzi[8] highlights two implications of this reservation. Firstly, this means that South Africa is against the inherent admission of the death penalty by the Maputo Protocol. Secondly, this implies that South Africa cannot facilitate the imposition of a death penalty on anyone in South Africa, for example through deportation or extradition of a person to a country where such a person is likely to be sentenced to a death penalty.

Given that the right to life in South Africa is unqualified, South Africa has therefore already complied with this right, and has gone beyond the minimum parameters set up by the Protocol; abolishing the death penalty for everyone. This argument lays the

[8] Mujuzi, Jamil. (2010). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations. *Law, Democracy & Development.*

foundation for lobbying the South African government to lift the reservation made on Article 4(2)(j) of the Maputo Protocol. An interpretative declaration[9] would have been more appropriate in this case, given that South African laws offered more protection to all women in South Africa than the Maputo Protocol did.

Article 6(d) of the Maputo Protocol

South Africa also made a reservation to Article 6(d) of the Maputo Protocol. Article (6)d requires that State Parties enact legislative measures to guarantee registration of marriages for their legal recognition. South Africa's reservation reads as follows:

> The Republic of South Africa makes a reservation and will consequently not consider itself bound to the requirements contained in Article 6(d) that a marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognised. This reservation is made in view of the provision of section 4(9) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), which stipulates that failure to register a customary marriage does not affect the validity of that marriage, and is considered to be a protection for women married under customary law.

South Africa's reservation to Article 6(d) of the Protocol and its justification for this reservation – the "protection for women married under customary law"- is, at face-value, reasonable given the number of women who got married under customary law before the advent of the Recognition of Customary Marriages Act.[10] Although section 4 of the Recognition of Customary Marriages Act provides for registration of customary marriages, section 4(9) stipulates that registration of a customary marriage is not a requirement for its validity. Article 31 of the Maputo Protocol make provisions for instances where national laws offer more progressive and favourable protection of women's rights than the Protocol. Whether or not such marriages are registered, the protection that this legislation affords them is equality with men, the right to own property, the right to seek a divorce if they think that a marriage has irretrievably broken down, and for the divorce to be processed through the courts[11].

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[9]The Vienna Convention does not define or make provision for interpretative declarations. The United Nations Office of Legal Affairs (Treaty Handbook) describes the purpose of an interpretative declaration as "clarifying the meaning of certain provisions or of the entire treaty."

[10] Act 120 of 1998

[11] Mujuzi, Jamil. (2010)

It is important to note that generally, the Recognition of Customary Marriages Act provides that customary marriages must be in writing; however, this requirement is not for validity purposes, but for affording women protection. The preamble of the Recognition of Customary Marriages Act specifically outlines the purport of the Act: "to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; [and] to provide for the equal status and capacity of spouses in customary marriages […]"[12] South Africa's requirement for registration of customary marriages is aimed at protecting spouses from entering into other marriages without their spouses' knowledge. Registration of marriages provides a public record for any interested party about the marital status of the spouses or intending spouses, and therefore offers more protection to the concluded marriages. The legislation already gave a reprieve for registration of customary marriages that were concluded before the Act came into force, to be registered within a specified period.[13] South Africa's ongoing process of developing a harmonised Marriages Bill led by the Department of Home Affairs[14] could present an opportunity to address the reservation made on Article 6(d) by mainstreaming the requirement for registration of all marriages in South Africa. Article 31 of the Maputo Protocol provides a legal basis for South Africa's removal of this reservation, based on the fact that South Africa's Recognition of Customary Marriages Act affords women favourable protection in marriage than the Maputo Protocol does.

Article 6(h) of the Maputo Protocol

South Africa also entered a reservation to Article 6(h) of the Protocol that provides for men and women's equal partnership in marriage and equal enjoyment of rights. To this end, Article 6(h) mandates State Parties to enact laws that guarantee equal

[12] Preamble to the Recognition of Customary Marriages Act at http://www.saflii.org/za/legis/consol_act/rocma1998366/ [Accessed 20 November 2020]

[13] Section 4(3)(a) of the Recognition of Customary Marriages Act provides that a customary marriage "entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette.*"

[14] This new Marriages policy or Bill will enable South Africans of different sexual orientation, religious and cultural persuasions to conclude legal marriages; will introduce strict rules around the age of marriage); align the marriage, matrimonial property and divorce legislation to address matrimonial property and intestate succession matters in the event of the marriage dissolution; allow for equitable treatment and respect for religious and customary beliefs in line with Section 15 of the Constitution; deal with the solemnization and registration of marriages that involve foreign nationals; and deal with the solemnization and registration of customary marriages that involve non-citizens especially cross-border communities or citizens of neighboring countries.

rights in respect of nationality of their children, with the exception in instances where national legislation or national security interests provide otherwise. South Africa's reservation reads as follows:

> The Republic of South Africa makes reservation to Article 6(h), which subjugates the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children.

South Africa's rationale for this reservation is that it protects the "inherent rights" of children to citizenship and nationality. This reservation is justifiable when it comes to the nationality of children where one of the parents is a citizen or national of a country with laws that vest children's citizenship to one of the parents, to the exclusion of the other. Mujuzi[15] gives Egypt as an example, where nationality law at the time stipulated that a child must always take the father's nationality, as it was believed that taking the mother's nationality was prejudicial to the child. Using the same example, if a child is born to an Egyptian mother and a South African father, the child would not be registered in Egypt as a citizen. In this case, if South Africa passes national law that prohibits such a child's citizenship in South Africa for national or security interests, the child would be rendered stateless. On this basis, the reservation is justified. However, it must be noted that the national interest or national security qualification constitute exceptions to the general rule and are not the focus of Article 6(h). Unless South Africa intends to develop such legislation that would exclude nationality or citizenship of children who otherwise qualify for citizenship according to the South African immigration and citizenship laws, based on national or security interests, then the reservation does not serve any significant purpose. Currently, South Africa does not have laws that deny children South African citizenship based on national interests or security. Article 31 of the Maputo Protocol also shields South Africa from any sanctions or negative consequences that may arise from the provisions of Article 6(h) of the Maputo Protocol.

[15] Mujuzi, Jamil. (2010).

Recommendations

The shadow report made by South African Civil Society Organisations (CSOs) made some observations on South Africa's reservations and the interpretative declarations, urging South Africa to lift some of the reservations. The report was submitted in response to the South African Government's report on Part B of the African Charter on Human and People's Rights, which was submitted to the ACHPR in 2016. The shadow report called for the removal of South Africa's reservation on Article 4(2)(j) of the Maputo Protocol, noting that the reservation was not necessary as the provision did not violate or contradict South African law. CSOs acknowledged the justification by South Africa for making a reservation on Article 6(d) and noted that the reservation alone was not enough to protect women in unregistered customary marriages and urged the government to take proactive measures in protecting women in polygamous unions. CSOs however commended the South African government for making a reservation on Article 6(h).

Regarding the above discussion of the provisions in Article 31 of the Maputo Protocol, the case is made for South Africa's removal of its reservations to the protocol. Given the protections to South Africa's non-compliance with the provisions cited in its reservations and based on its national laws affording women and girls more favourable protection than the Maputo Protocol, the following recommendations are therefore made to the South African government:

Lift reservations made to the Maputo Protocol on Articles 4(2)(j), 6d) and 6(h) of the Maputo Protocol.

South Africa is not at risk of being sanctioned by the African Commission on Human and People's Rights for non-compliance with Articles 4(2)(j), 6(d) and 6(h) of the Maputo Protocol. Given that South Africa's reservations are more interpretative and declaratory than reservations, and in the event that South Africa feels strongly about clarifying its progressive national laws that go beyond the protection parameters provided by the Maputo Protocol on Articles 4(2) (j), 6(d) and 6(h) of the Protocol, it is recommended that South Africa turns the reservations into interpretative declarations. South Africa made two declarative reservations to the Maputo Protocol, and these reservations can be added to the interpretative declarations. Unlike

reservations which can only be made upon ratification of the Treaty, without similar provisions regulating the interpretative declarations, South Africa can test the waters of international treaty law and instead seek to turn these reservations into interpretative declarations.

Conclusion

This policy brief makes a compelling case for South Africa's lifting of the three reservations made upon its ratification of the Maputo Protocol. The Maputo Protocol did not make provisions for reservations. In line with the objectives of full ratification and implementation of the Maputo Protocol by 2020 articulated in the 10-year Women's Decade, revisiting South Africa's reservations and making a case for their removal based on the Maputo Protocol provision in Article 31 is not only timely but would also fulfil South Africa's commitment to its goal for the Women's Decade.

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