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# Commentary on the Right to Education

## An Expository of Article 12 of the Maputo Protocol

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**Abstract:** The right to education is identified as a crucial and classical right. This classification is premised on the fact that it provides the basis on which an individual has the potential to transform their status and build their desired personality. Additionally, it is the basis on which society is projected to be transformed and set on a better pedestal, with individuals playing positive roles. The recognition of the right, though emanating from the Universal Declaration of Human Rights (UDHR) received only tacit recognition through other treaties. The Maputo Protocol recognises the right to education, as it flows from the African Charter on Human and Peoples' Rights. This commentary, therefore, examines the right to education as enshrined in the Maputo Protocol with the aim of restating the grounds covered in the protection of female children and women and exposing lost opportunities. Finally, it makes recommendations on how the lost ground can be covered and give better content and scope to the right to education.

**Keywords:** girl child, education, Maputo Protocol, human rights

### 1. Introduction

The importance of the right to education is evidenced in the fact that education enables female children to acquire the knowledge, values and skills that are needed to function in a civilised society (Singh, 2016, p. 119). According to the World Bank, “every day, girls face barriers to education caused by poverty, cultural norms and practices, poor infrastructure, violence and fragility” (World Bank, 2022). The World Bank further reports that, according to UNESCO, about 129 million girls remain unable to access education. The statistics cover both girls of primary and secondary school age. From the above statistics, the completion rate is placed at about 63% (World Bank, 2022). A great concern is that close to about 4 million girls are projected as never being able to access school because of the factors mentioned above, especially that of growing conflict (World Bank, 2022).

It is perhaps not surprising at all that one of the rights celebrated and protected in the struggle to emancipate the female gender is her right to education. Additionally, considering the patriarchal nature of African society, it can be said that the various treaties and literature that speak to the protection of rights of individuals, particularly females, can never be too much or over-emphasised.

Consequently, the right to education is a fundamental right that is appropriate and its implementation advances fulfilling the protection of the rights of female children and women in Africa. Mandela argues that education remains the tool through which the child of a peasant can change their status to become influential in society. Within the African context, Fafunwa (1974), Ikejiani (1965), Kenyatta (1979) and Ngugi (1981) all advocate education as a means of reaffirming dignity and ensuring that the identity of a people is not eroded, while promoting both individual and communal development.

This commentary focuses on the Maputo Protocol with specific attention to the provision in Article 12, the right to education. The Maputo Protocol was initiated by the OAU through its resolution AHG/Dec.126 (XXXIV) during the 34<sup>th</sup> Ordinary Session that was held on 8–10 June 1998 in Burkina Faso. The resolution came about because of the recommendation AHG/Res. 240 (XXXI) made during the 31<sup>st</sup> Ordinary Session held on 26–28 June 2005 in Addis Ababa, Ethiopia. The need for a Protocol arose from the acknowledgment of the priority of women in the socio-political development of Africa. The increased recognition of the structure of society as one that marginalises women and treats them as inferior, as well as the ratification of the Convention on the Elimination of Discrimination against Women (CEDAW) by African countries, led to agitation for a more comprehensive and domestic instrument that speaks to the rights of women in Africa.

The meeting, organised by the Women in Law and Development in Africa (WiLDAF) in March 1995, in Lomé, Togo enhanced advocacy in this respect. The meeting proved effective, as the Organization of African Unity called for an instrument to be drafted by the African Commission (Pambazuka website), which created a committee of experts made up of its members, representatives of African NGOs and international observers. The committee submitted its completed draft in 1999 and the protocol was adopted on 11 July 2003, by the African Union at its second summit in Maputo, Mozambique.

### **1.1. Did the right exist in other international treaties at the time – Or was it a first?**

The existence of the right to education in Africa before the Maputo Protocol is one that cannot be categorically stated. This is premised on varying contextual histories of what amounts to an education in each particular society. Before the influx of colonialists and their formal system of education and the resultant effect of treaties emerging that address the right of women and the female children to an education, the perception of African societies regarding girls and their education was quite different, as girls were to be taught by their mothers while boys were to be trained by their fathers (Bowen & Hobson, 1974). In customary societies, females were seen as homemakers while men

were sent out to ensure the survival of their families and that is why, in the traditional African setting, a woman stays at home to cook while the man goes out to hunt or farm for the survival of the family (Anyanwu & Onuora-Oguno, 2013).

Society gave the education it deemed necessary to each child based on gender and perceived gender roles. This is perhaps why some people have argued that there has been no time in which girl children were denied a right to education. It is important, however, to restate that education, which was stereotyped and aimed at keeping the female child as a beast of burden, is not envisaged as education, *stricto sensu*. The extent of the numeric literacy of the female children was indeed one that left much to be desired; this necessitated a concerted effort towards ensuring the recognition of the right to education in general and specifically for female children (Ayodele & Adedokun, 2012).

Imperatively, before the advent of the Maputo Protocol, several other instruments in international law already provided for the right to education from a general perspective. The right to education is traceable to the Universal Declaration on Human Rights, which states that “everyone has a right to education” (Article 26 UDHR). This position is further elaborated by scholars such as Audrey, who identified the important role of governments in achieving a universal right to education (Audrey, 2012). Commenting on the importance of education, the United States Supreme Court in its landmark case of *Brown vs. Board of Education* (1954 para. 493) noted that “it is doubtful that any child may reasonably be expected to succeed in life if the child is denied the opportunity of an education” (Bantekas & Oette, 2013). Specially commenting on the importance of education for the female children, CEDAW in its General Comment No. 36 restates the importance of education for achieving equality in society and increasing equal access to available opportunities.

One of the main instruments for human rights is the African Charter on Human and Peoples’ Rights (African Charter). It provides for the right to education of Africans in line with the mandate of the African Union, which is “freedom, equality, justice and dignity of the African people” (Article 17). The African Charter is at most an umbrella provision for the rights of persons, which causes a huge gap in the implementation of those rights based on the Charter alone. The right to education under the Charter is ambiguous and can be subject to various interpretations. For instance, the preamble of the Charter provides that the rights in the Charter are to be enforced in line with the traditions and values of the people, and this can lend credence to the interpretation of Article 17 as maintaining the status quo of the type of education traditionally given to women and the female children.

If such an interpretation is given to the Charter, it means the tradition of sending females to fattening houses, where they are taught to satisfy their husbands after marriage, which is the form of education practiced in some parts of Africa, would be deemed lawful and in line with the Charter although it may go against the spirit of the Charter. It is instructive to note that culture as envisaged is as explained in the African Commissions Guiding Principles, which provides that “the right to culture protects positive African values consistent with international human rights standards and implies an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights” (Para. 77).

## **1.2. Current relevant context – Brief information on the real-life situation addressed by the article, e.g. statistics on child marriage, for instance; how prominent is the issue?**

With the influx into the continent of westerners, ideologies on various things such as rights, equality, education and several other key concepts strengthened the interaction of individuals in the modern world. This position is very important to note, as the concepts of equality, education and others already existed in Africa even before the influx of western education on the continent. The arrival of foreigners brought about the introduction of western or formal education, which society accepted, although for only male children, from the outset; males were allowed to go out of the home to learn about how to provide for their families. Females were, however, not given the same access to formal education as their male counterparts for many reasons steeped in the culture of several communities. Historically, women were treated essentially as chattels, who did not have a name but were given the name of their owners to indicate who owns them at a given time. Thus, women and female children were given the names of their fathers while preparing for married life and, once married, given the name of their husbands, who were considered their new owners. Thus, their ability to take care of the house of their owner at a given time amounted to sufficient education for them and their communities saw no need for any other form of education.

It was presumed that girls ought not to be exposed to cultures and places that can corrupt them and they are safest at home, hence, there was no need for western education, which they regarded with a level of distrust (Nduka, 1975). Due to these factors and others, women and the female children were not given access to formal education when it was introduced, and this history will lay a foundation for the dismal gap between the education of the male and the female population in Africa in later years.

The challenge of child marriage continues to stare the female children in the face, despite the increasing awareness of the importance of education. During the Covid-19 pandemic hot periods, several girls who stayed out of school were subjected to domestic abuse and sexual assault. The direct implication of this is that keeping girls in school helped to keep them safe and out of trouble.

Aside from the above challenge, a sustained threat in the school space arena is another violation of the right to education. Attacks on girls attending schools continue to soar with consistent abductions which scares girls away from attempting to access school.

## **2. Drafting history**

In the initial draft of the Protocol, CAB/LEG/66.6/Rev.1, the right to education was provided in Article 11. The provision of the article concentrated on the removal of stereotypes in education and focused on training. It provided for shielding female children from sexual harassment in school and advocated the promotion of science and technology for girls. Following comments by the Legal Counsel and further consultations,

another draft was arrived at in 2003. It is important to take cognizance of the provisions of the UNESCO 1960 Convention Against Discrimination in Education, stating that private education or single-sex education does not amount to discrimination in this context.

The Draft Protocol adopted in 2003 enhanced the scope of Article 11, which in the present Draft became Article 12. A specific reference is made to the female children and providing sanctions against violators of the rights of the girls in school. The need for post-violation practice was also introduced in the form of guidance and counselling, while the need to include a gender approach in all spheres of activities was included. It is instructive to note the role of the Committee of Experts in the inclusion of the new clauses in the final draft version of the Draft Protocol.

The Maputo Protocol, as stated earlier, built upon the provisions of human rights in the Africa Charter particularly, those of women and female children by offering more detail. As opposed to the vague provision on the right to education in Article 17 of the African Charter, Article 12 of the Maputo Protocol provides for the right to education and training, which shows the recognition of the formal and informal education of females but most importantly, her right to choose the one more suitable for her.

The protocol's existence is in conformity with other international instruments on the rights of females and timely, as there is an increase in demands for equality and the dignity of females. Upon its adoption, there were reservations regarding certain provisions of the protocol, especially concerning the right to health and women's control of their own reproduction, which was seen as targeting the family, but no reservation to the right to education. Nevertheless, since its adoption, a total of 6 countries are yet to sign the protocol, 13 have not ratified it and 3 members of the African Union have neither signed nor ratified it, namely Botswana, Egypt and Morocco. In general, however, the protocol has received a good reception in African countries, at least on paper if not in implementation.

Despite the existence of this instrument, its acceptance and its binding nature, unlike other similar instruments such as the Beijing Declaration, it is noteworthy that the marginalisation of the female gender persists in most African countries in one form or another (Gawaya & Mukasa, 2005). For instance, the structure of academic and vocational institutions is one that prevents women from taking full advantage of their right to access to education and training (Ojobo, 2008). A female who is pregnant, for example, has very little allowance for balancing her education and impending motherhood and is most likely to drop out (Zewide, 1994). Moreover, the cost of education is so expensive in most African countries. Polygamy also impacts most families, which results in lots of children, and parents are unable to educate all their children but might have to select who will get a chance to be literate and the choice in most cases is the male child of the family, as there is a belief that it is only through male children that the family legacy can live on.

In Uganda, a high level of forced marriages, which represent a blatant disregard of the right to dignity of the female (Addaney & Onuora-Oguno, 2017) has been noted, mostly because of the Covid-19 pandemic which led to schools and the economy being shut down. Female children were given in forced marriages by their parents in exchange

for money, and such a transaction reduced them to chattels, which is a perception of the female that the Maputo Protocol set out to correct (Anyanwu & Onuora-Oguno, 2013). Girls were unable to continue their education even after the worst of the pandemic passed, as they were now saddled with the responsibilities attached to a married female in Africa.

In northern Nigeria, the terrorist group *Boko Haram* repeatedly kidnapped young girls from school and stated one of their reasons as the prohibition of female education according to the tenets of their religion (Onuora-Oguno & Abdulaheem-Mustapha, 2018). These girls were forced to marry and give birth to the terrorists' children, and even after their rescue they were mostly unable to reintegrate and regain their status in society. A country like South Sudan, which is yet to ratify but has signed the Protocol, also has a very low female participation in formal education as shown by statistics (Hodal, 2017).

All these show that the Protocol's effect is not yet as far-reaching as it should be and can be. Notwithstanding these limitations, since its adoption in 2003, the Maputo Protocol has contributed to shifting the trajectory on the promotion and protection of women's human rights in Africa.<sup>1</sup> Many countries have established mechanisms and policies to ensure the protection of women's rights and to make sure there is no violation or compensation is given for violations. In countries such as Uganda, Kenya, Rwanda and South Africa, in addition to human rights commissions, which are traditionally regarded as National Human Rights Mechanisms, there are specific Gender Equality or Equal Opportunities Commissions, specifically dedicated to the rights of women.

### 3. Concepts

Concepts important in the discourse of the right to education such as quality, access, availability, acceptability, adaptability, curriculum and teacher welfare are discussed in this section. The provisions of Article 12 is lauded in the sense that it specifically provides for means of ensuring that the experience of female children is enhanced. Article 12 (1) (a)–(e) is capable of enhancing access to education for female children. It seeks to ensure the elimination of all forms of stereotypes that would impact negatively on access to education. Similarly, the Article also advocates that governments should ensure proper policies that will enhance the education of the female children. The need to ensure their protection from all forms of harassment are equally captured in the Article.

Article 12 (2) is also very instructive, as it touches on sustained education and training for girls. A key point highlighted is the need to ensure retention at school. As already discussed, retention is a huge challenge that confronts female children's experience of access to education in Africa.

It is noted, however, that a key missing factor in the Protocol is an express provision on what the content of education itself should be as a fundamental right. Conversely, this is not a huge challenge, as this is covered by Article 13 of the International Covenant on Economic Social and Cultural Rights (ICESCR), which enshrined the right to education,

<sup>1</sup> Maputo Protocol on Women's Rights: A Living Document for Women's Human Rights in Africa, submitted by the Women, Gender and Development Directorate of the African Union Commission (<https://bit.ly/431SgkB>).

and its General Comment also gives a deeper reflection of its provisions (Beiter, 2006). Additionally, CEDAW, in its General Comment, focuses on three vital areas in its approach to education. These comprise the right to education, rights in education and rights through education (Para. 14, CEDAW GC No 36). Article 12 makes allusions to these key areas and therefore must necessarily be interpreted in conjunction in order to give full meaning to the intent of the drafters. Hence, considering the provisions of the General Comment (GC 13 and GC No 36 of CEDAW) on education it is plausible that one should rely on the provision and explanation of it to enhance the interpretation of Article 12. A further analysis reveals that GC 13 contextualises the right to education to encompass rights to and in education. Onuora-Oguno explains the context of the right to education as including issues of accessibility and reasonable accommodation, while rights in education includes the issues of curriculum content and an education space free from violence and discrimination (Onuora-Oguno & Shannika, 2018). Discussing this from a general and specific perspective, it is identified that the full gamut of Article 12 makes no direct reference to the concept of quality. Quality education, as captured by several scholars (Coomans, 2007), is pivotal to the realisation of the rights to and in education. Tomasveski (2001) clearly identifies four pivotal paradigms to ensure and measure quality. The 4As cover the ambit of Availability, Acceptability, Affordability and Adaptability.

The question of availability speaks closely to issues of access to education and availability of schools and learning materials. An emerging area that could be investigated is adaptability for the female children, especially in the emerging jurisprudence of girls' menstrual health. Poor sanitary conditions in schools and lack of access to sanitary pads are huge areas that impact negatively on the learning experience of the female children. The poor economic reality is another factor that denies the female child any experience of the right to education. For instance, school fees keep female children away from schools and in some circumstances force them into child labour, sexual violence and other abuses.

A core aspect of quality is teacher training. This continues to be elusive and leaves female children in looming danger every inch of the way in the school spheres: the continued kidnapping and murder (Usman, 2020) of female children. The mention of teacher training without adequate mention of teachers' welfare is perhaps another missed opportunity. Considering that women, for instance, are more common in the teaching profession, which is a gendered stereotyped role, as women are seen as caregivers with poor welfare (Onuora-Oguno, 2018) and their security demands further attention. In very recent times, news of attacks on teachers in schools have caused shock in several quarters (Serra, 2022).

#### **4. Consolidating the gains of Policies on the Right to Education**

There is a need to ensure that the gains on efforts towards realising and eliminating inequality in education must be sustained. A perusal of some Concluding Observations and Recommendations shows that States have been called upon to ensure the elimination of "inequality and gender disparity in school enrolment, retention and completion

at all levels of education (primary, secondary, and tertiary)” (Para. 88 Concluding Observation on Nigeria). Additionally, the need to “strengthen ongoing initiatives towards eliminating gender disparities in school enrolment, retention and completion at all levels of education (primary, secondary, and tertiary), and ensuring full and equal access to quality education for all children”.

Further Concluding Observations made reflect the need for States to ensure an enhanced education budget (Para. 35). Uganda’s effort in the growth of inclusive education is acknowledged and this should be emulated by other countries in order to improve the right to education.<sup>2</sup> Like Nigeria, Uganda is encouraged to ensure a growing retention rate in schools, especially by ensuring that the government does not neglect its primary obligation to provide education and rely on the establishment of private schools. On its part, the government of Togo, is acknowledged for its efforts on promoting girls’ education.<sup>3</sup> However, it is further encouraged to eliminate harmful voodoo practices that inhibit girls’ access to education. The need to strengthen equality of access to basic amenities in rural and urban communities was identified and addressed in the concluding observation for South Africa.<sup>4</sup>

A further consideration of all observations and State reports shows, for instance on a specific paradigm, that para. d of Article 12 continues to loom large, as its implementation is still strongly lacking. The culture of silence and disdain with which offences of sexual violence are treated in African communities continues to impact negatively on the threshold of access to education (Onuora-Oguno & Shannika, 2017). The poor completion rate of girls in schools are attributable to discrimination suffered within the school sphere. The curriculum content continues to perpetrate age-old discriminatory philosophies against female children.

Another core perspective for appreciating the extent to which states engage with the Maputo Protocol is that of a gendered approach to policy-making and implementation. This strategy can be implemented in Africa and countries can ensure that women are part of the decision makers in the education sector so that they can ensure that policies for that sector and its operations will favour women and ensure the protection of their access to education. A gendered approach would ensure that a deliberative model is adopted in tackling challenges facing women generally and particularly on the right to education. This process would impact the curriculum content and interpretation of curricula in schools. The effect would imply the gradual discontinuation of stereotyped narratives and approaches on issues that affect female children and women and therefore eliminate the violation of female children’s rights to education (Onuora-Oguno et al., 2018).

The right to education in the majority of African countries still looms large as it is not fully recognised at constitutional level. In most countries, education is enshrined as a fundamental objective of state principles and thus seen as a mere obligation and aspiration. Scholars like Viljoen argue against this position, stating that it should be treated as obligatory for states to meet the aspiration rather than treat it as mere privilege. In Nigeria,

<sup>2</sup> For more information see <https://www.maputoprotocol.up.ac.za/uganda>

<sup>3</sup> For more information see <https://www.maputoprotocol.up.ac.za/togo>

<sup>4</sup> For more information see <https://www.maputoprotocol.up.ac.za/south-africa>

for instance, education is assumed to be non-justiciable, however, scholars such as Onuora-Oguno (2019), Egbewole & Alatise (2017) and Ikpeze (2015) all argue against this position. It is opined that, by virtue of the treaty obligation of the African Charter, the right to education is justiciable and enforceable. In contrast, South Africa, Kenya and Ghana are some of the leading countries that recognise education as a fundamental right. This position explains why there is more growth in legal cases in these countries. South Africa leads the way with the highest number of cases adjudicated by the courts. Skelton advances that the courts have a strong impact on ensuring that the right to education is protected within South Africa. This position, however, comes with some caveats for courts to know when to draw the lines in doing so. Mbazira also raises this caution while warning that court decisions must be ones that can be implemented, as non-implementation will whittle down the value of such decisions (Mbazira, 2009).

Sub regionally, the Maputo Protocol, alongside other treaties, has been relied on to reject any practice that can limit female children's equal access to education. An instant case is that of *Women Against Violence and Exploitation in Society (WAVES) vs. The Republic of Sierra Leone*, (ECW/CCJ/APP/22/18): the ECOWAS court found the Policy that provided a different learning space for pregnant girls breached, among several treaty obligations, the Maputo Protocol. The court urged the government to reverse such policies and adopt an inclusive learning model. The issue of teen pregnancy is a huge challenge that negatively impacts female children's education (Sefoka & Odeku, 2021). Sadly, society continues to ignore the fact that female children are constantly subjected to sexual violence at home and in the community and this results in discrimination against pregnant learners. Teenage pregnancy thus is a huge impacting factor in the completion rate of girls. This is one of the core areas that the Maputo Protocol condemns and it encourages governments to take legislative steps to ensure that this discrimination is not continually entrenched. The South African case of *the Head of Department: Department of Education, Free State Province vs. Welkom High School & Harmony High* (The Welkom Case, Case no: 766 & 767/2011) further provides interesting jurisprudence that points to the right of a pregnant learner not to be denied access to school. In the *Welkom case*, the courts found the actions of a school principal to suspend a pregnant learner from staying in school based on not impacting the morality of other girl learners to be a violation of the right to education.

The cases decided in most municipal courts, although protecting the female child in certain circumstances, are not rich in reliance on the Maputo Protocol (Onuora-Oguno, 2015). However, it is worth noting the decision of the court in *RM Katakwe vs. Edward Hakasenke and Others* (2006/HP/0327, High Court, Zambia). In this case, the court considered a case of sexual violence against a female child by a teacher, and relying on the provisions of the Maputo Protocol read in consonance with Zambian law, found the teacher and school liable. Omondi et al. reports the dictum of the court thus:

- that the school takes over parental responsibility for the child for the time they are at the school. The law therefore places an obligation on the school to take care of the children for the period they are under their care. The owners of the school, in this case the government, owed a duty to the child (Omondi et al., 2018).

In the case of *WJ & another vs. Astarikoh Henry Amkoah & 9 others*, an *imparia materia* case with Katakwe, it is further reported that a Kenyan Court held thus:

- Indeed, I would go so far as to say that the TSC [Teacher Service Commission], the State and any educational or other institution in which teachers or other care givers commit acts of sexual abuse against those who have been placed under their care is vicariously liable for the wrongful acts of its employees” (Omondi et al., 2018, p. 74).

The import of the two cases above indicates that the courts are willing to engage with the provisions of regional and international law treaties protecting rights. While the Maputo Protocol was not relied on by the *amicus* in the instant case, reliance on treaties from the African human rights architecture is a pointer on the interest of courts to rely on treaties in safeguarding the interest of female children within the educational environment (Para. 147 of the Henry Amokah Case).

## 5. Conclusion

The importance of the Maputo Protocol in ensuring milestone progress in the continued struggle for the education of females is quite glaring from the improvements in the educational policies of African countries. There is however a need to ensure that there are follow up mechanisms to ensure that these policies are actually implemented and not just available on paper.

The chapter concludes that the importance of the right to education to the emancipation of female children is pivotal. It further underscores the need for equal access and quality content of the accessed education. Furthermore, the importance of appreciating that education must be tailored in such a way as to protect the dignity of girls was reiterated. The need for governments to treat education as a fundamental right resonates strongly with the need for a different approach to issues of education amongst African nations.

The chapter further concludes that the courts have roles to play in protecting the right to education, samples cases where both direct and indirect references are made to the right to education and dismantling of all discriminatory obstacles are highlighted.

## 6. Recommendations

To better facilitate the protection of rights to education for girls, the African Union can adopt new policies that have potential for sustaining the policy on education and the development of the continent. The African Union Agenda 2063 provides a framework, which, if read closely with the provisions of the Maputo Protocol, has great potential (Onuora-Oguno et al., 2018).

States are encouraged to ensure that they put in place policies that will drive the right to education to materialise. The treaty obligations of states to state reporting are measures

established to assess the extent of states' implementation of their treaty obligations. Other aspects are the roles courts can play in protecting the right to education and its impact on the development of female children. The rationale for an inclusive and holistic development of women is that "women who are safe, healthy, educated and fully empowered to realize their full potential transform their families, their communities, their economies, and their societies" (UNDP Annual Report 2017).

There are also several international policies for ensuring the participation of women in decision making in several sectors, such as the UN Framework Convention for Climate Change and the Hyogo Framework for Action. All these will ensure that the interest of all women is factored in whenever decisions are made.

Finally, the Maputo Protocol must not be considered in isolation if the gaps in it pertaining to the right to education are to be cured. General comment No. 13 and General Comment No. 36 must be closely relied on if the provisions of Article 12 of the treaty are to receive expansive interpretation and possible implementation.

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