

To cite: N Ntlama-Makhanya & N Lubisi-Bizani 'The 'Africa we want' in the African Union's Agenda 2063 on the realisation of women's human rights to access justice' (2021) 21

African Human Rights Law Journal 290-310

<http://dx.doi.org/10.17159/1996-2096/2021/v21n1a13>

The 'Africa we want' in the African Union's Agenda 2063 on the realisation of women's human rights to access justice

*Nomthandazo Ntlama-Makhanya**

Professor of Public Law and Acting Head: UNESCO 'Oliver Tambo' Chair of Human Rights, Nelson R Mandela School of Law, Faculty of Law, University of Fort Hare, South Africa

<https://orcid.org/0000-0001-5182-9474>

*Nombulelo Lubisi-Bizani***

Dean, Nelson R Mandela School of Law, Faculty of Law, University of Fort Hare, South Africa

<https://orcid.org/0000-0002-4073-9518>

Summary: *This article examines the envisioned design of the 'Africa we want' through the lens and intersection of the principles of the rule of law and access to justice in the elimination of the barriers that compromise the promotion of the rights of women in contemporary Africa as envisaged in Agenda 2063. The objective is to affirm the language of rights as an enabling environment that will advance the promotion of the rights of women in the regulation of state authority. The purpose of the article is grounded by many of the challenges faced by women of Africa in the enjoyment and fulfilment of their rights. The article raises questions on the improvement of access to justice by women, capacitation of the enforcement agencies and their contribution*

* BJur LLB (Fort Hare) LLM (Stellenbosch) LLD (UNISA); nntlama@ufh.ac.za or gatyeni20@gmail.com

** BJur, LLB, LLM, LLD (Fort Hare); nlubisi@ufh.ac.za

to socio-legal change. These questions are limited to the rights of women within the interrelationship that exists between the rule of law and access to justice. The article starts by setting the tone on the intersection of the two principles and their potential to advance the rights of women in Africa. It then focuses on the significance of the people-centred approach within the framework of the two principles in the advancement of the rights of women of Africa as envisaged in Agenda 2063.

Key words: *rule of law; justice; women; contemporary Africa; human rights; Agenda 2063; social change*

1 Introduction

Following the progress made in the promotion of the rights of women within the community of nations through legal and other reforms, Africa has since aligned itself with the said community in order to remove all the barriers that are faced by women in the enjoyment of their rights. The hosting of the Fourth World Conference on Women of the United Nations (UN),¹ and the subsequent adoption of the Beijing Declaration and Platform for Action,² were some of the many measures and reforms that opened Africa's eyes to the primary role of states' obligations in addressing various challenges faced by women of Africa. The commitment became a stimulus for Africa's empowerment of women in the advancement of socio-political and legal change. It encapsulates an acknowledgment that Africa's progression within the framework of rights of the global community strengthens the domestication of international human rights laws³ in the promotion of the rights of women. It also reinforces the states' obligations in the enforcement of human rights laws on the African

1 Held in Beijing, China, 1995.

2 With the Declaration, the governments were to take note of the following critical areas: (a) women and poverty; (b) education and training of women; (c) women and health; (d) violence against women; (e) women and armed conflict; (f) women and the economy; (g) women in power and decision making; (h) institutional mechanisms for the advancement of women; (i) human rights of women; (j) women and the media; and (k) women and the environment, <http://www.genderequality.ie/en/GE/Pages/BeijingPlatform> (accessed 22 August 2019).

3 These laws include, but are not limited to, the Universal Declaration of Human Rights, adopted 10 December 1948 (Universal Declaration); the International Covenant on Civil and Political Rights, adopted 16 December 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965 (CERD); the International Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979 (CEDAW).

continent, which is known for the arbitrary protection of rights.⁴ The significance of the stimulus depends on the creation of opportunities and the consolidation of the regulatory framework that is enforced through principles such as the rule of law. The latter principle is of direct relevance for the rights of women's access to justice as the most vulnerable members of society.⁵

With the progress so far made, the adoption by the African Union (AU) of Agenda 2063 with an affirmation of 'the Africa we want'⁶ has established the rule of law as one of Africa's seven aspirations that are at the epicentre of promoting the rights of women, especially around access to justice. Agenda 2063 envisages the development and transformative areas of importance, which are encapsulated in seven overarching aspirations. For purposes of this article, the Agenda 2063 encompasses gender equality in aspiration 3 on 'Africa of good governance, democracy, respect for human rights, justice and the rule of law with its people-driven objective which is inclusive of women as envisaged in aspiration 6'.

However, Africa is still faced with many challenges regarding the implementation of the aforementioned principles as many women are subject to various forms of abuse and discrimination. African governments are also implicated in human rights violations, which in turn has dire consequences for women.⁷ Although the African continent appears progressive on paper through the adopted legal reforms that were designed to address the plight of women, sexual, domestic violence, murder and other violent and extreme crimes against women tend to be less frequently reported, lack proper investigation, barely or rarely leading to meaningful conviction that will serve as a deterrent to the future commission of horrific crimes against women.⁸ Hence, the judiciary as the last line of defence in the substantive realisation of all fundamental freedoms is a subject of

4 MG Nyarko & AO Jegede 'Human rights development in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 294. See also M Segun 'Human rights abuses escalate in Africa during the pandemic' 18 January 2021, <https://www.hrw.org/news/2021/01/18/human-rights-abuses-escalate-africa-during-pandemic> (accessed 21 April 2021).

5 D Kobrynowicz & NR Branscombe 'Who considers themselves victims of discrimination? Individual difference predictors of perceived gender discrimination in women and men' (1997) 21 *Psychology of Women Quarterly* 347.

6 Adopted at the 24th Summit of the African Union held on 23-31 January 2015, Addis Ababa, Ethiopia.

7 E Durojaye 'The Special Rapporteur on the Rights of Women in Africa (SRRWA) 2007-2015' (2018) 16 *Gender and Behaviour* 10700.

8 R Jacobson 'Women and the rule of law' (2018) 38 *The Fletcher Forum of World Affairs* 101.

intense scrutiny and unwarranted attacks from the general populace, especially in South Africa.⁹

With this in mind, the article examines the envisioned 'Africa we want' through the lens and intersection of the principles of the rule of law and access to justice in the elimination of the barriers that compromise the promotion of the rights of women in contemporary Africa as envisaged in Agenda 2063. The objective is to affirm the language of rights as an enabling environment that will advance the promotion of the rights of women in the regulation of state authority. The purpose of the article is grounded by many of the challenges faced by African women in the enjoyment and fulfilment of their rights. The article raises questions as to the improvement of access to justice by women, capacitation of the enforcement agencies and their contribution to socio-legal change. These questions are limited to the rights of women within the interrelationship that exists between the rule of law and access to justice.

The article starts by setting the tone on the intersection of the two principles and their potential to advance the rights of women in Africa. It then focuses on the significance of the people-centred approach with reference to the rule of law and access to justice in the advancement of the rights of women in Africa as envisaged in Agenda 2063.

2 The rule of law and access to justice: The double-edged sword for women's rights

2.1 Rule of law and access to justice: Africa's integrated approach for the advancement of women's rights?

This part puts the emphasis on the envisioned aspiration for the intersection of the rule of law and access to justice in the context of Agenda 2063. It discusses the core content of these principles as fundamentals that are grounded in the promotion of the human rights of women. The focus is motivated by Africa's bold step in adopting a common approach that seeks to address the root causes of inequality between men and women in order to ensure the improvement of human rights for all, especially of ensuring women as equal beneficiaries of rights in contemporary Africa.

⁹ See N Ntlama 'Gender-based violence ignites the re-emergence of public opinion on the exercise of judicial authority' (2020) *De Jure Law Journal* 286.

It is without doubt that the rule of law and access to justice have an intrinsic relationship, which is founded on the basic principles of human rights. Both principles are a cornerstone of a functioning democracy in contemporary Africa. Their intersection is essential in bringing stability and promoting peace in Africa, especially for women who are mostly vulnerable. The AU's adoption of Agenda 2063, which is highly commended, gave impetus to the rule of law and access to justice as central values of African governments in ensuring the promotion of the rights of women. Agenda 2063 is a progressive plan that is meant to advance the rights of women which, in turn, has the potential to affirm the principles of gender equality.

Agenda 2063 is evidence of Africa's advancement of women's rights towards the reinforcement of the existing legal framework such as the African Charter on Human and Peoples' Rights (African Charter),¹⁰ which is the founding instrument that is couched and moulded in the language of human rights in Africa.¹¹ The African Charter guarantees human rights to all without exception and requires states not only to protect rights but to go further and ensure their fulfilment. Of particular significance regarding the African Charter is its commitment to the 'African conception of human rights which takes into account the African philosophy of law and the needs of Africa as it set out to combine the specific needs and values of African cultures with standards that have been recognised as universally valid'.¹² This is the envisioned people-centred conception of human rights, to be further discussed below, which starts at the bottom level of family in the consolidation and promotion of the rights language in Africa. The launch of the AU Strategy for Gender Equality and Women's Empowerment 2018-2028 (GEWE) at the AU Summit in 2019 reinforces the African Charter and is testimony to Africa's commitment to the ideals of the global community in the advancement of women's human rights. GEWE is focused on ensuring (a) women's economic empowerment and sustainable development; (b) social justice, protection and women's rights; (c) leadership and governance; gender management systems; (d)

10 Adopted in Nairobi, Kenya in June 1981 and entered into force on 21 October, 1986. It was registered with the United Nations on 10 September 1991 with Certificate 26363.

11 See art 1 of the African Charter which sets the threshold for state compliance with the requisites of the African Charter by reading as follows: 'Member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'

12 See Amnesty International 'A guide to the African Charter on Human and Peoples' Rights' (2006) Amnesty International Publications AI Index: IOR 63/005/2006] 10; see also eg art 18 of the African Charter.

women, peace and security; and (e) media and information and communications technology.

The GEWE strategy buttresses Agenda 2063 which envisages the intersection of the rule of law and access to justice without which the rights of women could not be upheld. It envisions Africa's democratic character, which aspires to be grounded on universal principles of human rights, good governance and justice. These principles underpin the provisioning of a framework for the legal empowerment of women, transparent and accountable institutions, which are charged with the responsibility of improving the quality of the enjoyment of women's human rights.¹³

Agenda 2063 endorses the rule of law as the foundation of regulating effective state authority where the branches and all spheres of the state should adhere and account to the promulgated laws by states. The obligation requires equal and consistent enforcement of the law in ensuring compliance not only with domestic laws but also with those of international human rights law. Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly (EFF)*¹⁴ expressed and contextualised the significance of the rule of law which is of direct relevance to the aspirations of Agenda 2063 and foundational to the regulation of state of authority. It was held:¹⁵

The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.

With the projected vision of the rule of law, it also is difficult to define it. However, its outcomes are a determinant of the principles it seeks to bring to the respective communities as it is characterised by legal certainty; principles of the supremacy of the law; equality before the law; accountability to the law; fairness in the application of the law; participation in decision making; avoidance of arbitrariness;

13 C Fombad & E Kibet 'Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects' (2018) 18 *African Human Rights Law Journal* 205. The authors contend that 'the rule of law is the bedrock on which democracy and democratic practices are supposed to be anchored' (208).

14 [2016] ZACC 11.

15 *EFF* (n 14) para 75.

and procedural and legal transparency.¹⁶ Botero expresses the same sentiments, that the rule of law is founded on universal principles where government and its officials and agents as well as individuals and private entities are accountable under the law; that laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property; that the process by which the laws are enacted, administered and enforced is accessible, fair, and efficient; that justice is delivered timely by competent, ethical and independent representatives and neutrals of sufficient number and who have adequate resources and reflect the makeup of the communities they serve.¹⁷

Drawing from these features the adoption of Agenda 2063 endorses Africa's aspirations of developing common goals that envision the use of the rule of law that is founded in the language of human rights. The foundation entails the effective system of governance, accountability, enabling environment and equitable process in the socio-political spheres. On the African continent, which experienced the historic trauma of inequalities, the rule of law is a regulatory legal framework, which should chart an approach for African governments to ensure its transmission to substantive reality. This means that the rule of law should remain a 'pillar of good governance'¹⁸ where states are required to conform and adhere to laws, which are beneficial not only in their promotion and respect but the fulfilment of the rights of women. The rule of law guides the work of government as it set parameters and performance standards against which the implementation of human rights may be tested.¹⁹ There can be no meaningful promotion and protection of rights without the strengthened systems of governance, which are grounded on the rule of law, because they are equally supportive and

16 See also statements made by many African governments at the High-Level Meeting of the 67th session of the General Assembly on the rule of law at the national and international levels, 24 September 2012, New York, <https://www.un.org/ruleoflaw/high-level-meeting-on-the-rule-of-law-2012/> (accessed 22 August 2019).

17 JC Botero et al 'Report on the World Justice Project: Rule of Law Index' (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (accessed 20 October 2019). The report also characterises the principle of the rule of law as a system where (a) government and private entities are accountable under the law; (b) laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights; (c) the processes by which laws are enacted, administered and enforced are accessible, fair and efficient; and (d) justice is delivered in a timely fashion by competent, ethical and independent representatives and others who are supported by adequate resources and reflect the makeup of the communities they serve.

18 M Mutua 'Africa and rule of law' (2016) *International Journal of Human Rights* 4.

19 Office of the United Nations High Commissioner for Human Rights 'Good governance practices for protection of human rights' (2007) Geneva (United Nations Publications) (iv).

dependent.²⁰ Hence, Khampepe J in *Welkom High School v Harmony High School*²¹ held:²²

The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. Accordingly, section 7(2) and the rule of law demand that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help. I pause to emphasise that this Court has consistently and unanimously held that the rule of law does not authorise self-help.

The proper regulation of state authority, which is founded in the rule of law, has a greater effect and is a critical factor on the evolution of the language of rights for women as it is informed by equal rights, responsibility and accountability. In the South African context, the rule of law is included as a foundational value of the new democratic dispensation.²³ The affirmation of the rule of law as a founding value informs the interpretation of the rights and the setting of positive standards as envisaged not only in the South African Constitution but also in all constitutions of Africa and their respective laws, which require compliance in order to be valid.²⁴

The rule of law was conceptualised by Beaulac as not 'only a represented reality but also played a leading role in the creation and transformation of reality ... accordingly, it has contributed to the modelling of the shared consciousness of society including that of international society'.²⁵ He traced his conception from Dicey's²⁶ theory of the rule of law that it may be considered from three different points of view in that it –

- (a) gives an expression to absolute supremacy of regular law as opposed to the influence of arbitrary power;
- (b) entails equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts; and

20 M Mogoeng 'The role of the judiciary in promoting peace, good governance and sustainable economic development' 10 May 2013, Cotonou, Benin, https://www.judiciary.org.za/images/chief_justice_2013/Speech-CJ_10-May-2013_Benin.pdf (accessed 10 October 2019).

21 2013 (9) SA 989 (CC).

22 *Welkom High School* (n 21) para 86 (footnotes omitted).

23 See sec 1 of the 1996 Constitution.

24 See *United Democratic Movement v President of the Republic of South Africa* 2002 (11) BCLR 1179 para 19.

25 S Beaulac *The rule of law in international law today* (2009) 199.

26 AV Dicey *Introduction to the study of the law of the Constitution* (1961).

- (c) entails that the laws of the constitution ... are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.²⁷

The viewpoints by Dicey are an indication of the uniqueness of the 'human rights lens in the intersection of the rule of law and the language of rights'.²⁸ This means that the rule of law and human rights are integral in the fight for protection against those subject to vulnerability. At the heart of Agenda 2063, which infused the principle of the rule of law, is the rooting of the elimination of the barriers that compromise the equal rights of women in the enjoyment of their human rights.

It is also important to affirm that rule of law is a *sine qua non* to access to justice as it has long been regarded as one of the important cornerstones of the principles of democracy, good governance and effective and equitable development.²⁹ Access to justice is multi-faceted because it integrates all the other rights such as equality, dignity, freedom and security, and many other fundamentals that are included in various instruments, including domestic and international customary law. It is characterised by fairness in the treatment of litigants, justness of results delivered, the timeous resolution of disputes brought before the courts and responsiveness of the system to those who use it.³⁰ To that end, the acceptance of the interrelationship that exists between the rule of law and access to justice is indicative of the reflection of the interests of the citizens of the state that provides an avenue through which the fundamental rights of everyone, especially women, are protected and fulfilled.³¹

Access to justice is a vital component of the rule of law in the promotion of the rights of women and serves as a fundamental value of justice.³² This means that access to justice is interwoven with the rule of law as a fundamental element for the realisation of women's human rights in Africa. It reinforces the multi-dimensional approach to the language of rights, which encompasses accessibility, availability, accountability and the provision of adequate remedies in the enforcement of rights. The two entail commonality in the

27 Dicey (n 26) 202, quoted in Beaulac (n 25) (footnotes omitted).

28 JD Mujuzi 'The African Commission on Human and Peoples' Rights and its promotion and protection of the right to freedom from discrimination' (2017) 17 *International Journal of Discrimination and Law* 86.

29 Fombad & Kibet (n 13) 208.

30 R Bowd 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' 13 October 2009, Policy Brief 1.

31 Bowd (n 30) 3.

32 A Clark, J Williams & S Wydall 'Access to justice for victims/survivors of elder abuse: A qualitative study' (2016) 15 *Social Policy and Society* 207.

provision of an effective system of accessing justice, which should be characterised by fairness, transparency, non-discrimination and accountability. These factors do not entail mere access to justice but for the equitable and effective remedies, which are essential for the rights of women. The quality of access to justice is reflective of each state's commitment to good governance and the advancement of the democratic principles.

The adoption by the AU in 2003 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)³³ was an acknowledgment that Africa needed legal certainty in addressing issues that affect women, including their right to access justice.³⁴ By mid-2021, 42 states have become party to the African Women's Protocol. The 13 states that to date have not become party to the Women's Protocol could draw comparative lessons on the existing need for the development of a gender-sensitive agenda which is biased against women and 'not to be islands unto themselves'³⁵ from the states that have become party to it, and align with the legal requirements that, if implemented, would serve as a pace setter in the elimination of all forms of discrimination against women. It is also imperative for the AU to encourage the ten states that have only signed the Protocol ratify it with reservations,³⁶ failing which, to 'pull the bull by the horns' and ensure that all member states, including the three that have neither signed nor ratified the Protocol, adhere to the reforms that are designed to promote the rights language in Africa. It is the same in the case of those states that ratified the Protocol to ensure that they are accountable and report on the progress made in order to identify best practices and challenges in its implementation.³⁷

The Southern African Development Community (SADC) followed suit by the adoption of the Protocol on Gender and Development,³⁸ which is also an acknowledgment by regional governments to

33 Adopted 11 July 2003, Maputo, Mozambique.

34 See eg art 2 of the African Women's Protocol which prohibits all forms of discrimination and puts the emphasis on state responsibility to adopt legal and other measures to promote the rights of women. Art 2 is directly linked to art 8 which entitles women to equal access to justice and for states to ensure the fulfilment of the rights in question.

35 Idiom extracted from Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

36 D'Apollos 'Slow progress in meeting commitment to 2020 as the year of universal ratification of Maputo Protocol' Press release, African Union, 20 November 2020, https://au.int/sites/default/files/pressreleases/39613-pr-accelerating_the_implementation_of_commitments_to_african_women.pdf (accessed 25 May 2021).

37 As above.

38 Adopted in August 2008 with a revised amendment adopted on 20 August 2018.

advance the rights of women on access to justice.³⁹ This instrument envisages adherence to the principles of the rule of law that should transmit to the upholding of women's rights wherein access to quality justice is upheld. In turn, the principles should transmit to the upholding of the fundamental rights of all, including women.

The intersection of the rule of law and access to justice puts greater emphasis on the empowerment of women for the advancement of the principle of gender equality. The recent appointment of the first female chief justice in Kenya, Justice Martha Koome, is commendable as a progressive and transformative step towards advancing the intersection of the rule of law and access to justice.⁴⁰ The appointment is viewed as having the potential to shape the jurisprudence that will emanate from the courts. First, her appointment would legitimise the democratic character of the judiciary by ensuring the representation that mirrors the diverse nature of the population in terms of race, gender and class, among others. Second, the appointment would make a difference by bringing an essentially female perspective to judging law by sensitising and educating male judges about gender stereotypes, myths and male bias is reflected in their judgments.⁴¹ This is the case in South Africa with the appointment of the first woman as acting chief justice, which is viewed as transformative in leading the highest court of the land.⁴² Without much focus on these appointments, if they are viewed from a 'womanhood perspective' instead of being judges with capabilities to deliver access to justice which, in turn, would uphold the rule of law, their potential is likely to fade into the cloud of being 'women' and not 'judges'.

Therefore, it cannot be denied that notwithstanding the plethora of adopted legal reforms in addressing women's challenges, African governments are still accused of being at the pinnacle of perpetuating women's subordination. This means that challenges facing women in Africa do not exist in a vacuum.⁴³ African women have long been faced by high levels of violence (domestic and otherwise); delays in the enforcement of their rights which is perpetuated by high costs of litigation; questionable enforcement of the law and limitations in

39 See arts 7(a)-(g) of the Protocol.

40 A Soyinka 'Kenya has its first female chief justice: Why this matters' *The Conversation* 3 May 2021, <https://theconversation.com/kenya-has-its-first-female-chief-justice-why-this-matters-160108> (accessed 6 May 2021).

41 As above.

42 L Bhengu 'Justice Khampepe appointed as acting chief justice', <https://www.news24.com/news24/southafrica/news/justice-sisi-khampepe-appointed-as-acting-chief-justice-20210505> (accessed 7 May 2021).

43 R Matzopoulos et al 'Utility of crime surveys for Sustainable Development Goals monitoring and violence prevention using a public health approach' (2019) 109 *South African Medical Journal* 382.

the existing remedies; and complex legal procedures and the lack of national information flow about rights and legal processes.⁴⁴ These challenges raise important questions: first, as to what strategies to put in place to eliminate perceptions that access to justice depends on the purse of a person; second, how to develop an inclusive-oriented approach that is sensitive to gender nuances in order to ensure the empowerment of women; third, the effect that the law has in eliminating societal norms that entrench gender stereotypes; lastly, whether law can be relied upon as an effective measure to determine social change.

These questions are mentioned here because they bring to the fore contested views on the meaning and essence of the rule of law and access to justice, especially in Africa, wherein arguments are raised that they cannot be transplanted onto the continent without taking into account the geographic and economic peculiarities of each state. To an extent, Mutua argues that the understanding of the principles became sophisticated because 'no credit was given to pre-existing African legal systems, where attempts could be made to view the law in a wider social context both domestically and internationally'.⁴⁵ With this argument Mutua raises a plethora of questions, which will not be repeated here but can be summed up as follows: Can the law be used as a tool for social justice?⁴⁶ It is also not the intention to engage with the complexity and sophistication of the questions other than acknowledging that all states, despite the shortcomings that might be experienced, intend to strive and root their systems of governance to the core values of the principles of the rule of law and access to justice.⁴⁷ This is important for Africa which continues to suffer from the historic legacy of colonisation and the further abuse and discrimination suffered by women.

44 See MD Muluneh et al 'Gender-based violence against women in sub-Saharan Africa: A systematic review and meta-analysis of cross-sectional studies' (2020) 17 *International Journal of Environmental Public Health* 1.

45 Mutua (n 18) 163.

46 Mutua 164.

47 Mutua 170.

3 Agenda 2063: Unleashing the potential for women's rights to gender equality?

3.1 Snail-pace approach of legal reforms in fulfilling women's rights?

As argued here, African governments at times are accused of being at the forefront of compromising the rights of women which, in turn, questions their commitments to the overall goal of liberating the women of Africa. The article also contends that Agenda 2063 is unlikely to achieve its aspirations, as is the case with many other projected legal reforms, such as the African Women's Protocol and the SADC Gender and Development Protocol, without forging relations with other institutions such as those of higher learning. For example, the snail-pace concept is used here to indicate the extreme low levels of the impact of legal reforms in addressing the challenges faced by women. It then becomes a great challenge to determine the effect of the reforms in contributing to socio-legal change in the fulfilment of their rights. It is our considered view that the African Charter, as the founding document of the rights language, supplemented by the African Women's Protocol, with the latter, which continues to be celebrated as a symbol of hope for the fulfilment of the rights of women of Africa, guarantees various rights, including the right of access to justice and, further, not just equal protection but benefit of the law.⁴⁸ Thus, the guarantee, as evidenced by the adoption of Agenda 2063, shows that the Women's Protocol has not yet fulfilled its desired purpose of eliminating all the barriers that compromise the achievement of equal rights for all, including the evolution of the prescripts of gender equality in ensuring the substantive realisation of the rights of women.

The progressive step taken by the adoption of Agenda 2063 is commendable. However, the challenges facing women of Africa continue to manifest themselves in various forms as evidenced by

48 See art 8 of the Protocol which provides that 'women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure (a) effective access by women to judicial and legal services, including legal aid; (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; (e) that women are represented equally in the judiciary and law enforcement organs; and (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.'

the development of legal reforms, which are meant to address their continued strife. The above questions remain unanswered about the impact of earlier legal reforms that were designed to address women's issues. The release of the report on crime statistics in South Africa for the year 2018, which were assessed by the Minister of Police, Bheki Cele, as 'not a rosy picture', raises questions about the significance of the rule of law and its relationship with access to justice.⁴⁹ The interdependence of the two principles seek to forge instruments of governance by enforcement agencies, which should translate to the language of rights for women.

It appears that Africa is out of depth in dealing with horrendous crimes against women in order to translate into reality the principles that are envisaged in various instruments.⁵⁰ It bears repetition that with numerous legal reforms and other adopted measures and the continued challenges faced by women today, the question is whether this means that law is not a vehicle for social change. How would Agenda 2063 make a difference to what already is in the public knowledge, which has seen the snail-pace approach of the legal reforms in contributing to socio-political change?

The questions are borne out by Agenda 2063, which envisions the development that is 'people driven' with great reliance on empowerment of women and youth. The people's approach raises further questions, namely, whether by the year 2063 the projected vision would have been achieved in, first, eliminating all forms of violence and discrimination (social, economic, political) against women and girls; second, fulfilling the enjoyment of all human rights by women; third, empowering women to access equal opportunities, more especially women in rural areas who are mostly affected by factors that compromise their human worth; last, seeing the attainment of gender equality.⁵¹

49 Citizen Reporter 'Police Minister Bheki Cele's assessment that the stats paint a "not very rosy" picture may be an understatement' 12 September 2019, <https://citizen.co.za/news/south-africa/crime/2178229/crime-stats-sex-offences-increase-by-4-6-murder-increases-by-3-4/> (accessed 12 September 2019).

50 L Volgeman & G Eagle 'Overcoming endemic violence against women in South Africa' (1991) 18 *Social Justice* 209. See also TB Zimudzi 'African women, violent crime and the criminal law in colonial Zimbabwe' (2004) 30 *Journal of Southern African Studies* 499.

51 M Botha 'Gender inequality in the workplace remains an uncomfortable conversation for many' *Sowetan Newspaper* 8 January 2020, <https://www.sowetanlive.co.za/opinion/columnists/2020-01-08-gender-inequality-in-workplace-remains-uncomfortable-conversation-for-many/> (accessed 8 January 2020). Botha appears to have lost faith in the achievement of gender equality as he argues that with the overwhelming challenges faced by women despite the spate of legal reforms the structural impediment prevents women from achieving professional success, which means that no matter how hard women work, chances of progression are minimal.

The questions are not borne out of 'prophecy' for the likely 'doom' of Agenda 2063. They have a background on the challenges that continue to be faced by women of Africa today. At the risk of repetition, Africa has seen a steady progression towards developing human rights-oriented laws and especially for women in line with the requisites of the laws of the international community. In terms of implementation, the laws seem not to be transmitting towards their intended objectives. Many women continue to be undervalued even in countries such as South Africa that are highly regarded in the area of not promoting equality through legal reforms but their translation into substantive reality.

Despite the projected vision to liberate women from socio-political, legal and cultural injustices, the conducts of African governments continue to be questionable around their commitment to advance the rights of women. The arrest and sentencing of Dr Stella Nyanzi, who was found guilty and sentenced to 18 months' imprisonment for allegedly insulting and harassing President Museveni of Uganda, left a bitter taste in the area of drawing an appropriate balance on the limitation of rights.⁵² The jailing of Dr Nyanzi is indicative of the struggles women face to an extent of having to lose their own humanity and dignity to fight the authorities in Africa. There are a number of other examples in Africa where women had to go to extreme levels to attract the attention of governments in the fight for equal rights. In South Africa a woman protested naked outside the South African Union Buildings, demanding to see President Cyril Ramaphosa.⁵³ The situation of women's subordination is acute in Sudan when they are still subject to the marital authority of their husbands who determine whether or not the woman should work. Notwithstanding the numerous legal reforms in Sudan enabling women to negotiate legal constraints that placed them under the guardianship of their husbands, they remain subjected to a strict public dress code and behavioural codes and the upholding of occupational segregation even in the workplace environment.⁵⁴

52 E Lirri 'Challenging power isn't polite and beautiful: Dr Stella Nyanzi and the right to be impolite in Uganda' *Equal Times* 28 June 2019, <https://www.equaltimes.org/challenging-power-isn-t-polite-and?lang=en#.XWJ7PugzZ1s> (accessed 22 August 2019).

53 C Maphanga 'Woman arrested during naked protest outside Union Buildings' *News24* 13 March 2019, <https://www.news24.com/SouthAfrica/News/watch-woman-arrested-during-naked-protest-at-union-buildings-20190313> (accessed 25 August 2019). See also K Abdelaziz 'Sudanese women protesters sentenced to 20 lashes, month in jail' *World News* 9 March 2019, <https://www.reuters.com/article/us-sudan-protests/sudanese-women-protesters-sentenced-to-20-lashes-month-in-jail-idUSKBN1QQ0KW> (accessed 25 August 2019).

54 L Tonnesen 'Women at work in Sudan: Marital privilege or constitutional law?' (2019) 26 *Social Politics: International Studies State, Gender and Society* 223.

Furthermore, against the backdrop of the questions raised above, Africa's compliance with human rights norms and ethos raises questions, resulting in many women subjected to extreme levels of gender-based violence, and numerous forms of abuse and discrimination.⁵⁵ President Yoweri Museveni of Uganda has gone to the extent of calling for an 'eye-for-an-eye' and a 'tooth-for-a-tooth' approach⁵⁶ in addressing the escalation of violence, which has proved to have disastrous consequences for the promotion of the rights of women. President Museveni is calling for these approaches, which is reflective of the weaknesses in his own system of governance in adhering to the principle of the rule of law which, in turn, would have enabled the fulfilment of the right to access justice for women. This is the case with President Cyril Ramaphosa of South Africa who seems to be slow into signing into law the amendments to the gender-based violence laws. The public pressure is piling on the President to sign, first, the Domestic Violence Amendment B20-2020, which seeks to extend the definition of domestic violence to victims of assault to those engaged to be married, those who are dating, those in customary relationships and those in actual or perceived romantic, intimate or sexual relationships of any duration. As of 11 March 2021, South Africa's Parliamentary Portfolio Committee on Justice and Correctional Services was still in discussion over the correct terminology to be properly used in the proposed amendments to the Bill.⁵⁷ Second, the Criminal and Related Matters Amendment B17-2020, which is a direct response to the public outcry against accused offenders being easily granted bail, and perpetrators only, having to serve minimum sentences for very serious crimes. The third amendment is in the Criminal Law Sexual Offences and Related Matters B16-2020 which recognises sexual intimidation as an official offence, something it had not done before.⁵⁸

The broader question emanating from the questions and examples highlighted above in an attempt to fulfil the aspirations of Agenda 2063 is whether the concept of law for social change is an elusive concept

55 Ntlama (n 9).

56 M Frykberg 'Museveni demands "eye for an eye" sentencing after nephew murdered' *IOL* 12 September 2019, <https://www.iol.co.za/news/africa/museveni-demands-eye-for-an-eye-sentencing-after-nephew-murdered-32848585> (accessed 12 September 2019).

57 See minutes, <https://pmg.org.za/page/Domestic%20Violence%20Amendment%20Bill:%20deliberations2> (accessed 7 May 2021).

58 K Mlaba 'South Africa's new gender-based violence laws: What you should know and how to have your say' *Global Citizen* 23 September 2020, <https://www.globalcitizen.org/en/content/south-africa-new-laws-gender-violence-what-to-know/> (accessed 20 October 2020). See also President Cyril Ramaphosa 'Address on public and gender-based violence' 5 September 2019, <https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-public-and-gender-based-violence-5-sep-2019-0000> (accessed 14 October 2019).

for the advancement of good governance within the framework of the rule of law with reference to the rights of women to access justice in addressing all the ills that they experience. This is important because of the need not to frame the rights of women within the context of 'victimhood'. Women are entitled to equal fundamental rights as citizens of each respective state. Their characterisation as victims stigmatises their entitlement as equal human beings for no other reason than being human. The manifestation of barriers that inhibit women's fulfilment of their rights, even remedies that are provided by the courts, do not seem to bridge the gap and serve as deterrent to the further perpetration of horrific crimes against women.⁵⁹ If in South Africa the 2018 Crime Against Women Report⁶⁰ highlights that approximately 3 000 women were killed in the year 2018, which entails the death of one woman every three hours, more than five times than the global average, serious questions have to be asked about the impact of the laws and those entrusted with the responsibility to enforce them. It is not our intention to delve into the quality of the investigation processes by the criminal justice system, but the continued scourge of violent crime against women leaves a bitter taste on the advancement of their rights.⁶¹

3.2 The rights language: A determinant for a common approach?

Africa's progress to date, on legal reform, especially the aspirations that are focused around the people-centred approach in advancing human rights, is not merely a commitment to legal obligations but seeks to define Africa's identity. Africa's identity is defined around the concept of collectivism where the pain of one is also the pain of the other person. This means the sharing of the values and principles, which are a core determinant of the attachment that is placed on the humanity of the human person. The defined identity is a commitment to principles and values in the affirmation of due diligence in the affirmation of the language of rights as it provides a framework for societal change objectives that are envisaged in various instruments. Africa's Agenda 2063 obligates states to sharpen

59 See art 25 of the African Women's Protocol which requires states to provide appropriate remedies to be determined by a competent judicial or legislative authority for any woman whose rights have been violated.

60 R Maluleke 'Crime against women in South Africa: An in-depth analysis of victims of crime survey data' (2018) Statistics South Africa, <https://www.statssa.gov.za/publications/Report-03-40-05/Report-03-40-05June2018.pdf> (accessed 27 December 2019).

61 See South African Police Service 'Annual Crime Report 2019/2020' 30 October 2020 ISBN 978-0621-48614-8, https://static.pmg.org.za/SAPS_CRIME_REPORT_2020_WEB.pdf (accessed 24 May 2021).

their claws in the monitoring and influence of the enforcement of the operationalisation of the legal reforms for the language of rights of women.

The common approach entails that in dealing with Africa's challenges, African governments cannot undertake such a mammoth task in isolation. Various institutions, including those of higher learning, which are a reservoir of knowledge, could prove useful in the generation of knowledge and the production of innovative strategies in addressing the challenges faced by governments in ensuring the people-centred conception of addressing the plight of women. These institutions may also devise mechanisms in assisting governments with pro-active and concrete ways of transmitting national information flow for better enforcement, monitoring and evaluation of the impact of the rights laws in the resolve of the barriers faced by women in the fulfilment of their human rights.

The envisioned people-centred approach in Agenda 2063 was long affirmed by former President Nelson Mandela in his inaugural speech in 1994 when he stated:⁶²

We must construct that people-centred society of freedom in such a manner that it guarantees the political and the human rights of all our citizens. My government's commitment to create a people-centred society of liberty binds us to the pursuit of the goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear. These freedoms are fundamental to the guarantee of human dignity. They will therefore constitute part of the centrepiece of what this government will seek to achieve, the focal point on which our attention will be continuously focused.

The people-centred approach, with former President Mandela as an advocate for such a conception in South Africa, as substantiated by Schenk and Louw, is at least characterised by awareness, motivation and behaviour of individuals and in the relations between individuals as well as groups within society; legal empowerment which enables the people to elicit the power they have by joining hands in the use of their skills and confidence building in ensuring the promotion of their rights; and participating in the planning, assessment, implementation of the plans and programmes designed for the

62 1994 – President Mandela, State of the Nation Address, 24 May 1994 (after national elections), <https://www.sahistory.org.za/archive/1994-president-mandela-state-nation-address-24-may-1994-after-national-elections> (accessed 18 November 2019).

enforcement and fulfilment of their rights.⁶³ The envisaged 'Africa we want' in Agenda 2063 encapsulates the people-centred approach which requires the taking of the people's aspirations of equal society as a fundamental goal that seeks to promote their needs with the intended benefits for all including the vulnerable members of our communities. The centred approach entails a common conception in the furthering of Agenda 2063 by requiring African governments to (i) affirm their political will and commitment to create greater awareness about the existing laws in curbing the lack of national information flow, which disadvantages women, mostly those in rural areas; (ii) empower institutions of higher learning in conducting evidence-based research on issues that affect women on access to justice; and (iii) encourage, support and strengthen national and regional partnerships in Africa to ensure an integrated vision on the elimination of barriers that undermine the progress made by Africa today.

Without a doubt the consolidation of the legal rights of women, which should serve as a direct response to the advancement of their rights, on the one hand, and the enforcement of state accountability, on the other, is of great significance for the promotion of the right to gender equality. As noted above, the institutions of higher learning serve as the apex for research and production of human rights-oriented knowledge that seeks to enhance the construction of a more human society as a basis of the new development strategy from various stakeholders. Since these institutions are interdisciplinary in their respective fields, they produce social, legal, economic and cultural leaders that have special qualities to steer the production of human rights-oriented knowledge, which is of equal concern for both men and women. These institutions have the potential to advance the interrelationship of the principles of the rule of law and access to justice for women, which has essential implications for the determination of the impact of the law in addressing socio-political and legal challenges. In essence, the unearthing of knowledge, which is socially and legally relevant through various methodologies, is of significance for the evolution of the principles of the law, which are fundamental for the rights of women. Equity and societal transformation will remain an aspiration if there is no marshalling of the human capital, especially from institutions of higher learning, to develop and adapt innovative strategies for the elimination of barriers that subjugate women.

63 C.J. Schenk & H. Louw 'A people centred perspective on people centred community development' (1995) 10 *Journal of Social Development in Africa* 84.

The construction of a people-centred approach for Africa's development has a great potential to succeed in the conducting of research, analysis, examination and production of knowledge that is founded on human rights. In this way, assumingly, Africa will be enabled to determine the impact of legal reforms in addressing the plight of women by focusing on and taking stock of the intersection of the rule of law and access to justice as core principles that should be grounded on a human rights-inspired approach. The human rights approach has the potential to contextualise the rule of law as an integral part of the facilitation of women's access to justice. The rights approach is two-pronged in that it requires the development of human capacity of those charged and responsible for the enforcement and implementation of the adopted legal reforms. On the other hand, it also envisages the building of capacity in the creation of the greater awareness of the rights to which women are entitled.⁶⁴ The focus on vulnerability and exclusion which is acute against women should, within the common approach of Agenda 2063, include an integrated, interdisciplinary, multi-sectoral and multi-disciplinary approach in the advancement of the rights language which is inclusive of women.

It is our considered view that this integration is at the epicentre of transmitting the production of the rights language for the advancement of the rights of women. The integration is grounded in the carriage of an in-depth review and analysis of various human rights theories and human rights education in diverse forms in the popularisation and dissemination of knowledge about laws that impact on human rights. It strives to enhance society's human rights awareness, which is meant to build capacity in the area of human rights education. Therefore, it is without doubt that the commitment to eliminate barriers that undermine the rights of women, the commitment of Africa's Agenda 2063 to advance the rule of law and access to justice has a potential to contribute to the prescripts of the values and principles of the community of nations and not enclose itself to its continental location.

4 Conclusion

The interdependence of Agenda 2063, in line with the other already adopted legal reforms and measures, is an indication of Africa's boldness not to shy away from its problems, which continue to

64 See UN Women 'Adopting a human rights-based approach' 31 October 2010, <https://www.endvawnow.org/en/articles/304-adopting-a-human-rights-based-approach.html> (accessed 22 October 2020).

subjugate women. The legal and other measures that Africa has since adopted responded to the various challenges that face women by publicly pledging to resolve them by adopting an envisaged people-centred approach that is meant to embark on a road towards the progression to the language of rights. The progression is founded on the principles of the rule of law, which strengthens the construction of an important goal of building a regional/continental system of consensus on human rights education. Although Agenda 2063 is commendable, its adoption and success, measured against the existing legal reforms in the advancement of the rights of women, such as the African Women's Protocol, remains to be seen. The uncertainty is shown by the many questions that are left unanswered in this article which limit the determination of the impact of the two principles: the rule of law and access to justice in the advancement of the rights of women. This uncertainty is likely to bring to its knees the 'Africa we want'.