

LITIGATING FOR THE PROTECTION OF WOMEN'S RIGHTS IN SEPARATION, DIVORCE AND ANNULMENT OF MARRIAGE



INITIATIVE FOR STRATEGIC
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Maputo Protocol Series



LITIGATING FOR THE PROTECTION OF
WOMEN'S RIGHTS IN SEPARATION,
DIVORCE AND ANNULMENT OF MARRIAGE

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ISLA Manuals Article 7

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Acronyms and Abbreviations _____.

ACHPR	African Commission on Human and Peoples' Rights
Banjul Charter	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW	Committee on the Elimination of Discrimination against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
UDHR	Universal Declaration of Human Rights

Foreword

Of the types of litigation that are arguably the most contentious and emotive, the litigation of family law ranks at the very top. While many plausible arguments exist as to why the practice of family law is, often, highly combative and rarely results in amicable compromise, I have, after spending many years engaged in handling briefs of separation, divorce, child maintenance and custody and division of matrimonial assets, arrived at a silent realisation.

The problem therein is not the parties involved in the litigation; it lies in the normative and institutional structures of family law. Patriarchy has influenced both the laws of marriage in operation in any time and place, and on the social norms and sociological facts that accompany them. It is not accidental that formation of family is only encouraged under the structure of the institution that is called marriage which in turn is recognised and protected upon adherence to certain rules and regulations.

Feminists have persuasively argued that the law operates to sustain, perpetuate and enforce the dependence of women in the sphere of marriage and family life. A critical audit of judicial decisions on family law from various jurisdictions will reveal that the laws applicable are far from being egalitarian. Whether it be at the entry of, during or at the exit of a marriage union, the institution itself, as it is created from a patriarchal standpoint, will exploit the vulnerabilities of women.

It therefore comes as no surprise that ISLA will be at the forefront of addressing these systemic failures and entrenched injustices at the highest possible level. ISLA lends its expertise, support and resources to justice stakeholders and litigators across the African continent to change the narrative. I can authoritatively state as much since that I am a beneficiary of ISLA's gracious support when it joined as *amicus curiae* in a public interest litigation case where we sought to challenge the interpretation of a Kenyan law on division of matrimonial assets after a divorce. ISLA has forged a path very few civil society actors may be willing to take; to nurture and train a vibrant team of feminist lawyers, be part and parcel of the judicial process and go the distance – however long it takes. ISLA has skin in the game.

The development of this manual is yet another testament to ISLA's commitment. The manual has carefully chosen art 7 of the Maputo Protocol as its focus and with good reason. The Maputo Protocol, having been signed by 49 states and ratified by 42 state parties to the African Union (AU), is a legally binding instrument that enjoys wide recognition in the continent. Changes to family law in favour of gender equality are hard-won victories especially in Africa. If there is no concerted and sustained effort to challenge and change laws, practices and institutions that discriminate and violate women in the sphere of family life, we will remain stuck in a never-ending cycle of vicious family law litigation with the end result of disenfranchised women.

The manual is a wonderful resource to any strategic litigator or justice actor in the continent on how to effectively litigate to challenge laws and institutions that hinder or violate equal rights for women in family law. It has been brilliantly put together and will prove to be indispensable owing to its ease of reference, its in-depth, critical analysis of the four provisions of art 7, collation of very relevant jurisprudence and practical suggestions on how one can develop and implement their litigation strategy. It also alerts the reader on how to identify possible violations under the Protocol. This manual not only articulates art 7 of the Maputo Protocol but also equips the reader with comparative provisions from other international and regional human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women.

In 2022, the AU turned 20 and the manual could not have been developed at a more auspicious time. While the AU is endowed with some of the most progressive legal and policy frameworks in the world and its governments have made numerous proclamations to attaining gender equality through regional, African and global commitments, there is still a big gap between the commitments and the reality. The AU has launched a campaign ‘#WhatAfricanWomenWantCampaign’ and one of the objectives of the campaign is to ‘[r]emove the contradiction between statutory provisions and practices that undermine these gender equality and women’s rights. The dual legal system in most countries result in rights being given with one hand and taken away with another’. This is exactly one of the objectives of the manual: to equip the reader on how to achieve this.

I daresay, with utmost confidence, that any justice actor/stakeholder/litigator involved in strategic litigation agitating for women’s rights in family life will be heavily indebted to this manual as their primary resource material. It is a much-needed guide that will shine light on the dark roads that lie ahead.

Irene Ndegwa

June 2022

1. Introduction

The realisation of the right to non-discrimination and equality ensures that all humans irrespective of their gender, status, age, race, opinion, language or birth have equal access to power, resources and opportunities and are treated with dignity, respect and fairness. Due to the importance of these rights, they are central features in major international and regional human rights treaties and national constitutions. However, discrimination against women is still persistent across the globe. Regrettably, discrimination and inequalities start within the family where women are often undervalued, experience harmful cultural practices and patriarchal oppression.¹

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which was adopted in 2003 and entered into force in 2005, lays a strong foundation for women's rights legal framework in the African continent.² It aspires to guarantee comprehensive rights for women in Africa and has a number of articles that intersect with global human rights frameworks such as non-discrimination, right to dignity, elimination of harmful cultural practices, right to peace, right to education and training, right to property, access to justice and equal protection before the law. The Maputo Protocol has been enforced differently by member states, with the majority creating concrete laws, policies and programmes on gender equality. Nonetheless, unequal power relations between men and women at the family level, diverse marital regimes, discriminatory laws and customs, complex legal systems and judicial decisional discordance in personal matters continue to hamper the full realisation of women's rights in Africa. In addition, very few member states that have ratified the Maputo Protocol submit implementation reports thereby presenting difficulties in tracking the progress on commitments.³

Article 7 of the Maputo Protocol requires states to enact appropriate legislation to ensure that women and men enjoy equal rights in case of separation, divorce or annulment of marriage. In living up to their commitment under the Maputo Protocol, many countries have repealed discriminatory laws governing marriage, but culture and religion continue to influence the implementation of the laws. Other countries, in efforts to weaken their human rights obligations, allow the application of discriminatory customary or religious laws in family matters under the guise of protecting family life through reservations of

¹ UN Human Rights Council 'Report of the Working Group on the issue of discrimination against women in law and in practice' (2018) UN Doc A/HRC/38/46.

² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (Maputo Protocol).

³ African Union 'List of countries which have signed, ratified/acceded to the Protocol' (16 October 2019) <<https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>>.

treaty provisions⁴ or allowing the application of customary or religious laws in personal matters. The impact of the gap between the provisions of the Maputo Protocol, domestication at national level and actual realisation of these rights by women not only perpetuates inequality and discrimination within marriage, but extends such inequality and discrimination to women's social, political and economic participation.⁵ Therefore, unless discrimination and inequalities within a marriage are addressed, the realisation of women's rights will remain a mirage in Africa. An apt illustration on how African states have sought to strengthen the realisation of art 7 of the Maputo Protocol, the African Commission on Human and Peoples' Rights (ACHPR) in March 2020 adopted General Comment No. 6 to provide interpretive guidance on art 7(d).⁶ The General Comment takes the character of a living document by providing comprehensive interpretation of art 7(d) and general guidance on state obligation towards implementation of the article. It gives strength and renews the validity of the Maputo Protocol.

1.1. Purpose of the manual

This manual provides a practical guide to litigators and social movement actors in Africa and around the world interested in propelling the realisation of women rights upon separation, divorce or annulment of marriage as protected under art 7 of the Maputo Protocol. It equips the user with the necessary information on:

- relevant human rights standards on women's rights upon separation, divorce or annulment of marriage;
- the application of the human rights standards within the national legal systems;
- the scope of these rights, manifestation of the violations; and
- potential areas for litigation or advocacy.

Strategic litigation is considered an important tool for upholding women's rights and legal empowerment.⁷ It improves the legal environment as it focuses on wider public policy reform and secures legal remedies following violations. Engaging in strategic litigation amplifies the rule of law, contributes towards clarification of laws and establishes a basis for law reforms within certain legal parameters.⁸ This manual seeks to encourage

⁴ Ibid.

⁵ MA Fineman 'Why Marriage?' (2001) 9 *Virginia J of Social Policy & the Law* 239, 248-249.

⁶ ACHPR (2020) 'General Comment No. 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D))' (adopted at the 27th Extra Ordinary Session of the African Commission on Human and Peoples' Rights, held from 19 February to 4 March, 2020 in Banjul, Gambia) <<https://www.achpr.org/legalinstruments/detail?id=75>>.

⁷ PS Malla 'Upholding Women's Right through Litigation' Panel paper submitted during the 45th session of United Nations Commission on the Status of Women (2010) <https://www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Sapana%20Pradhan%20Malla%20paper.pdf>.

⁸ A Coomber 'Strategically litigating equality-reflections on a changing jurisprudence' (2012) 15 *European Anti-Discrimination LR* 11-21.

litigators to authoritatively apply international and regional human rights law to challenge existing discriminatory laws, policies and practices through strategic litigation. In doing so, litigators will support the development of progressive jurisprudence and compel the state to comply with its human rights obligations.

This manual will also aid social movement actors in evaluating the extent to which normative and institutional structures in African countries guarantee the protection, promotion and respect for women's rights upon dissolution of marriage. Such evaluation is not only helpful in understanding the status, but also to guide in the development of strategies that will place women's rights at the dissolution of marriage within the broader context of social empowerment, economic justice and equal rights.

The manual also makes reference to international and regional human rights instruments, articles and select countries' national laws and judicial decisions that provide a wider understanding of art 7 of the Maputo Protocol. Since assessing the situation of women's rights upon dissolution of marriage is complex and multi-faceted, users of this manual are encouraged to contextualise their strategies and recognise that women are not homogeneous. It is important to understand that women have layered identities derived from social relations, legal systems and interactions with structures of power and failure to address the intersecting forms of discrimination often perpetuates the violations of women's human rights and their right to live free from discrimination.⁹

⁹ For example, social status, type of marital regime, economic status, ethnic background and nationality are intersecting forms of discrimination that should be addressed when dealing with the general discrimination against women after separation, divorce or annulment of marriage.

2. Conceptual and Normative Human Rights Framework on Women's Rights During Separation, Divorce or Annulment of Marriage _____.

2.1. Introduction

Women's rights during separation, divorce or annulment of marriage form part of the general rights that are guaranteed to women in various core international and regional human rights instruments. In addition to these core human rights instruments, there exists protocols, general comments and monitoring frameworks aimed at enhancing the realisation of these rights. This chapter focuses on key human rights instruments that lay the foundation for women's rights during separation, divorce or annulment of marriage and their application in proceedings before domestic courts.

A series of human rights conventions and treaties have been adopted at the international and regional levels conferring legal form on inherent human rights. International human rights laws set down obligations that states are bound to respect. The adoption of regional human rights instruments reflects particular human rights concerns in the region and provides specific protection mechanisms.¹⁰ Depending on the type of legal system, ratified treaties can be enforced directly for monist countries or through legislative adoption for dualist countries. Regardless of the legal systems, states are bound to respect, protect and fulfil their obligation under the instruments.¹¹

Working definitions

Accession: An act where a state accepts the offer to become a party to a treaty already signed by other states. It has the same legal effect as ratification and occurs after a treaty has entered into force.¹²

Civil law system: Civil law states adopt a system in which national and international law are viewed as a single entity. In Africa the majority of the Francophone countries have civil law systems and are monist hence, once ratified, human rights treaties automatically become part of domestic law and can be applied by the courts, without requiring the enactment of legislation.

¹⁰ United Nations Office of the High Commissioner for Human Rights (UN OHCHR) 'International Human Rights Law' <<https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>>.

¹¹ Ibid. States assume obligations to respect, protect and fulfil human rights. The obligation to respect requires states to refrain from interfering or limiting the enjoyment of human rights; the obligation to protect requires states to protect individuals or groups against human rights violations by others or the state itself; and the obligation to fulfil requires states to take action to facilitate the enjoyment of the guaranteed rights.

¹² Vienna Convention on the Law of Treaties (1969) (Vienna Convention) arts 2(1)(b) and 15.

Common law system: Common law states do not automatically incorporate treaties into domestic law. Treaties are first approved by their respective parliaments and following that, specific legislative measures are taken to reflect the principles and content of treaties in the domestic legal system. In Africa, the majority of Anglophone countries have common law systems and take a dualist approach in treaty ratification through actual legislative reform.¹³

Ratification: An act where a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act.¹⁴

Reservation: Declaration made by a state that it seeks to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. It enables a state to give notice of not applying certain provisions of the treaty. Reservations must not be incompatible with the object and purpose of the treaty.¹⁵

Reporting: A report submitted to relevant treaty body outlining a state party's implementation of status of human rights as per the respective treaty. The process provides an opportunity for the treaty bodies to examine states' progress in the implementation of treaties and make appropriate recommendations for further progress.

Signing: Authentication and express willingness of the state to continue with the treaty making process. The signature enables a state to proceed to ratification and creates an obligation to refrain, in good faith from any act that would defeat the object and the purpose of the treaty.¹⁶

General comments/recommendations: Interpretation of treaty provisions by respective human rights treaty bodies on thematic issues. They assist to interpret and clarify substantive provisions of a treaty not only for reporting obligations by state parties but also aiding in identification of best approaches to implementation of treaty provisions.¹⁷

2.2. Relevant instruments

Various human rights instruments guarantee women's equal rights in marriage and upon dissolution of marriage. The Universal Declaration of Human Rights (UDHR),¹⁸ though not binding in its declarations, is widely accepted as the yardstick to measure human

¹³ The courts of such states are also not bound to apply treaties in their decisions, although an increasing number do so. See section 2.1. of this manual.

¹⁴ Vienna Convention arts 2(1)(b), 14(1) and 16

¹⁵ Vienna Convention arts 2(1)(d), 19, 20, 21, 22 and 23.

¹⁶ Vienna Convention arts 10, 12(2)(b) and 18.

¹⁷ OHCHR 'Treaty Bodies - General Comments' <<https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx>>.

¹⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

rights standards.¹⁹ Article 2 sets the principle of non-discrimination and prohibits any form of discrimination including discrimination based on sex, in the enjoyment of rights guaranteed in the UDHR. Other rights recognised include equality and equal protection before the law, right to property, food and adequate housing.²⁰

Other international and African regional human rights treaties are:

- International Covenant on Civil and Political Rights (ICCPR)²¹
- International Covenant on Economic, Social and Cultural Rights (ICESCR)²²
- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)²³
- African Charter on Human and Peoples' Rights (Banjul Charter)²⁴
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)²⁵

The following table highlights women's rights during separation, divorce or annulment of marriage.

Human rights guaranteed	Source
Equality and non-discrimination	Articles 2, 3, 16, 23 and 26 of the ICCPR Articles 2 and 3 of the ICESCR Articles 2 and 15 of the CEDAW Articles 2, 3 and 18 of the ACHPR Article 2 of the Maputo Protocol
Protection and assistance to the family and equality in marriage	Article 17 of the ICCPR Article 10 of the ICESCR Article 16 of the CEDAW Article 18 of the ACHPR Articles 6 and 7 of the Maputo Protocol

¹⁹ H Hannum 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 *Georgia J of Int and Comparative Law* 287 <<https://ssrn.com/abstract=1957798>>.

²⁰ UDHR arts 7, 17 and 25.

²¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

²³ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 (CEDAW).

²⁴ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (Banjul Charter).

²⁵ Maputo Protocol (note 2 above).

Human rights guaranteed	Source
Right to food and adequate standard of living	Article 11 of the ICESR Article 14 of the CEDAW Articles 15 and 16 of the Maputo Protocol
Right to highest attainable standard of health	Article 12 of the ICESR Article 12 of the CEDAW Article 16 of the ACHPR Article 14 of the Maputo Protocol
Right to equal participation in rural development/sustainable development	Article 14 of the CEDAW Article 19 of the Maputo Protocol
Right to property	Article 14 of the ACHPR Articles 6(j), 7(d), 19(c) and 21 of the Maputo Protocol
Elimination of harmful cultural practices	Article 5 of the CEDAW Article 5 of the Maputo Protocol
Access to justice	Articles 2 and 14 of the ICCPR Article 13 of the ACHPR Article 8 of the Maputo Protocol

Most African states have ratified the above cited international and regional human rights instruments.²⁶

In addition to the articulation of the normative content of women's rights, the provisions of the instruments are constantly monitored, elaborated and interpreted by authoritative human rights mechanisms through general comments/recommendations. Whilst general comments are not legally binding, they are a highly authoritative interpretation of human rights' obligations under a treaty. Article 45(1)(b) of the Banjul Charter and art 31 of the Vienna Convention on the Law of Treaties require the ACHPR and treaty bodies, respectively, to continuously engage in context interpretation of treaties.²⁷

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) General recommendation Nos. 21, 25 and 29,²⁸ Human Rights Committee General comment No. 19 on protection of the family, the right to marriage and equality

²⁶ OHCHR 'Status of Ratification Interactive Dashboard' <<https://indicators.ohchr.org/>>.

²⁷ Ibid.

²⁸ CEDAW Committee 'General recommendation No. 21 Equality in Marriage and Family Relations' (1994); CEDAW Committee 'General recommendation No. 25 Article 4, paragraph 1, of the Convention (temporary special measures)' (2004); CEDAW Committee 'General recommendation No. 29 General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)' (2013) CEDAW/C/GC/29.

of the spouses²⁹ and General comment No. 28 on the equality of rights between men and women³⁰ are examples of international interpretative texts developed to ensure that women's rights in and upon dissolution of a marriage are respected. At the regional level, the adoption of the General Comment No. 6 on art 7(d) of the Maputo Protocol³¹ is indicative of the important role human rights mechanisms hold in advancing women's rights.

In addition, the Special Rapporteur on the Rights of Women in Africa is a special procedures mechanism with a mandate to promote women's rights. For instance, after a promotion mission to Gambia, the Special Rapporteur recommended that the Gambian judiciary should eliminate discrimination against women within the courts particularly in traditional courts in all areas including determination of rights relating to marriage, ownership of land, inheritance and succession.³²

It is therefore necessary for users of the manual to establish status of ratification of human rights instruments by the relevant state, the existence of country-specific concerns by treaty bodies including concluding observations or any decisions against the state by treaty monitoring or enforcement agencies.³³

Check list

- ✓ Identify international and regional human rights instruments ratified by your country that promote women's rights at dissolution of marriage. Include any reservations made and reasons for any such reservations.
- ✓ Establish the implementation status of the ratified instruments.
- ✓ Identify country specific issues raised by treaty body monitoring through concluding observations, general comments, decisions or resolutions that are applicable in advancing women's property rights during dissolution of marriage in your country.

²⁹ Human Rights Committee 'General comment No. 19 Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (1990).

³⁰ Human Rights Committee 'General comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (adopted 29 March 2000) CCPR/C/21/Rev.1/Add.10.

³¹ ACHPR 'General Comment No. 6' (note 6 above).

³² ACHPR 'Report of the Human Rights Promotion Mission to the Republic of the Gambia' (2017) <https://www.achpr.org/public/Document/file/English/The%20Gambia_ACHPR%20Promotion%20Mission_ENG.pdf>.

³³ Details of concluding observations by human rights bodies for countries are accessible. OHCHR 'Africa Region' <<https://www.ohchr.org/EN/Countries/AfricaRegion/Pages/AfricaRegionIndex.aspx>> for international and ACHPR 'State Reports and Concluding Observations' <<https://www.achpr.org/statereportsandconcludingobservations>> for regional bodies.

3. Article 7 of the Maputo Protocol: Separation, Divorce and Annulment of Marriage

Article 7 provides as follows:

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: -

- a) Separation, divorce or annulment of a marriage shall be effected by judicial order;
- b) Women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- c) In case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- d) In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

One cannot properly appreciate the import of art 7 in the absence of its precursor; art 6. Article 6 contains the general principles for women's rights in marriage. It primarily focuses on the relation of women to marriage, their entry into it and their rights in family life. Article 6 obligates state parties to ensure equality in marriage by enacting appropriate national laws that guarantee free and full consent of parties before marriage; minimum age of marriage; promotion of monogamy but also the legal protection of women in polygamous marriages; registration of marriages; free choice of matrimonial regime and place of residence; rights of a married women to retain her maiden name and nationality; equal rights on choice of children's nationality; joint contribution towards safeguarding their family interests; and the right of a married woman to acquire her property and administer the same freely.³⁴

The equality in marriage outlined in art 6 overlaps with other rights including protection from violence such as early or forced marriage, equal parental rights, recognition of care work and property rights.

³⁴ See art 6(a)-(j).

Many African countries have reviewed family laws and codes to address the minimum age of marriage, full consent between parties and criminalisation of child marriages. For example, in the Democratic Republic of Congo, the country reviewed its Family Code in 2016 and revised the legal minimum age for marriage for women and men to 18 years.³⁵ Other countries such as Niger are yet to review their minimum age thus allowing child marriages.³⁶ Most common law countries recognise civil, customary and religious marriages and permit polygamy within religious and customary marriages. Countries such as Kenya, Malawi and South Africa require the registration of all marriages recognised by statute but the situation is different in a number of civil law countries where only civil marriages are recognised by law.

Articles 6 and 7 emphasise that state parties shall take legislative and all appropriate measures to ensure equality in and after marriage. The articles are important in understanding that women's rights are easily violated within the family domain. It is necessary for litigators to understand the context for the realisation of arts 6 and 7 and the challenges that women face that would be addressed if the articles are realised.

The ability to identify forms and manifestation of violations of these provisions is critical in coming up with appropriate litigation or advocacy strategies.

³⁵ See Family Law 2016-008 (2016) art 352.

³⁶ Visit 'Girls not Brides' <<https://atlas.girlsnotbrides.org/map/>> to establish the status of child marriage in your country.

4. Article 7(a): Separation, Divorce or Annulment of a Marriage Shall be Effected by Judicial Order _____.

4.1. Meaning and scope

Article 7(a) is premised on the basis that women are expected to enjoy equal rights as men do in seeking separation, divorce or annulment of marriage through a competent court process. This means that regardless of the marital regime, social or economic status, women should be in a position to pursue appropriate orders regarding dissolution of their marriage through a formal judicial system. As highlighted earlier, marriages in most African countries are governed by civil, customary and religious laws. While most statutes make reference to dissolution of marriages through a judicial process, some countries permit customary or religious systems to dissolve marriages without any judicial intervention or pronouncement.³⁷

Securing of divorce under customary or religious law is overly discriminatory against women due to lack of codification of customary laws, gender bias and likelihood of these structures perpetuating male dominance during the process.³⁸ It is also imperative to note that informal justice systems have in the recent past been promoted as an acceptable form of dispute resolution mechanism especially for women in rural and indigenous communities.³⁹ However, their application must be in conformity with human rights standards especially with regards to fairness, accountability and participation of women.

In addition to application of a non-judicial process in the dissolution of marriage, structural and procedural obstacles such as gender stereotyping, compounded discrimination, and evidentiary requirements and practices in formal courts make it difficult for women to access justice.⁴⁰ The full realisation of women's rights to seek separation, divorce or annulment of marriage through judicial order requires states to implement their obligations under human rights law and this can only be achieved by ensuring that judicial institutions adopt and exercise a gendered dimension of access to justice in such cases.

³⁷ Discussed in further detail at section 5.2.1.

³⁸ MO Izunwa 'A critique of certain aspects of the grounds, procedure and reliefs attaching to customary divorce law in Southern Nigeria' (2015) 7(5) *J of Law and Conflict Resolution* 31.

³⁹ CEDAW Committee 'General recommendation No. 33 on women's access to justice' (2015) CEDAW/C/GC/33 recognises the flexibility and accessibility of informal justice systems in promoting access to justice for women. However, it cautions that these systems may lead to further violations of women's rights and propel perpetrators impunity. It call for states to guarantee that informal justice systems do not restrict access by women to judicial remedies and the systems must not lead to further violation of their rights.

⁴⁰ Ibid.

The legal duty by state parties to protect and fulfil access to justice for all is contained in art 2(3) of the ICCPR and art 7(a) of the Banjul Charter. The CEDAW's arts 2(b) and (c) contain provisions on legal duties of state parties 'to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women and to establish legal protection of the rights of women on an equal basis with men'. The CEDAW Committee examines the obligations of state parties to ensure that women have access to justice. These obligations encompass the protection of women's rights against all forms of discrimination with a view to empowering them as individuals and as rights holders, and promote effective access to justice as a way of emancipating and transforming potential of law. The Maputo Protocol and ACHPHR General Comment No. 6 require states to take appropriate measures to ensure that women can access justice.

4.2. Violations of Article 7(a) of the Maputo Protocol

4.2.1. Discriminatory laws and practices on marriage

A legally recognised marriage is prerequisite for a woman to access court for separation, divorce or annulment of marriage. A myriad of challenges are encountered in this regard in most African countries.

- i) Legal pluralism in African countries is a breeding ground for discrimination against women in marriage especially when there exists contradictory legal provisions or when the law is silent on social realities.

In most Francophone countries, the Family Codes only recognise civil marriages which must be registered. In Burkina Faso for example art 232 of the Persons and Family Code provides that '[i]n order to promote the full development of the spouses to fight against socio-economic obstacles and feudal conceptions, monogamy is consecrated as the common law form of marriage. However, polygamy is allowed under certain conditions'.⁴¹ In efforts to avert negative impact of legal pluralism in marriage laws, some common law countries like Kenya and Malawi⁴² have codified marriage laws and recognise civil, customary and specific religious marriages with a requirement on their registration. Despite the codification, women still face challenges due to discriminatory practices and complex administrative processes.

Some highlights

Tunisia, a predominately Islamic religious country, prohibits polygamy under its Personal Status Code of 1956 and requires that all marriages be registered under

⁴¹ Despite the reality being that Islamic religious and traditional ceremonies account for most of Burkina Faso's marriages, art 233 of the Code specifically prohibits customary and religious marriages.

⁴² Kenya: Marriage Act 2013; Malawi: Marriage, Divorce and Family Relations Act 2015.

a notarial deed. Polygamy is allowed in Morocco, on condition that a wife consents to subsequent marriage, however unregistered tribal marriages that are operating under customary law and urfi (temporal) marriages are not recognised by law yet they are practiced. South Africa does not recognise religious marriages, but recognises civil and customary marriages. In Gambia, the law recognises civil, Christian and Muslim marriages with civil and Christian marriages considered monogamous but in the case of *Susan Badjie v Isatou Secka*⁴³ the Supreme Court of Gambia held that even if the deceased's marriage was celebrated under a monogamous regime, his second marriage was legal since he was a Muslim man with an unalterable right to marry more than one wife under Sharia law. Courts in Kenya and Tanzania continue to recognise polygamous marriages in situations where the initial marriage entered was monogamous.⁴⁴

- ii) Prerequisites such as registration of marriages or payment of dowry for customary or religious marriages not only affects the legal status of a marriage in certain jurisdictions but also a woman's decision to seek judicial redress to dissolve the union. Whereas the law may recognise a civil marriage, customs would demand that certain rites be performed for the union to be recognised. It is common in most parts of the continent for couples to undertake customary marriages and thereafter move to civil registration, especially in communities where customary marriages are held in higher regard than civil marriages.⁴³⁴⁴
- iii) In addition, very few national, cultural and religious laws recognise cohabitation as a form of marriage though the same is widely practiced amongst the young generation. Secularisation, economic constraints, inability to pay bride wealth and acting as a stepping stone to marriage are examples cited for the rise in cohabitation unions in Sub-Saharan countries.⁴⁵ Malawi, Tanzania and Liberia have laws which recognise this form of marriage after certain requirements are met.⁴⁶ Women under this type of union have weak protection and courts in a number of cases have refused to recognise the validity of such unions.

Most African constitutions provide wide-ranging provisions on equality and

⁴³ SC 15/2012 November 2014.

⁴⁴ In Tanzania see division of matrimonial assets case in *Limbu Ntalima v Ester Kaoande* (PC Matrimonial Appeal No. 03 of 2019) [2020] TZHC 1604. In Kenya in succession cases see *Re in the matter of Estate of Reuben Nzioka Mutua (deceased) P&A Cause No. 843* and *In Re Estate of Late Peter Kamau Ng'ang'a (Deceased)* [2018] eKLR. Although the amendments of the Law of Succession in November 2021 provide that only a spouse recognised under the Marriage Act is entitled to inherit.

⁴⁵ C Odimegwu et al 'Cohabitation in Sub-Saharan Africa' (April 2018) 18(1) *Southern African J of Demography* 111.

⁴⁶ In Malawi, s 13 of the Marriage, Divorce and Family Relations Act 2015 requires the court to make a determination on cohabitation based on length of the relationship (not less than five years); the fact of cohabitation; the existence of a conjugal relationship; ownership, use and acquisition of property; whether the parties mutually have, care for, or support children; and the reputation of the parties in the community as being married and the public display of aspects of their shared relationship.

non-discrimination⁴⁷ with countries such as Tanzania defining discrimination in their constitution.⁴⁸ However, constitutions such as Botswana⁴⁹ and Gambia still contain claw back clauses that allow the application of customary law in personal matters. Article 33(1) of the Constitution of the Republic of The Gambia⁵⁰ guarantees equality in law, however the equality and non-discriminatory provision under art 33(5) shall not apply to any law in so far as that law makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. Despite the constitutional provisions on equality, some countries still have laws that only recognise certain types of marriages or require their registration for them to be valid. This then discriminates against women in unregistered or unrecognised marriages and impedes them from receiving equal treatment before the law particularly when they choose to seek judicial redress in the event of dissolution of marriage.

The CEDAW and the Maputo Protocol require member states to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.⁵¹ Article 6(c) of the Maputo Protocol and the CEDAW Committee's General recommendation No. 29⁵² encourages monogamous marriages and art 6(d) of the Maputo Protocol and art 2 of the CEDAW calls for registration of all marriages. However, the CEDAW Committee and ACHPR recognise the realities faced by women and have developed interpretive texts to help clarify substantive provisions of treaties. The following table highlights the differences between the different international and regional instruments.

CEDAW	MAPUTO Protocol	ACHPR General Comment No. 6	Human Rights Committee
On polygamy: The CEDAW Committee is keen on having polygamy abolished but is careful about how this might happen, identifying a two-pronged ap	On polygamy: Article 6(c) and (d) of the Maputo Protocol calls for state parties to enact laws and	On unregistered unions: 'The practice in most African States show that predominantly, only civil marriages and religious marriages are registered,	On de facto unions: 'In giving effect to recognition of the family in the context of

⁴⁷ For example see Constitution of the United Republic of Tanzania (1977) arts 9(h), 12, 13 and 16(1); Malawi Constitution arts 13, 20 and 22; Constitution of Kenya (2010) arts 10, 27 and 45; Burkina Faso Constitution (1991) arts 1 and 23.

⁴⁸ See art 13(5): "'discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society'.

⁴⁹ Article 15(4.)

⁵⁰ 1996 with amendments through 2004.

⁵¹ CEDAW art 2(f); Maputo Protocol arts 2(1)(b) and 2(2).

⁵² CEDAW Committee 'General recommendation No. 29' (note 28 above) para 21.

CEDAW	MAPUTO Protocol	ACHPR General Comment No. 6	Human Rights Committee
proach; firstly, by protecting the rights of women in existing polygamous marriages and secondly, by discouraging future polygamous marriages.⁵³ On unregistered unions: General recommendation No. 29 require state parties to protect women in unregistered unions and provide ways for establishing proof of marriage by means other than registration.⁵⁴ On cohabitation: CEDAW calls for recognition of cohabiting unions in order to prevent women from being exposed to economic risks when a cohabiting relationship ends. It provides that recognition of cohabiting relationships is part of a state's obligations under art 16(1) of the CEDAW and calls for state parties to consider such a union in cases where neither party is married to another person.⁵⁵ On substantive equality: General recommendation No. 21 requires state parties to rely on the provisions on equality and non-discrimination as opposed to common law principles, religious or customary law.⁵⁶	take measures to protect women in marriage including those in polygamous marital relationships.	yet majority of marriages in Africa are customary marriages that are not registered. This presents challenges for regulating and implementing equitable processes for the distribution of matrimonial property during separation, divorce, or annulment.⁵⁷ On substantive equality: It requires state parties to focus on impact of laws and their application on women's lives and their ability to access and enjoy their human rights on an equal basis.⁵⁸ General Comment No. 6 requires states to apply the principles and rights enshrined under the Maputo Protocol to transform laws, practices and institutions that govern marriages.	art 23 of the Covenant, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these contexts.⁵⁹

⁵³ CEDAW Committee 'General recommendation No. 21' (note 28 above) para 14; Human Rights Committee 'General comment No. 28 (note 30) para 24.

⁵⁴ Ibid paras 25 and 26.

⁵⁵ CEDAW arts 30 and 31. See also CEDAW Committee 'General recommendation No. 21' (note 28 above) para 18.

⁵⁶ CEDAW Committee 'General recommendation No. 21' (note 28 above) para 17.

⁵⁷ ACHPR 'General Comment No. 6' (note 6 above) para 19.

⁵⁸ ACHPR 'General Comment No. 6' (note 6 above) para 42.

⁵⁹ Human Rights Committee 'General recommendation No. 28' (note 30 above) para 27.

Both the CEDAW Committee and ACHPR also caution against using registration as the sole means of proving the existence of a marriage.

The ACHPR General Comment No. 6 recognises the challenges women face in diverse marital regimes and the different standards accorded to women in and at the dissolution of marriage. It makes reference to situations where couples who do not perform marriage rites, cohabit for years and hold themselves out as husband and wife are not recognised as married hence unable to enjoy legal protection. Further, it makes reference to the potentially polygamous nature of Islamic and customary marriages and their prominence in the continent yet they are still not recognised in certain countries with women disproportionately affected by the exclusion.⁶⁰

Divergence between statutory, customary and religious laws and practices should be addressed beyond constitutions and, therefore, state parties are expected to guarantee equality between women and men in their constitutions and laws i.e. states with constitutional exemptions on application of equality principles are required to amend them in order to secure women's rights in family relations.

4.2.2. Ineffective access to justice systems

Whereas the realisation of women's rights in the context of marriage, family and property relations are guaranteed under international law, constitutions and legislation, without an effective and systematic application of human rights standards and norms across the justice chain, women will not realise these rights. The ways in which justice institutions enforce these rights have far reaching consequences on women's ability to access justice for violations that occur across varying contexts within a country.

Access to justice is a fundamental right that allows individuals to use legal processes and systems to protect their rights.⁶¹ Three main mechanisms for justice have been identified:

- i) formal justice derived from laws, policies and structures;
- ii) informal justice that emanates from social groups or community structure; and
- iii) transitional justice that is derived from accountability or reparation of victims where normal justice will not be able to provide adequate justice.⁶²

Therefore for art 7(a) to be realised, special attention must be given to women's interaction with both formal and informal justice systems.

To seek separation, divorce or annulment of marriage through a judicial order, women must be able to access an effective justice system. According to the 2020 World Justice

⁶⁰ ACHPR 'General Comment No. 6' (note 6 above) paras 15-18.

⁶¹ L Valesca & M Gomez 'Access to Justice: Promoting the Legal System as Human Right' in W Leal Filho et al (eds) *Peace, Justice and Strong Institutions, Encyclopedia of the UN Sustainable Development Goals* (2020) 1.

⁶² Ibid 88.

Project's 'Rule of Law Index', most African countries lack strong access to justice systems due to a number of factors including inequality and discrimination based on gender and economic status.⁶³ The unresponsive justice sector to the needs and realities of women, discriminatory legal framework, ineffective mechanisms on law enforcement and exclusion and disempowerment of women prevent women from exercising their right to redress through the court processes.⁶⁴

i) Formal justice systems

An unresponsive judiciary has resulted in courts issuing orders that are adverse to women's equality rights. In Gambia the *Susan Badjie v Isatou Secka*⁶⁵ case involving a succession dispute between two women shows the complicated position women can find themselves in as a result of interpretation of the law by courts, especially superior courts. The case involved a dispute between two women over the estate of the late Ebrima Badjie. Susan Badjie was married to Ebrima in 1995 under a civil marriage which by law is monogamous. In 2003, without the knowledge of Susan, Ebrima married Isatou Secka under the Muslim Marriage Act. The trial court held that the deceased's marriage to Isatou was void since the deceased lacked capacity to enter into a subsequent marriage when his marriage to Susan was subsisting. The Court of Appeal affirmed the trial court decision. However, the Supreme Court set aside the order and ruled that Isatou's marriage to the deceased was valid:

The deceased personal law at all material times was Sharia. The right of Muslims to be guided by Sharia law in respect of marriage, divorce, and inheritance are enshrined in Section 7 of the Constitution, statutes and other laws. There is no statute or law in the Gambia that abrogates a Muslim marriage solemnised under the Sharia law ... The right of the Muslim male to marry more than one wife under Sharia Law is unalterable. The Muslim male may decide not to exercise the right, but the right remains exercisable. Under a person's Islamic personal law one can decide to marry and remain married to one wife whether or not the marriage contracted is a Muslim marriage or one contracted under the Civil Marriage Act, but that by itself does not mean that such a person had 'opted' out of his personal law and his decision is irreversible while he remains married to that one wife.⁶⁶

In a case involving distribution of matrimonial property, the Ghanaian Court of Appeal in *Sackey v Boakye-Mensah*⁶⁷ ruled that a spouse must establish as a matter of course that the property was acquired during the subsistence of the marriage. In this case the couple cohabited from 1972 to 1977, formalised their union under customary law in 1978 and divorced in 1985. The court held:

⁶³ World Justice Project 'Rule of Law Index' (2020) <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf>.

⁶⁴ International Development Law Organization (IDLO) 'Strengthening Women's Access to Justice: Making Rights a Reality for Women and Girls' (2017) <<https://www.idlo.int/system/files/event-documents/IDLO%20CN%20-%20Access%20to%20Justice%20for%20Women%20and%20Girls%20NO%20CONTACTS.PDF>>.

⁶⁵ SC 15/2012 November 2014.

⁶⁶ Ibid.

⁶⁷ (218 of 2007) [2008] GHACA 22.

Customary law does not recognize concubinage. A concubine cannot therefore claim for a share in her boyfriend's property or girlfriend's property just because of services rendered to the boyfriend or girlfriend during concubinage ... The trial judge was therefore on course when she concluded that since the assistance the appellant claimed she gave the respondent between 1972 and 1977 ... was given when they were in concubinage relationship, even if it could be quantified, it could not be claimed under customary law since the law frowned and gives no recognition to concubinage.⁶⁸

The Economic Community of West African States Court of Justice in *Aminata Diantou Diane v Republic of Mali*⁶⁹ held that the failure of Mali's court to hear and determine without delay a case by Aminata against her in-laws violated her rights to effective remedy and non-discrimination as provided under arts 7 and 18(3) of the Banjul Charter and art 14(2) of the ICCPR. Aminata's husband suffered a stroke and was unconscious and incapacitated, her in-laws then abducted him and initiated divorce proceedings against her then assaulted and confiscated her matrimonial property.

These decisions affirm the inequality faced by women in plural legal systems and how an unresponsive justice system can perpetuate the vulnerability of women who seek justice. Reality acts as a criterion for interpreting the application of law. Therefore, judges are required to be sensitive to social realities.

Discriminatory legal texts continue to exist across the continent. Despite having equality and non-discrimination provisions in their constitutions, the Family Codes of Djibouti, Gabon, Equatorial Guinea, Mali and Sudan hold men as the head of the household and require women to obey their husbands, provisions which directly affects a women's decision to seek justice. The case of *Ato Del Avellanal v Peru*⁷⁰ illustrates the dilemma women with no right to equal access to justice are faced with.

ii) Informal justice systems

Customary and informal justice systems are popular among women due to their proximity to the people, non-adversarial nature, simplicity and cheap and easy enforcement of decisions. However, they also present a number of challenges. Overt discrimination and inequality is deeply embedded in cultural and religious practices therefore informal justice systems can reinforce patriarchy and enforce harmful outcomes for women.⁷¹

⁶⁸ Ibid.

⁶⁹ ECW/CCJ/APP/35/17) [2018] ECOWASCJ 14.

⁷⁰ Communication No. 202/1986 *G Ato del Avellanal v Peru* (October 1988) UN Doc. GAOR.A/44/40 CCPR/C/34/D/202/1986. Despite the Peruvian Magna Carta and the Peruvian Constitution guaranteeing equal rights to both men and women, a wife who owned apartment buildings in Lima could not sue her tenants for unpaid rent since the Peruvian Code required a married woman to pursue such a claim through her husband. The Peruvian Supreme Court affirmed the provisions of the Family Code and she lodged a complaint with the Human Rights Committee. The Human Rights Committee held that the Peruvian Family Code violated her rights under art 14(1) of the ICCPR on equality before the law, art 3, which requires state parties to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the ICCPR, and art 6, which requires state parties to ensure that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, hence the provision of the Family Code violated protection against discrimination based on gender.

⁷¹ IDLO 'Issue Brief: Navigating Complex Pathways to Justice: Women and Customary and Informal Justice Systems' (2020).

The impact of informal justice systems on women's rights is dependent on whether they are legally recognised or not. In Botswana, customary courts are subordinate courts under the judiciary. These courts have jurisdiction to hear and determine customary divorce.⁷² In Kenya, religious and traditional dispute resolution systems are recognised under the Constitution. The Islamic religious Kadhis courts⁷³ are part of subordinate courts operating under the judiciary, the administrative chiefs and village elders are regarded as an autonomous third party system operating under the executive and the autonomous alternative justice institutions operating independently from the state.⁷⁴ Under the Marriage Law, only the civil and Kadhis courts are allowed to determine disputes relating to dissolution of marriages. However, cultural structures especially in rural areas continue to hear and determine disputes relating to separation and divorce.⁷⁵

The overlapping jurisdiction between the formal courts and informal justice systems opens up the possibility for conflict of laws; this is particularly harmful to women since traditional justice systems apply customary law in family disputes even when the customary law applied conflicts with statutory law or the jurisprudence of the formal courts.

It is now accepted that the focus on access to justice goes beyond improving an individual's access to courts or guaranteeing legal representation but includes the ability of a person to seek and obtain a remedy through an formal or informal justice institution of grievance handling in compliance with human rights standards.⁷⁶

The CEDAW Committee's General recommendation No. 33 identifies the following six interrelated and essential components towards realisation of access to justice for women: justiciability, availability, accessibility, good quality and accountability of justice systems, and provision of remedies for victims.⁷⁷

⁷² See *Mafokate v Mafokate* 2000 (2) BLR 430 (HC) where the Botswana High Court proceeded to hear and determine a customary divorce by virtue of its original jurisdiction but mentioned that such cases are best handled by the customary court.

⁷³ Recognised under Constitution of Kenya art 170.

⁷⁴ Judiciary of Kenya 'Alternative Justice Systems Baseline Policy and Policy Framework' (2020).

⁷⁵ Human Rights Watch & FIDA Kenya "'Once You Get Out, You Lose Everything'" Women and Matrimonial Property Rights in Kenya' (2020).

⁷⁶ United Nations Development Programme *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (2005).

⁷⁷ CEDAW Committee 'General recommendation No. 33' (note 39 above) paras 13-14: 'Justiciability entails the unhindered ability of women to access justice and to claim their rights; *availability* entails the existence of courts and other quasi-judicial bodies throughout the national territory, including rural and remote areas; *accessibility*, requiring all justice systems to be secure, affordable, physically accessible to women and that they are adapted and appropriate to respond to the needs of women; *good quality* includes elements such as competence, efficiency, independence, impartiality and timeliness; the *provision of viable and meaningful remedies*; and *accountability* of the justice system(s)'.

CEDAW'S components on access to justice

- ✓ On justiciability, the CEDAW Committee recommends state parties to ensure that rights and correlative legal protections are recognised and incorporated in the law and improving the gender responsiveness of the justice system; improve women's unhindered access to justice systems and empower them to achieve de jure and de facto equality; and ensure that the professionals of justice systems handle cases in a gender sensitive manner.
- ✓ On availability of justice systems, the CEDAW Committee recommends the creation, maintenance and development of courts, tribunals and additional entities, as needed, that guarantee women's right of access to justice without discrimination on the whole territory of the state party, including in remote, rural and isolated areas.⁷⁸
- ✓ On accessibility of justice systems, the CEDAW Committee recommends the removal of economic barriers to justice by providing legal aid and development of targeted outreach activities and distribute information about available justice mechanisms.
- ✓ Justice systems should be of good quality and adhere to international standards of competence, efficiency, independence and impartiality, as well as to international jurisprudence and implement mechanisms to ensure that procedures are impartial and not influenced by gender stereotypes or prejudice.
- ✓ On provision of remedies, the CEDAW Committee recommends the provision and enforcement of appropriate, timely remedies for discrimination against women and ensure that women have access to all available judicial and non-judicial remedies.⁷⁹

Further the CEDAW Committee's General recommendation No. 33 calls for harmonisation of laws by enactment of laws that defines the relationship between existing plural justice systems, the creation of state review mechanisms and the formal recognition and codification of religious, customary, indigenous, community and other systems.⁸⁰ Informal justice systems are allowed on condition that they adhere to human rights standards such as non-discrimination and fairness.

The Human Rights Committee requires state parties to the ICCPR to provide information in their reports on the following: whether there are legal provisions preventing women from direct and autonomous access to the courts; whether women may give evidence as witnesses on the same terms as men; whether measures are taken to ensure equal access to legal aid in particular in family matters; and whether certain categories of women are denied the enjoyment of the presumption of innocence.⁸¹

⁷⁸ Ibid paras 15 and 16.

⁷⁹ Ibid paras 17, 18 and 19.

⁸⁰ Paras 62 and 64.

⁸¹ Human Rights Committee 'General recommendation No. 28' (note 30 above) para 18.

Article 8 of the Maputo Protocol requires state parties to take appropriate measure to ensure that women have effective access to judicial and legal services.⁸² The article recognises the importance of tradition and customs, but notes that these can adapt to ensure they do not contravene women's rights. The Maputo Protocol seeks to resolve the tension between customary and women's rights and encourages the maintenance of the former, as long as they do not contravene the latter.

The ACHPR General Comment No. 6 requires state parties to establish systems and other processes to allow women to seek justice in the event of separation, divorce or annulment of marriage. It calls for special attention to women with no children, women with disabilities and those in rural areas due to their vulnerability and requires states to provide broad legal aid services that would include legal representation, legal assistance, legal advice, legal information, alternative justice systems and restorative justice.⁸³ Recognising the role of judicial and administrative officers in preventing or perpetuating gender discrimination, the ACHPR requires state parties to train judicial and administrative officers on women's equal rights in marriage and ensure adequate resources and information that will advance gender equality.⁸⁴

Possible claims under art 7(a) of the Maputo Protocol

- ✓ Failure of the state to legally recognise certain types of marriages widely practiced such religious, customary and de facto marriages.
- ✓ Mandatory legal requirement for registration of all marriages yet systems and processes are not available to all citizens.
- ✓ Legal texts, cultural and religious practices that restrict women from seeking redress through formal courts.
- ✓ Lack of harmonisation of formal and informal access to justice systems, including provision of review or appeal mechanisms by the state.
- ✓ Failure of the state to provide legal services, including accessible courts, awareness creation, legal aid services and trainings.

⁸² This includes legal aid; to establish adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; equip law enforcement organs at all levels to effectively interpret and enforce gender equality rights; and reform existing discriminatory laws and practices in order to promote and protect the rights of women.

⁸³ ACHPR 'General Comment No. 6' (note 6 above) para 56.

⁸⁴ Ibid para 57. The United Nations General Assembly Declaration of the High-level Meeting on the Rule of Law also recognises the need for strengthening justice and to ensure that it is accessible and responsive to the needs and rights of all individuals. It further calls for effective just, non-discriminatory and equitable delivery services to all; independence of the judicial system, together with impartiality and integrity; equal access to justice for all including awareness raising of legal rights, including to members of vulnerable groups; incorporation of international human rights principles in the informal justice mechanisms, and the need for special attention to women and children who are susceptible to violence and discrimination.

5. Article 7(b): Women and Men Shall Have Equal Rights to Seek Separation, Divorce or Annulment of a Marriage _____.

5.1. Meaning and scope

The principle that women are equal with men is the heart of women's emancipation. In law, women are regarded as equal to men but the same cannot be realised due to the unequal social, economic and cultural structures in society. The legal provision of equality in marriage permits a woman to enter into, remain in and exit from a marriage without encountering any barriers. Article 7(b) therefore allows a woman equal access to marital freedom.

The use of divorce restrictions to circumscribe women's status in society had been applied across the globe for years with female initiated divorce perceived as a threat to social order to husbandly authority and wifely domesticity.⁸⁵ The influence of customary, religions and colonial laws on marital regimes continues to sustain marital hierarchy that favours masculine privilege and patriarchal authority in marriage across the continent. Discriminatory laws and customs seem to control women's status through limitations on exits from marriage. The scope of art 7(b) is therefore to ensure that law and practice allow women to govern their own lives and make independent decisions with regards to separation, divorce and annulment of marriage.

The CEDAW under art 16 requires state parties to eliminate all forms of discrimination against women at the inception of marriage, during marriage and at its dissolution by divorce or death. The state has an obligation to protect rights under art 7(b) by ensuring that laws and systems accord both men and women equal treatment including instituting legal proceedings in court. This obligation also requires that states prohibit institutions or individuals from restricting a woman's ability to seek legal redress.⁸⁶

The duty to respect requires the state to refrain from interfering in the enjoyment of women's rights. It prohibits enacting or maintaining laws or regulations; or establishment of programmes and administrative procedures that directly or indirectly deny women from enjoying this right.⁸⁷ To fulfil the right under art 7(b), the state is required to take

⁸⁵ CK Yeref 'Divorce as a Substantive Gender-Equality Right' (February 2020) 22(2) *J of Constitutional Law* 455.

⁸⁶ CEDAW Committee 'General recommendation No. 21' (note 28 above) para 8.

⁸⁷ CEDAW Committee 'General recommendation No. 28: Core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28 para 9.

all appropriate measures including adopting anti-discrimination legislation, establishing legal protection for the rights of women, and modifying or abolishing discriminatory laws and practice.⁸⁸

5.2. Violations of Article 7(b) of the Maputo Protocol

5.2.1. Discriminatory laws and practice on seeking separation, divorce or annulment of marriage

Most countries have constitutions that contain broad language which mandates gender equality or non-discrimination on the basis of sex; others have specific provisions on equality in marriage. However, certain practices or laws grant men the authority to head households or be the legal representatives of households, thereby giving them the authority to make decisions on behalf of the family; this authority includes a woman's decision to separate, divorce or annul a marriage.⁸⁹

Similar to marriage laws, separation, divorce or annulment of marriage are governed by different regimes namely civil, customary or religious law. While dissolution of marriage is normally conducted through judicial courts, a number of jurisdictions such as Botswana, Nigeria and Uganda permit the dissolution of customary marriages through cultural structures using applicable customs. However, similarities with these regimes is that, often, women are denied equal rights to men when seeking separation, divorce or annulment of marriage.

i) Statute laws

In Uganda, the Divorce Act regulates separation and divorce cases. Both the husband and wife can petition the court for divorce. However, the grounds for petition are different between men and women. Women are required to prove change of religion by husband and aggravated adultery (adultery and other offences such as bigamy, adultery, incest or desertion); for a husband, he only needs to have one ground – adultery by the wife.⁹⁰ Compared to men, the process of seeking a divorce is more tedious for women. For example, it is easier for men than women to divorce under Muslim law as men can divorce their wives unilaterally. Despite the High Court in *Uganda Association of Women Lawyers and Others v Attorney General*⁹¹ declaring the provisions to be discriminatory and hence unconstitutional, no legislative amendments have been undertaken.

⁸⁸ Ibid paras 16 and 17.

⁸⁹ UN Women, UNDP, UNODC & OHCHR *Practitioner's Toolkit on Women's Access to Justice Programming* (2018) Module 2: Marriage, Family and Property Rights.

⁹⁰ Divorce Act CAP 249 s 4.

⁹¹ [2004] UGSC 1 (discriminatory sections of the Divorce Act that made it difficult for women to prove grounds for divorce).

ii) Religious and customary laws

Even when the law allows women to separate, divorce or annul a marriage, religion and culture may prohibit them from taking this action, making it difficult for women to seek divorce.⁹² Under Sharia law, divorce by talaq can only be effected by a husband, giving a man unilateral and unconditional power to divorce his wife without any reason and without resorting to legal proceedings. Women on the other hand must give reasons for divorce to be allowed. The three divorce options for women are khul, mubarah or talaq-e-tafwaz and require a judicial process.⁹³ This is the practice in most Muslim countries and countries that allow the application of Islamic law in personal matters.

Women are not allowed to divorce in most customary laws across the continent of Africa. If she does, the incident attracts negative implications for herself and her family.⁹⁴ In Burkina Faso, a divorced woman is considered by her parents as 'setting a bad example' to her unmarried sisters.⁹⁵ Therefore to preserve the dignity of her family, a married woman is expected to persevere even if she faces insuperable adversity.⁹⁶

The economic and social impact on women in case of separation, divorce or annulment of marriage takes away a wife's practical ability to divorce her husband. In addition to the expensive and tedious judicial processes, women are unlikely to have means of sustenance outside a marriage. In some cultural and religious marriages, women may be required to refund the bride price upon dissolution of marriage.⁹⁷ In Kenya, courts have ruled that distribution of property acquired during a marriage that was later annulled cannot be claimed under matrimonial property since the annulment invalidated everything including marital rights.⁹⁸ The challenges render separation, divorce or annulment almost unviable for women. State parties are required to introduce measures directed at encouraging full compliance with the CEDAW's provisions on equality before the law and equality in marriage and ensure that religion, private law or custom does not impede the actualisation of these said articles.⁹⁹

The CEDAW Committee takes note of the financial consequences of divorce and different standards of fault for wives and husbands, such as requiring proof of greater

⁹² For example, Christians often quote the Bible in Malachi 2:16 that God hates divorce. For Muslims divorce is considered the most detestable thing before Allah.

⁹³ A Shah 'Women's Human Rights in the Koran: An Interpretive Approach' (2006) 28(4) *Human Rights Quarterly* 892. Talaq involves a husband repudiating a wife by saying 'you are divorced' three times. Khul is where a wife buys her release by returning her dowry; mubarah involves mutual consent though husband still has leverage and talaq-e-tafwaz occurs when the husband delegates a wife power to divorce.

⁹⁴ J Obonye 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' (2012) *J of African Studies and Development* 147.

⁹⁵ GB Thiombiano 'Effects of marital breakdown on women's living conditions in Burkina Faso (Spring/Summer 2012) 39(1-2) *Canadian Studies in Population* 1.

⁹⁶ Note 91 above.

⁹⁷ Human Rights Watch & FIDA Kenya (note 75 above).

⁹⁸ See *O K N v M P N* [2017] eKLR and *G M v D M* [2018] eKLR (women inability to claim matrimonial property after annulment of marriage).

⁹⁹ CEDAW Committee 'General recommendation No. 21' (note 28 above) para 48.

infidelity by a husband than by a wife as a basis for divorce, and calls on state parties to revise provisions that link grounds for divorce to financial consequences and eliminate difference in the standards of fault for wives and husbands. In addition, the CEDAW Committee requires state parties to eliminate any procedural requirement for payment of preferment, dowry repayment or any other payment that was an element in the marriage formation that does not apply equally to husbands and wives.¹⁰⁰

In Uganda, in *Mifumi v Attorney General*¹⁰¹ involving a petition seeking to declare the marriage custom and practice of demanding bride price and its refund in the event of divorce as unconstitutional, the Supreme Court dismissed the claim that the practice of bride price payment was unconstitutional but ruled that the refund of bride price upon divorce was unconstitutional. The court held:

The custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2nd respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term 'bride price' is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded. Apart from this, the custom completely ignores the contribution of the woman to the marriage up to the time of its break down. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. I respectfully do not agree with the suggestion proposed by the 2nd respondent that when the marriage breaks down, a woman's contribution should be subjected to valuation ... the refund of bride price violates Article 31(1) which provides that 'men and women of the age of eighteen and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution'.¹⁰²

The Human Rights Committee states that art 23(4) of ICCPR on equal rights and responsibilities extends to arrangements regarding legal separation or dissolution of the marriage, noting that 'any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited'.¹⁰³

The ACHPR General Comment No. 6 supports judicial process in the dissolution of marriage. It highlights the negative impact of different grounds and procedures for divorce on distribution of marital property at the time of separation, divorce or annulment of the marriage.¹⁰⁴

¹⁰⁰ CEDAW Committee 'General recommendation No. 29' (note 28 above) paras 38, 40 and 41.

¹⁰¹ [2015] UGSC 13 (payment and refund of bride price).

¹⁰² Ibid.

¹⁰³ Human Rights Committee 'General recommendation No. 28' (note 30 above) para 2.

¹⁰⁴ ACHPR 'General Comment No. 6' (note 6 above) paras 14, 16 and 18.

The ACHPR calls on state parties to enact legislation that allows women and men to enjoy equal rights in case of separation, divorce or annulment as provided for under art 7 of the Maputo Protocol.¹⁰⁵ Further, it calls for review of the domestic legal framework by state parties to ensure that they are harmonised and give full effect to women's equal rights to marital property, including the repeal of discriminatory laws; harmonisation of family and civil codes with the Maputo Protocol, particularly around issues of marriage, divorce, separation or annulment of marriage; and ensuring that the threat of dispossession in case of divorce or separation is punishable by the law.¹⁰⁶

5.2.2. Divorce restrictions

In addition to discriminatory laws and practices, divorce restrictions affect the realisation of art 7(b) of the Maputo Protocol. Most countries have fault-based provisions and mandatory waiting periods before divorce can be initiated, thus discouraging formal divorce processes.

i) Fault-based restrictions

In Burkina Faso, whereas arts 354 and 355 of the Family Code allows parties to a marriage to jointly request a divorce without giving a reason for divorcing, it also allows for fault-based divorce under art 367 which allows a spouse to petition for divorce on the following grounds: adultery, excess abuse or serious insults, when a family member or children's safety are seriously compromised by obvious misconduct or moral or material abandonment, separation for over three years or medically impotence or sterility. In Kenya, depending on the type of marriage different grounds apply, though common grounds are adultery, cruelty, desertion, exceptional depravity and irretrievable breakdown of marriage.¹⁰⁷ However, for Muslim marriages, Islamic law on divorce applies while for customary marriages the Marriage Act also permits the application of a valid ground under the customary law of the petitioner.

In Egypt, women do not have a unilateral right to seek divorce. The law permits both fault-based and non-fault-based divorce. For fault-based divorce a woman must prove that the husband suffers from illness including mental illness, venereal disease and impotence; makes no provision of maintenance; is absent, imprisoned or injured (darar) which includes a variety of forms of physical and mental harm.

Whereas the above laws may appear gender neutral, fault-based divorce perpetuate women's social and economic inferiority resulting in women living under the sovereignty of their husbands. The substantial burden of providing evidence in fault-based divorce may prevent women from seeking justice. In addition, adultery as a ground for divorce is overwhelmingly directed against women. This is evident in the harsher penalties given to women than men in laws that criminalise divorce. In some jurisdictions, grounds

¹⁰⁵ Ibid para 36.

¹⁰⁶ Ibid para 51.

¹⁰⁷ Marriage Act of 2014 ss 65, 69 and 70.

for divorce have a direct link to the financial consequences of a divorce or custody of children, for example payment of alimony or child custody may be denied subject to a woman's role in the dissolution of marriage. In Kenya, s 83(3) of the Children Act allows a court to refer to reasons used in granting judicial separation or divorce to grant custody orders, meaning fault-based divorce can be used to deny a woman custody rights. The section reads:

In any case where a decree for judicial separation or a decree, either nisi or absolute for divorce, is pronounced, and the court pronouncing the decree either nisi or absolute finds the parent by reason of whose misconduct the decree is made to be unfit to have the legal custody of the child or children of the marriage, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled to legal custody of the child except with the leave of the court.

Therefore, no-fault divorce is a fundamental right for women since it allows them marital freedom; marital freedom is a critical component for social order and realising women's rights.¹⁰⁸

ii) Lengthy statutory waiting periods

In addition to fault-based divorce, restrictions on when one can file a divorce and re-marry after dissolution of marriage impacts negatively on women. In Burkina Faso, the waiting period is two years. This practice has seen couples opt to informally separate rather than wait for the necessary period to initiate a formal divorce. In Kenya the Marriage Act states there should be a mandatory three year period before a divorce is initiated in a civil marriage. The High Court of Kenya in *Tukero ole Kina v Attorney General & another* declared the three year waiting period as unconstitutional.¹⁰⁹ The judge stated:

By imposing the three year limitation, the impugned Section had the effect of forcefully keeping parties in a situation they no longer wished to be part. So that while Section 66 (2) contemplated cruelty and exceptional depravity as a ground for dissolution of marriage, a Petition could not be entertained until the time limit was reached. This, in my view, is a prima facie is a case of an affront to a person's human dignity preserved by Article 28 and I have no hesitation in holding as much.¹¹⁰

On the matter of a waiting period before remarriage, in countries such as the Democratic Republic of Congo and Burkina Faso, divorced women must wait 300 days before they can remarry. For Muslims, a divorced woman cannot remarry until the lapse of a three month waiting period (idda).

¹⁰⁸ Yeref (note 85 above).

¹⁰⁹ [2019] eKLR (three year waiting period before divorce is petitioned declared unconstitutional).

¹¹⁰ Ibid para 122.

The South Africa Supreme Court of Appeal decision in *RH v DE* held that a husband's claim for compensation from a wife's intimate partner based on adultery was not tenable in the modern world.¹¹¹ The court held:

The evidence normally led in adultery actions seriously impacts on the dignity and privacy of the defendant, and the spouse that is alleged to have committed adultery. In this case Ms H was subjected to embarrassing and demeaning cross-examination and was made to suffer the indignity of having her personal and private life placed under a microscope and being interrogated in an insulting and embarrassing fashion. The clear impression one gains from the evidence in this case was that the plaintiff was motivated by considerations of anger at his wife for the breakup of their marriage. He found the defendant a convenient scapegoat and repository of his anger and his desire for revenge. So, instead of being moved by a need for solace and closure, the action was driven by a negative and destructive craving for revenge. I have no doubt that this is often the case ... In the light of the changing *mores* of our society, the delictual action based on adultery of the innocent spouse has become outdated and can no longer be sustained; that the time for its abolition has come ... the continued existence of the action is in conflict with our constitutional norms.¹¹²

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Article 1 of the CEDAW notes restrictions on the basis of sex as having an impact on the realisation of equality and non-discrimination and calls on member states under art 2 to condemn discrimination against women in all its forms including taking measures that will embody equality in constitutions and laws, put in place sanctions to prohibit discrimination and refrain from engaging in any act that would promote discrimination against women.

The CEDAW Committee notes that some legal systems make a direct link between grounds for divorce and financial consequences of divorce with fault-based divorce regimes conditioning financial rights on lack of fault. It further notes that fault-based regimes may include different standards of fault for wives and husbands and that fault-based economic frameworks frequently work to the detriment of the wife, who is usually the financially dependent spouse. The CEDAW Committee calls on members states to revise provisions linking grounds for divorce and financial consequences to eliminate opportunities for husbands to abuse these provisions to avoid any financial obligations towards their wives; revise provisions relating to fault-based divorce to provide compensation for the contributions made by the wife to family economic well-being during the marriage; and eliminate different standards of fault for wives than for husbands, such as requiring proof of greater infidelity by a husband than by a wife as a basis for divorce.¹¹³ In its concluding observations on the combined sixth and seventh periodic reports of Mali in 2016, the CEDAW Committee called on the Malian state to

¹¹¹ (594/2013) [2014] ZASCA 133; 2014 (6) SA 436 (SCA) (claim for damages on allegations of adultery denied).

¹¹² Ibid para 39.

¹¹³ CEDAW Committee 'General recommendation No. 29' (note 28 above) paras 39-40.

repeal provisions of the Personal and Family Code including the requirement for a waiting period for a divorced woman to remarry, stating that this provision is discriminatory.¹¹⁴

The Human Rights Committee requires state parties to ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation, and that the grounds for divorce and annulment should be the same for men and women.¹¹⁵ The Human Rights Committee urged Venezuela to amend all laws that still discriminate against women, including those relating to adultery and the ban on marriage for ten months following the dissolution of a previous marriage since it violates women's rights as provided for under arts 2, 3 and 26 of the ICCPR.¹¹⁶

The OHCHR and Joint United Nations Programme on HIV/AIDS International Guidelines on HIV/AIDS and Human Rights recommends the review of laws to ensure equality of women regarding property, marital relations and access to employment and economic opportunity, so that discriminatory limitations are removed on rights to own and inherit property, enter into contracts and marriage, obtain credit and finance, initiate separation or divorce, equitably share assets upon divorce or separation and retain custody of children.¹¹⁷

The ACHPR General Comment No. 6 highlights how grounds for divorce in customary marriage may vary depending on the custom in a particular group and the impact on the distribution of marital property at the time of separation, divorce or annulment of the marriage, and calls for review of discriminatory laws and practices.¹¹⁸

Possible claims under art 7(b) of the Maputo Protocol

- ✓ Laws that automatically give men authority to head homes.
- ✓ Legal texts, cultural and religious practices that restrict women from seeking separation, divorce or annulment of marriage (including refund of dowry, fault-based divorce and restriction of remarriage after divorce).
- ✓ Lack of harmonisation of laws to govern separation, divorce or annulment of marriages, including lack of accountability mechanisms for available justice systems.

¹¹⁴ CEDAW/C/MLI/CO/6-7.

¹¹⁵ Human Rights Committee 'General recommendation No. 28' (note 30 above) para 26.

¹¹⁶ Human Rights Committee UN doc GAOR A/55/38 41 para 406.

¹¹⁷ UN AIDS *International Guidelines on HIV/AIDS and Human Rights* (2006).

¹¹⁸ ACHPR 'General Comment No. 6' (note 6 above) paras 18, 50 and 51; Maputo Protocol art 7(d).

6. Article 7(c): In Case of Separation, Divorce or Annulment of Marriage, Women and Men Shall Have Reciprocal Rights and Responsibilities Towards Their Children. In Any Case, the Interests of the Children Shall be Given Paramount Importance._____.

6.1. Meaning and scope

Women's discrimination in the family affects their decision making power and undervalues their status in marriage. Social institutions, formal and informal laws, and cultural and religious practices control women's household responsibilities and parental authority.¹¹⁹ The legal guardianship and division of care and responsibility for children after divorce mirrors societal expectations of men and women in the family sphere. It is reported that in Asia and Africa women in 146 countries enjoy equal rights and responsibilities of their children upon divorce. However, in 34 countries women do not have equal rights and obligations for their children upon divorce.¹²⁰

The overarching issues relating to custody and child responsibility that negatively affects women's equality rights include domestic violence, the weaker bargaining position of women in the family and interpretations of the best interest of the child in a gender-biased way.¹²¹

The essence of art 7(c) of the Maputo Protocol is to ensure that gender issues affecting women's ability to have custody and child responsibility is given special attention. State parties have an obligation under art 16 of the CEDAW to ensure equality for women in the family, including with regards to their rights and responsibilities as parents. In addition under the Convention on the Rights of the Child,¹²² the state parties are required to recognise that both parents have common responsibilities for the upbringing and development of their children. Under both conventions, the best interests of the child are overriding.

¹¹⁹ Social Institutions and Gender Index *Global Report* (2019).

¹²⁰ Ibid.

¹²¹ F Raday 'Gender Equality and Women's Rights in the Context of Child Custody and Maintenance: An International and Comparative Analysis' UN Women Discussion Paper Series No. 30 (2019).

¹²² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

The obligation to protect and fulfil requires governments to put in place laws and adopt measures that prohibit, any custom, tradition, cultural or religious practice that is inconsistent with the gender equality principle and the rights of the child.¹²³ The obligation to respect requires states to refrain from interfering with women's rights to guardianship and responsibility towards their children upon separation, divorce or annulment of marriage. The Committee on the Rights of the Child has regarded that shared parental responsibilities are generally in the child's best interests. The courts are required to take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case.¹²⁴

6.2. Violations of Article 7(c) of the Maputo Protocol

6.2.1. Discriminatory laws and practice on reciprocal rights and responsibilities towards children

Customary, religious and colonial laws give males prerogative over guardianship and custody of children upon divorce. Under both customary and religious laws, lineage systems serve as a basis for rights, privileges and duties within the family, including decisions on child custody and child maintenance. For example, in countries where Islam is recognised as a source of family law, Sharia principles apply in cases of custody and care for children after divorce. Under Sharia, mothers are generally entitled to physical custody of children up to a certain age, although this varies between different legal schools within Islam and is differentiated between boy and girl children.¹²⁵

In Morocco under the Family Code (Moudawana) a father is considered to be the legal guardian of his children; the mother has the right to custody of both the male and female children until the age of 15. In addition, a woman seeking custody will not marry except in certain exceptional cases. In Gambia, the laws on guardianship and maintenance of children vary depending on the legal regime applied. In civil law, the guiding principle for custody is the best interest of the child. However, in customary and religious law where Cadi courts and district tribunals have jurisdiction over children's issues including custody, access and maintenance, the best interest of the child may not be the primary consideration. For example, the Cadi courts, which preside over Muslim family disputes, will grant custody of a male child who is seven years old and above to the father and that of a female child to the mother.¹²⁶ In Botswana, where marriage is under customary law, children born in wedlock are considered to belong to the father's lineage.¹²⁷

¹²³ CEDAW Committee 'General recommendation No. 29' (note 28 above) paras 21 and 27; ACHPR 'General Comment No. 6' (note 6 above) para 13; African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) art 1(3).

¹²⁴ Committee on the Rights of the Children 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' (2013) CRC/C/GC/14.

¹²⁵ Social Institutions and Gender Index (note 119 above).

¹²⁶ Ibid.

¹²⁷ EM Mokobi 'Lingering inequality in inheritance law: the child born out of wedlock in Botswana' (2000) 31(2) *Perspective* 231-236.

In addition to guardianship and custody of children, child maintenance after divorce continues to disadvantage women. Due to the socio-economic impact of divorce, women's income usually reduces compared to men and upon divorce, most women are not well prepared to take care of the children as a result of the gender roles assigned in marriage where a woman was a caregiver while a man was the wage earner. Further access to justice challenges and hurdles in enforcement of court orders remain a huge problem for women who at times are met with violence when they choose to seek redress.¹²⁸

The majority of national laws and codes in Africa have enacted specific laws to handle child custody and maintenances cases upon dissolution of marriage. These laws have express provisions of the best interest of the child principle in determining children matters. However, customary and religious laws still stifle women's right to custody and maintenance of the children.

Articles 16(1)(d) and (f) of the CEDAW require state parties to ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children. The CEDAW Committee takes concern with some countries where de jure equality exists and women are still assigned different roles and responsibilities thereby violating the principle of equality under the CEDAW. It calls upon state parties to recognise the shared responsibility of parents to care, protect and maintain their children and that the principle of best interest of the child be the paramount consideration.¹²⁹ Further the CEDAW Committee calls for state parties to take note of women's economic equality upon divorce and how laws, customs and practices relating to custody and financial support of minor children have an economic impact on women's post-divorce economic status.¹³⁰

On the general understanding of the principle of equal rights and responsibilities with regard to children after dissolution of marriage, the Human Rights Committee requires state parties to extend the application of art 23(4) and address any discriminatory treatment in regard to the grounds and procedures of child custody, maintenance or alimony, visiting rights and prohibit loss or recovery of parental authority over a child, ensuring that the best interest is considered at all times.¹³¹ These views were further expounded by the Human Rights Committee when it emphasised that, in order to fulfil their obligations under art 23(4), state parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children's religious and moral education.

The definition of discrimination under the Maputo Protocol encompasses a variety of possible discriminatory actions having either the express purpose or the actual effect of discriminating against women. Discrimination can occur through direct or indirect

¹²⁸ Ibid.

¹²⁹ CEDAW Committee 'General recommendation No. 21' (note 28 above) paras 20 and 21.

¹³⁰ CEDAW Committee 'General recommendation No. 29' (note 28 above) para 21.

¹³¹ Human Rights Committee 'General recommendation No. 28' (note 30 above) para 26.

discriminatory provisions and laws that appear to be gender-neutral can tend to ignore salient issues that affect the realisation of gender equality. In the case of child custody and maintenance upon separation or dissolution of marriage, when the law does not recognise the social and economic status of women rights, equality will not be realised. Substantive equality is therefore critical for gender equality and addressing other horizontal inequalities between groups that are discriminated against or otherwise forgotten.

Possible claims under art 7(c) of the Maputo Protocol

- ✓ Laws and practice that give men prerogative over child custody without taking into consideration the overriding principle of best interest of the child.
- ✓ Availability of legal texts, cultural and religious practices that restrict women obtaining custody and maintenance orders for children upon divorce.
- ✓ Lack of harmonisation of systems handling child custody and maintenance disputes upon divorce, including failure to inculcate the best interest of the child in all the systems and provision of review or appeal mechanisms for justice systems by the state.
- ✓ Failure of the state to provide legal services; including accessible courts and awareness of equal parental rights upon dissolution of marriage.

7. Article 7(d): In Case of Separation, Divorce or Annulment of Marriage, Women and Men Shall Have the Right to an Equitable Sharing of the Joint Property Deriving from the Marriage

7.1. Meaning and scope

Women have limited access to and enjoyment of property rights mainly due to unequal power relations between men and women, discriminatory social and cultural structures and practices, and lack of economic empowerment. This affects women's rights to property both at the time of marriage and on divorce or separation. While in marriage, they exercise limited economic decision-making power in the household but household and reproductive roles are never given economic value.¹³²

The situation is worse for women's control of property within a marriage. Traditional and religious practices and property rights institutions have favoured men over women with a number of laws treating men as household heads who enjoy complete control of family property. These factors increase the vulnerability of women when marriages break down.¹³³

As highlighted in previous sections, despite a number of laws in different states guaranteeing the right to equality, non-discrimination and property, other legislations, customary norms and patriarchal practices entrench gender inequality in this regard resulting in violations of property rights during separation, divorce or annulment of marriage in Africa. In addition, in many parts of the continent, discriminatory laws and practices that inhibit women from jointly owning property, marital power being granted to husbands, gendered responsibilities and burdensome household responsibilities, and negative cultural and religious practices continue to undermine women's contribution to acquisition of marital property.¹³⁴

The scope of art 7(d) of the Maputo Protocol is to ensure that laws, cultural and religious texts and structures are transformed to ensure that women have equal rights to property during separation, divorce or annulment of marriages.

¹³² ACHPR 'General Comment No. 6' (note 6 above) paras 1-2.

¹³³ Ibid para 3.

¹³⁴ Ibid paras 4-5.

The CEDAW and the Maputo Protocol require state parties to ensure equality of all persons and eliminate all forms of discrimination against women including within a family setup. The obligation to protect requires state parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In order to respect women's matrimonial property rights, the state is required to refrain from violating these rights and to fulfil this right, the state is required to take up measures such as provision of access to justice services, creation of awareness, undertake capacity building and ensure adequate financial resources towards this mandate.¹³⁵

The development of the General Comment No. 6 by the ACHPR provides clarity on the legal obligations of states to establish a continent-wide standard based on human rights principles and measures state parties should undertake to give effect to equitable sharing of marital property during separation, divorce and annulment of marriage.

7.2. Violations of Article 7(d) of the Maputo Protocol

7.2.1. Discriminatory laws and practices on right to property during separation, divorce or annulment of marriage

The right to own property is protected by most constitutions without any form of distinction based on gender.¹³⁶ Secure land rights for women means attainment of food security, sustainable economic development, prevention of domestic violence and provides them with greater voice in decision making at home and in the community.¹³⁷

In marriage, the majority of statutes and codes provide spouses with rights to access property and protection against eviction or alienation from property by a spouse. However, discriminatory laws and social norms, legal pluralism and lack of effective implementation of existing laws continue to hamper the realisation of women's property rights especially on division of matrimonial property upon dissolution of marriage.¹³⁸

In Africa the ability for men and women to own property during marriage and upon dissolution is governed by different marital property regimes which may exist by default or by contract.

¹³⁵ Ibid paras 51, 52, 53, 54, 55, 56, 58, 59, 60 and 61.

¹³⁶ See Côte d'Ivoire Constitution art 11; DR Congo Constitution arts 34-40; Kenyan Constitution art 40; Ugandan Constitution art 26.

¹³⁷ E Hillenbrand & M Miruka 'Gender and Social Norms in Agriculture: A Review' in AR Quisumbing, RS Meinzen-Dick & J Njuki (eds) *2019 Annual trends and outlook: Gender equality in rural Africa: From commitments to outcomes* (2019) 16.

¹³⁸ IGAD 'The IGAD Regional Women's Land Rights Agenda 2021 – 2030' (2021).

Summary of types and definitions of property regimes

Separation of property: All assets and income acquired by spouses before and during the marriage remain the separate property of the acquiring spouse. At the time of divorce or the death of one of the spouses, each spouse retains ownership of all assets and income brought to the marriage or acquired during marriage by that person and any value that has accrued.

Partial community of property: Assets acquired before marriage are regarded as the separate property of the acquiring spouse, and assets and income acquired during marriage, with a few exceptions specified by law, are regarded as joint property of the couple. This regime also applies to cases where assets acquired before marriage and assets acquired during marriage are regarded as the separate property of the acquiring spouse but the accrued value of the property acquired by any of the spouses is considered joint property. At the time of dissolution of the marriage, the joint property or its accrued value is divided equally between the spouses.

Full community of property: All assets and income whether brought into the marriage and acquired during the marriage, with a few exceptions specified by law, become the joint property of the couple. After dissolution of marriage property is divided equally between the spouses.

Deferred full or partial community of property: The rules of full or partial community of property apply at the time the marriage is dissolved; until then, separation of property applies.

Other: This occurs in economies where the default property regime does not fit any of the four descriptions above.¹³⁹

Marriage out of community of property without accrual or marriage out of community of property with accrual are the forms of matrimonial property regime in South Africa. The law also allows for ante nuptial contract before marriage.¹⁴⁰

In Botswana, the law provides for both in and out of community property. In Liberia, art 23 of the Constitution establishes separate property regime and mandates legislature to enact appropriate laws. In Burkina Faso, art 252 of the Persons and Family Code sets community of property as the default marital regime in monogamous marriage though parties can opt for a separate property regime through a contract; while for polygamous marriages a separate regime is the automatic marital regime. Kenya, Nigeria, Botswana and South Africa are among countries that legally recognise prenuptial and post-nuptial agreements. The court however has discretion on the enforcement of pre or post-nuptial agreements concerning the allocation of property in the event of a divorce.

¹³⁹ World Bank Group Women, Business and the Law 2016: Getting to Equal (2015).

¹⁴⁰ South Africa Matrimonial Property Act 88 of 1984 chs I and II.

The marital regime that offers better protection for women is full or partial default community of property provided the same is not negated by other laws such as customary or religious laws.¹⁴¹ This is because it recognises women's role in the accumulation of marital property through unpaid work and their reproductive roles in the family. The worst regime for women is separate property regimes, which reinforce gender gaps.¹⁴²

Application of religious and customary/personal law in personal matters, non-recognition of reproductive work towards acquisition of matrimonial property, ineffective access to justice mechanisms and lack of substantive laws on matrimonial property laws continue to affect the equality principle with regards to divisions of matrimonial property.¹⁴³ In Gambia, a Cadi court in *Dawda Jawara v Matty Faye*¹⁴⁴ applied Muslim law and denied a wife her right to matrimonial property upon divorce and asked her to vacate from the home after iddah. Whereas the Court of Appeal allowed her 50 per cent share of the property, the Supreme Court set aside the order citing that an equitable share of matrimonial property was not applicable to property acquired prior to the marriage and she was thus only entitled to actual financial contributions. The decision disregarded her non-monetary contribution towards improvement of the property.

The lack of comprehensive laws on division of matrimonial property has seen disputants especially within the common law countries move to courts for appropriate orders. However, the unpredictability of the courts and the failure of the courts to consistently apply the substantive equality principle jeopardises women's right to equality. For example, in Ghana it took years before the Supreme Court developed the principle of 'equitable sharing of joint property' and 'equality is equity' in *Mensah v Mensah*.¹⁴⁵ This decision allowed the application of equal share of matrimonial property in cases of dissolution. Unfortunately, the situation changed when the Ghanaian Supreme Court issued adverse orders against a wife in *Adjei v Adjei*.¹⁴⁶ In the case, the trial court had awarded a wife one out of four flats built during the subsistence of the marriage on a piece of land acquired before the marriage and to which the wife and her children were residing in. The trial court, in its decision, made reference to the wife's work of nurturing the family. However, upon appeal by the husband, the Court of Appeal reversed the order of the trial court and held that the wife was not eligible to get any of the flats because the land was acquired prior to the marriage and the doctrine of 'equality is equity' was not applicable. The Supreme Court affirmed the Court of Appeal decision and held that the wife did not prove that the property was jointly acquired. This case demonstrates how in failing to apply the principle of substantive equality the courts exacerbate inequality and discrimination.

¹⁴¹ World Bank Group (note 139 above).

¹⁴² Ibid.

¹⁴³ UN Women, UNDP, UNODC & OHCHR (note 89 above).

¹⁴⁴ (Unreported) SC CA 023/2016.

¹⁴⁵ [1998-99] SCGLR 350 Supreme Court (recognition of indirect contribution of matrimonial property as contribution and principle of equality in marriage).

¹⁴⁶ (J4/06/2021) (2021) GHASC 5 (proof of contribution towards acquisition of matrimonial property).

The interpretation of equitable distribution continues to present a challenge in many countries. In Ghana, Kenya, Uganda and Nigeria, though not consistent, the equitable principle has been mostly applied to mean 50:50 share. In Malawi, s 74 of the Marriage, Divorce and Family Relations Act gives guidance on how to arrive at equitable distribution. The courts are expected to look at the income of each spouse, the assets of each spouse, the financial needs of each spouse, the obligations of each spouse, the standard of living of the family during the subsistence of the marriage, the age and health of each spouse, or the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

The CEDAW Committee points out that equal rights of spouses with regards to art 16(1) (h) of the CEDAW complement rights under art 15(2) which obligates the state to ensure that women have equal access to enter into contracts and control property. It highlights a number of violations affecting women's matrimonial property including where property owned by a woman is being managed by a man during marriage or divorce; where even in a community in property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold; and failure to treat property acquired during a de facto marriage. It calls on state parties to revoke all laws, customs and practices that perpetrate the said violations.¹⁴⁷

The CEDAW Committee in General recommendation No. 29 highlights negative impact of laws and practices of some countries that still maintain discriminatory systems of property management during the marriage which regard men as the head of the household and lack of laws that acknowledge the right of women to own an equal share of property with the husband during a marriage. In addition, it states that while other countries recognise the right, the practicability to exercise the right may be limited by legal precedent or custom. It calls on state parties to ensure that both spouses have equal access to the marital property with equal legal capacity to manage it and ensure that the right of women to own, acquire, manage, administer and enjoy separate or non-marital property is equal to that of men.¹⁴⁸

To protect and fulfil equality rights during dissolution of matrimonial property, the CEDAW Committee requires state parties to ensure that the guiding principle on economic advantages and disadvantages related to the relationship and its dissolution are borne equally by both parties; ensure that the division of roles and functions during the spouses life together should not result in detrimental economic consequences for either party; provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage; and provide for equal formal and de facto legal capacity to own and manage property.¹⁴⁹

To achieve both formal and substantive equality with respect to property rights upon the dissolution of marriage, the CEDAW requires state parties to recognise women's

¹⁴⁷ CEDAW Committee 'General recommendation No. 21' (note 28 above) paras 25, 30 and 31.

¹⁴⁸ CEDAW Committee 'General recommendation No. 29' (note 28 above) paras 36 and 38.

¹⁴⁹ Ibid paras 45 and 46.

user rights in property related to livelihood or compensation to provide for replacement of property-related to livelihood; adequate housing to replace the use of the family home; equality within the property regimes available to couples (community property, separate property, hybrid); the right to choose property regime; the inclusion of present value computation of deferred compensation resulting from contributions made during the marriage; and consideration of post-dissolution spousal payments as a method of providing for equality of financial outcome.¹⁵⁰

The Human Rights Committee requires the law to contain equal rights and obligations for both spouses with regards to ownership and administration of property regardless of the marital property regime. It further obligates state parties to recognise that discrimination against women is often intertwined on grounds such as race, language and religion and state parties should take up measures to address discrimination that affects woman in different ways.¹⁵¹

On access to justice, in addition to the provisions highlighted in section 4.2.2. above, the CEDAW Committee requires state parties to revise the rules on the burden of proof in order to ensure equality between the parties, especially in all fields where power relationships deprive women of the chance for a fair judicial treatment of their case.¹⁵²

ACHRP General Comment No. 6 highlights the challenges around matrimonial property women in Africa are faced with. They include unequal power balance, legal pluralism, vulnerability associated with dissolution of marriage, and discriminatory laws and processes.¹⁵³ It calls upon state parties to take, enact and implement clear, accessible, enforceable and justifiable legislation in order to address the challenges.¹⁵⁴¹⁵⁵

The Ghanaian Supreme Court in determining a case of division of matrimonial property, *Quartson v Quartson*,¹⁵⁵ criticised Parliament for its 'regrettable inaction' and 'failure to awaken from its slumber' with regards to its responsibility for passing a law regulating the sharing of joint property as expected by the constitution and international treaties. The court stated:

In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament. We do not think that this court is usurping the role of Parliament, especially in cases where the inaction of Parliament results in the denial of justice and delay in the realization of constitutional rights.

¹⁵⁰ Ibid para 47.

¹⁵¹ Human Rights Committee 'General recommendation No. 28' (note 30 above) paras 25 and 30.

¹⁵² CEDAW Committee 'General recommendation No. 33' (note 39 above) para 15(g).

¹⁵³ ACHPR 'General Comment No. 6' (note 6 above) paras 15-25.

¹⁵⁴ Ibid paras 51-52.

¹⁵⁵ (J4 8 of 2012) [2012] GHASC 49 (31 October 2012) (a person who engages in household duties should not be discriminated against in the distribution of properties acquired during marriage; and the role of the courts in filling legislative gap).

The ACHPR General Comment No. 6 emphasises on the importance of equality and non-discrimination, in the realisation of women's marital property rights and calls on state parties to meet their obligations under the CEDAW, the Banjul Charter and the Maputo Protocol on equality and non-discrimination with particular focus on the Maputo Protocol call for substantive equality as a means to combating inequalities and non-discrimination.¹⁵⁶ It defines substantive equality as '[a]ny form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law'.¹⁵⁷

It further defines equitable distribution as '[t]he apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family'.¹⁵⁸

To realise equitable distribution as envisaged under art 7(d) of the Maputo Protocol, the ACHPR requires that equitable distribution must be seen through the lens of substantive equality. It explains that the substantive equality approach requires interventions that respond to the historical, social, religious, political and economic conditions that affect the enjoyment of women's property rights at dissolution of a marriage. Further, it requires understanding of the intersectionality of women by protecting the rights of women in all types of marriages including those in polygamous and cohabiting unions¹⁵⁹ and calls for provision of additional entitlements and protections that would aid in rectifying conditions that impede equal enjoyment of matrimonial property by women.¹⁶⁰ In doing so, the state will address the underlying causes and structures of gender inequality in division of matrimonial property thus achieving de facto and de jure rights.

In determining the scope of equitable share, the ACHPR calls for state parties to consider the duration of the marriage, whether couples produced children, the cause of the separation and the responsibility that each spouse bears. Further it calls for recognition of joint property deriving from marriage to include inherited family land by the spouses during the subsistence of the marriage unless expressly exempted by law or contract.¹⁶¹ Full community of property is defined as a marital property regime under which all assets and income brought into the marriage and acquired during the marriage become the joint property of the couple. Joint property deriving from the marriage (marital assets) is described to include all property acquired during the course of the marriage, regardless of who holds the title to it and requires that joint property deriving from the marriage be viewed through the lens of marriage in community of property marital regime.¹⁶²

¹⁵⁶ ACHPR 'General Comment No. 6' (note 6 above) paras 27, 28, 29, 30, 31, 32 and 33.

¹⁵⁷ Ibid para 14.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid para 49.

¹⁶⁰ Ibid paras 14 and 40.

¹⁶¹ Ibid paras 44-45.

¹⁶² Ibid para 14.

The General Comment No. 6 in making reference to para 46 of the ACHPR decision in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endroriois Welfare Council) v Kenya*¹⁶³ calls for state parties to ensure that the right to property is considered beyond ownership but must also include access, disposal of, mortgage and transfer. It considers property acquired before the marriage, as well as gifts, inheritances and tort settlements in favour of one spouse not to be matrimonial property to be divided at divorce, unless such assets have been treated by the spouses during the subsistence of marriage as joint property.¹⁶⁴

7.2.2. Failure to recognise non-financial contribution towards acquisition of matrimonial property

Social norms that promote male guardianship affects the distribution of matrimonial property. Social norms feminise caregiving and unpaid care work is considered a women's domain while provision of income is associated with masculinity and manhood. This has resulted in men's monetary support being given more prominence than a woman's care giving role in the society.¹⁶⁵ The unequal power relations in marriage limits women's access to and enjoyment of property rights and leads to discriminatory social and cultural structures that fail to recognise women's households contribution through productive work.

Courts especially in common law countries continue to issue varying decisions with regards to non-monetary contributions towards acquisition of matrimonial property. In a number of decisions in Botswana, Ghana, Kenya, Nigeria and Malawi, the courts declined to consider non-monetary contribution while distributing matrimonial property.¹⁶⁶ Phrases such as 'lack of strong evidence' and 'mere fact of a marriage should not make an inference of joint ownership' have been used to belittle non-monetary contribution by women towards acquisition of matrimonial property. While the trend is changing with more courts recognising non-monetary contribution, lack of comprehensive laws make it easy for courts to overrule or overturn previous progressive decisions. The Ghanaian Supreme Court decision in *Adjei v Adjei* and the Kenyan Court of Appeal decision in *Echaria v Echaria* are good examples of why comprehensive laws are necessary to guide interpretation by the courts.

It is important to note that even in countries that recognise both monetary and non-monetary contribution in law, courts tend to give more prominence to a party who proves direct contribution, which in most cases is a man. In Kenya, the High Court decision in *MAA v AR* awarded 70:30 in favour of the husband who had proof of monetary

¹⁶³ No. 276/2013 (indigenous peoples' rights over traditionally owned land and their right to development under the African Charter).

¹⁶⁴ ACHPR 'General Comment No. 6' (note 6 above) para 6.

¹⁶⁵ Hillenbrand & Miruka (note 137 above).

¹⁶⁶ See *Rabantheng v Rabentheng* 1988 High Court [1988 BLR] (Botswana); *Quartey v Martey* [1959] GLR 377 HC 380 (Ghana); *Echaria v Echaria* Civil Appeal 75 of 2001 (Kenya); *Nyangulu v Nyangulu* High Court 10 Malawi Law Reports 435 (Malawi).

contribution over the wife's non-monetary contribution.¹⁶⁷ The court stated that it was difficult to distribute property when only the financial contribution is known meaning that courts are yet to conceptualise and appreciate the significance of non-monetary contribution in marriage.

The CEDAW Committee points out that in a number of countries, greater emphasis on division of marital property is placed on financial contributions to property acquired during a marriage with contributions such as raising children, caring for elderly relatives and discharging household duties dismissed. It further mentions that often such contributions of a non-financial nature by the wife enables a husband to earn an income and increase the assets. It calls for state parties to accord the same weight to financial and non-financial contributions.¹⁶⁸

In addition, the CEDAW calls upon state parties to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage and to recognise the value of indirect contributions, including non-financial contributions with regard to the acquisition of property acquired during the marriage. To achieve substantive equality state parties are required to consider the valuation of non-financial contributions to marital property subject to division, including household and family care, lost economic opportunity, tangible or intangible contribution to either spouses career development and other economic activity, and to the development of his or her human capital.¹⁶⁹

The ACHPR echoes the need for women's indirect contributions to the economic and social wellbeing of their families to be fully recognised in cases of separation, divorce or annulment of marriage and that the application by states of the community of property must be aligned to art 7(d).¹⁷⁰ Non-monetary contributions are defined as the contributions made to and during the subsistence of the marriage through non-remunerated efforts and unpaid care work including but not limited to caring for minor children, taking care of the family home, cultivation and improvement of land, or any other non-monetised contributions.¹⁷¹ State parties are required to undertake legislative changes that will ensure the value of indirect and nonfinancial contributions are respected. In addition, it requires state parties to give special attention particularly to women living with disabilities, older women, widows and other vulnerable women.¹⁷²

¹⁶⁷ (2018) eKLR (division of property where monetary contribution was considered more than non-monetary contribution).

¹⁶⁸ CEDAW Committee 'General recommendation No. 21' (note 28) para 32.

¹⁶⁹ CEDAW Committee 'General recommendation No. 29' (note 28 above) paras 43, 45, 46 and 47.

¹⁷⁰ ACHPR 'General Comment No. 6' (note 6 above) para 47.

¹⁷¹ Ibid para 14.

¹⁷² Ibid para 54. For further reading see ISLA 'Women's Economic Justice Programme Training Manual – Matrimonial Property and Inheritance Rights Module' (2021).

Possible claims under art 7(d) of the Maputo Protocol

- ✓ Failure of the state to enact harmonised comprehensive law that gives full effect to women's equal rights to marital property (that defines matrimonial property, gives equal rights to own and administer property, ability for spouses to own separate property in marriage, protection of women in all systems of marriage including polygamous and cohabiting union).
- ✓ Existing law and practice does not provide for equitable distribution of matrimonial property upon dissolution of marriage.
- ✓ Existing law or practice does not recognise non-momentary contribution as a form of contribution towards acquisition of matrimonial property.
- ✓ Lack of laws requiring free, prior and informed written consent by spouse prior to sale or transfer of marital property?
- ✓ Failure of the state to provide legal services; including accessible courts, awareness creation equal parental rights with regards to child custody and maintenance.

8. Developing and Implementing the Litigation Strategy

Strategic litigation promotes the use of law in the advancement and protection of human rights and for the benefit of marginalised and disadvantaged people. It is an important tool to address structural obstacles, enhances access to justice and contribute to legislative and societal transformation.¹⁷³

Weak and ambiguous laws are difficult to enforce making strategic litigation an ideal tool for bridging the gap.¹⁷⁴ Strategic litigation helps in the creation of judicial precedent and the establishment of effective and enforceable law; the interpretation of existing laws, constitutions and treaties to substantiate or redefine rights; and to challenge existing laws that are detrimental to the realisation of recognised and protected rights.¹⁷⁵

Due to the complex nature of strategic litigation, litigators need to develop strategies that will help in advancing women's property rights upon dissolution of marriage. Even when litigation is unlikely to succeed, it is important to proceed because the essence of strategic litigation is beyond winning but also to support the rule of law, provide a foundation for future litigation, raise awareness of human rights issues, document injustice, promote government accountability, change public attitudes and empower vulnerable groups.¹⁷⁶

A litigation strategy helps in developing litigation objectives, preparation and presentation of a case and identification of post judgment implementation processes. The same is developed before a suit is filed and will help in ensuring that some tactical decisions are guided by strategic considerations. Below are examples of key components of strategic litigation strategies.

Definition of the objectives of the strategic litigation

This involves coming up with case selection and identification of goals, objectives and methods of litigating the case. In the context of women's property rights upon dissolution of marriage, it is prudent to establish if the violations illustrates a structural problem in relation to the state obligation to protect, promote and fulfil equality and non-discrimination with regards to property rights upon dissolution of marriage. Other issues that are important at this stage is understanding community perception or public

¹⁷³ UN Office of the United Nations High Commissioner for Human Rights *Strategic litigation for sexual and gender-based violence: Lessons learned Workshop report* (2019).

¹⁷⁴ Kenya National Environmental Complaints Committee *Public Interest Litigation Handbook* (2019).

¹⁷⁵ K Kitching 'Strategic Litigation and Case Selection Research Paper'.

¹⁷⁶ Coomber (note 8 above).

hostility e.g. challenging religious and customary law that discriminate against women is likely to create public hostility.

Identification of a client

In identification of a client, the type of a client chosen should be carefully established, e.g. a woman in polygamous union or a cohabitee and the type of case, e.g. equitable sharing of property or non-monetary contribution. Whereas the goal is towards law reform, the first duty is always to the individual client. Ensure the safety and security of the client and ensure that the client is ready to commit their time and attention to the case.¹⁷⁷ It is necessary at this stage to identify, clarify and narrow down on factual and legal issues based on the information from the client.

Selection of legal forum and jurisdiction

Legal principles, such as jurisdiction and procedural processes, and practical considerations such as distance must be taken into account before initiating a suit. Further, it is necessary to undertake analysis of laws and jurisprudence around the same issue and identify if there exists progressive or regressive decisions.

Strategic mapping of actors

This entails mapping potential allies, as well as possible opponents or actors who may resist or advocate against the strategic cause being pursued. Development of a matrix placing individuals and organisations according to their level of agreement, or opposition, and their degree of influence will assist in tracking the actors. The matrix should also include influencers who could impact the views and conduct of others. When analysing actors, their past and their current position on the issue to be litigated must be included.¹⁷⁸

Communication and advocacy strategies

This strategy helps in elaborating and publishing of the situation, including the various obstacles faced by women in the context of division of matrimonial property rights. A good communication and publicity strategy may be required to win the public's support for the litigation. The publicity must not injure the case or the applicant. To cut down on costs, collaborate with (an)other institution(s) with expertise in media campaigning to support in the communication and advocacy strategies.

¹⁷⁷ Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) & the Katiba Institute 'A guide to Public Interest Litigation in Kenya' (2015).

¹⁷⁸ UN Office of the United Nations High Commissioner for Human Rights (note 173 above).

Funding of strategic litigation

Strategic litigation is a long and complex process that requires sustained, multi-year funding and results cannot be guaranteed immediately. The funding should not be short-term neither should it have time pressure because parties at times have little control of the court process. Court fees, witness expenses, expert fees, legal cost and research work are examples of funding needs which should be factored in the funding plan. In addition, the plans should factor in appeal or enforcement processes.

Post judgment implementation

Good judgments without implementation will not serve the goal and objective of strategic litigation. Legal, cultural or policy change can only be achieved if the final orders are implemented effectively. Collaboration with organisations is vital in ensuring the full implementation of the orders. At the planning stage it is necessary to establish a post judgment monitoring strategy that gives a roadmap on what happens after a judgment is delivered.¹⁷⁹

¹⁷⁹ Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) & the Katiba Institute (note 177 above).

9. Conclusion ---

The primary purpose of this manual is to provide a practical guide on the relevant human rights standards to persons involved in litigation and advocacy around equal rights for women in cases of separation, divorce or annulment of marriage as provided for under art 7 of the Maputo Protocol. It is intended to aid the users in assessing the extent to which a country has implemented its human rights obligations towards achieving equality and non-discrimination under art 7.

To deepen the understanding of the situation of women's equality rights during separation, divorce or annulment of marriage in Africa, the manual has analysed laws and practices in select civil, common law and dualist legal systems; and both Sub-Saharan and Maghreb regions. The rationale behind the comparative analysis is to provide users with wider understanding on cross-cutting issues across the continent and how the information can be used to create change in other jurisdictions. The areas identified for litigation confirm with certainty that there is a place for litigation in advancing art 7 of the Maputo Protocol. The reference documents and the information provided is not exhaustive and users are encouraged to source more information.

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