



GENDER INEQUALITY IN FAMILY LAWS IN AFRICA:

AN OVERVIEW OF KEY TRENDS IN SELECT COUNTRIES

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ACRONYMS AND ABBREVIATIONS

ACDHRS	African Center for Democracy and Human Rights Studies
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights of the Welfare
AEFL	Association of Egyptian Female Lawyers
AFLN	Africa Family Law Network
AJS	Association des Juristes Sénégalaises
AU	African Union
CEDAW	Convention on Elimination of all forms of Discrimination Against Women
CIDDEF	Centre d'Information et de Documentation sur les Droits de l'Enfant et de la Femme
CLADEM	The Latin American and Caribbean Committee for the Defense of Women's Rights
CRC	The UN Committee on the Rights of the Child
DRC	Democratic Republic of Congo
EDVAW	Elimination of Discrimination of Violence Against Women
FGM	Female genital mutilation
FEMNET	The African Women's Development and Communication Network
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
KLR	Kenya Law Reports
NAFGEM	The Network against Female Genital Mutilation, (Tanzania)
OECD	Organisation for Economic Co-operation and Development
PSGR	People Serving Girls at Risk
SADC	Southern African Development Community
SIHA	Strategic Initiative for Women in the Horn of Africa
SOAWR	Solidarity for African Women's Rights Coalition
UDHR	Universal Declaration of Human Rights
UN	United Nations
WANET	Women's Advocacy and Communication Network
YWCA	Young Women's Christian Association

FOREWORD

It is my absolute pleasure to present our ground-breaking Report on the status of family law reform in Africa. The premise of this Report is simple. There can be no equality in society, without equality in the family. Yet discrimination in family law continues to be institutionalised in law, practice, and policy in many countries in Africa and the globe as established in the Equality Now's 2020, "[Words and Deeds: Holding Governments Accountable in the Beijing +25 Review Process](#)" (with a Special Focus on Family Law). This current Report provides insights into the African context by providing an overview of key trends in 20 countries selected based on geographical and language considerations.

The adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) and its entry into force in 2005 was a watershed moment for women in Africa as it contains robust and progressive protections of women's rights. Currently, 45 of 55 African countries have ratified the Maputo Protocol, yet many of them have retained discriminatory family laws and policies in their statutes and practices. Family law discrimination in Africa is compounded by a range of challenges including the multiplicity of civil, customary, and religious family law systems due to legal pluralism; child marriage; barriers to registration and legal recognition of marriages; polygamy; marital rape and domestic violence; and unequal divorce, child custody, inheritance, and matrimonial property legal regimes.

The Report demonstrates that while there is progress in family law reform in the continent, it has been slow and inconsistent. Clawback clauses and actions water down the full impact of some of the progressive laws enacted. A few Member States continue to place reservations on Article 16 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and Articles 6 and 7 of the Maputo Protocol on grounds of culture and/or religion. Indeed, culture and religion emerge as major impediments in the struggle for family law equality both in terms of stalling reforms and threatening the reversal of gains already made in critical areas such as the campaign to end child marriage and female genital mutilation.

The analysis of the trends in the selected countries shows that none of them has attained full legal equality in family law reform. Since discrimination does not happen in a vacuum, this Report features the lived experiences of affected women. It is thus our hope that this Report will be a critical data source informing legal, policy, and practice reforms to end sexism and discrimination in family law in the continent. The Report comes at an opportune time when the [Africa Family Law Network \(AFLN\)](#) currently convened by Equality Now, FEMNET, Musawah, and SIHA has been launched. Equality Now and the AFLN will use the Report as an evidence repository and work with the policy and judicial organs of the African Union particularly the Special Rapporteur on the Rights of Women in Africa to influence change.

We wish you a happy reading as we look forward to meaningful changes in the lives and lived realities of African girls and women in accordance with Goal 5 of the 2030 Agenda and Aspiration 6 of Agenda 2063 of the African Union.



Patricia Amira,
Chair, Equality Now Africa Board

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Director, Africa Office

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1. EXECUTIVE SUMMARY

INTRODUCTION: FAMILY LAWS IN AFRICA

The laws governing family structures and relationships play a crucial role in shaping the lives of women and girls within African communities. In Africa's diverse and dynamic context, family laws encompass a wide range of legal provisions, customs, and practices that govern matters such as marriage, divorce, inheritance, child custody, and property rights.

The landscape of family laws in Africa is rich and complex, influenced by a myriad of factors, including historical legacies, colonial influences, and evolving social dynamics. While family laws vary across countries and regions, they often reflect the broader social norms, power structures, and gender dynamics prevalent within African societies.

Historically, many African societies had intricate systems of customary laws that governed family relations and property rights. These customary laws were deeply rooted in the cultural fabric of each community, providing guidelines for marriage, inheritance, and dispute resolution. With the advent of colonisation, however, European legal systems were introduced, leading to a blend of customary and statutory laws that continue to shape family legislation in many African countries by way of legal pluralism.

One of the critical challenges faced by family laws in Africa lies in ensuring their alignment with international human rights standards. The ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)¹ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)² by numerous African countries reflects the commitment to advancing gender equality and women's rights within the family sphere. However, the implementation and enforcement of these treaties remain inconsistent, as many countries still grapple with discriminatory laws and practices that perpetuate gender inequality and violate women's rights.

Another significant dimension in understanding family laws in Africa is the intersectionality of cultural, religious, and customary practices. The continent is home to diverse ethnic, linguistic, and religious communities, each with its own unique family law systems. Civil law, religious law (such as Islamic law or Christian canon law), and customary law coexist, sometimes overlapping or conflicting, creating complex challenges for legal harmonisation and reform efforts.

Furthermore, the dynamics of family structures in Africa have undergone significant transformations in recent decades. Urbanisation, globalisation, and the influence of modern values have brought about changes in marriage patterns, divorce rates, and the roles and responsibilities of family members. These shifts have prompted a critical examination of existing family laws and the need for reforms that reflect gender equality and the evolving needs and realities of African societies.

This Report serves as an assessment of the current status of family laws in 20 countries in Africa, analysing their compliance with the Maputo Protocol, CEDAW, and other relevant global and regional human rights treaties. The assessment was largely undertaken between April 2022 to December 2023.

The Report is organised and analysed on nine broad family law themes:

- ▶ Legal pluralism
- ▶ Child marriage
- ▶ Registration and legal recognition of marriages
- ▶ Polygamy
- ▶ Gender-based violence within the family (marital rape and domestic violence)
- ▶ Divorce
- ▶ Child custody
- ▶ Inheritance
- ▶ Matrimonial property

¹ <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 16 April 2024)

² <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf> (accessed 16 April 2024)

SUMMARY OF KEY FINDINGS

LEGAL PLURALISM

Key Findings

In most countries studied for this Report, there are pluralistic legal systems where statutory laws live side by side with customary and religious laws. Some of them, such as the Democratic Republic of Congo, Ethiopia, Kenya, Mozambique, South Sudan, and The Gambia, protect this legal pluralism through their constitutions. However, countries such as Kenya issue the caveat that these other systems are recognised as long as they are consistent with the Constitution. Countries such as Ethiopia have a plural legal system, religious and customary law is significantly constrained by legislative and constitutional provisions.

Malawi offers a good example for addressing legal pluralism. The Marriage, Divorce and Family Relations Act 2015 consolidated previously fragmented legal regimes and advanced progressive legal reform. The Act recognises and regulates civil marriages, customary marriages, religious marriages, and marriage by reputation or permanent cohabitation, granting all unions equal legal status. The recognition of marriage by reputation or permanent cohabitation is of special import, and will protect many vulnerable women who do not have the protection of a formally concluded marriage.

In some countries, there is a lack of statutory laws codified family laws that lead to customary laws being predominantly applied. In South Sudan for instance, the Transitional Constitution obliges courts to apply customary law subject to the provisions of the Constitution and the law. Due to the lack of statutory law a unified family law code and the Constitution's recognition of South Sudan's plural legal system, family law is governed by the customs custom of the large number of diverse ethnic groups in South Sudan. This leads to significant problems such as:

- ▶ No minimum age of marriage under customary law.
- ▶ Polygamy is legal for men.
- ▶ Divorce is generally easier for men to obtain.
- ▶ Women are often deprived of an equitable share in property upon divorce or deprived of inheritance upon the death of their husbands.
- ▶ While the Child Act grants equal rights of custody to parents, custom and tradition generally place children with their fathers, unless they are of tender age³.

- ▶ The strong likelihood of losing property and custody of children, as well as the rule that divorce requires repayment of the bride price, prevent many women from leaving unhappy and even abusive marriages.
- ▶ A number of harmful traditional practices persist in custom, including polygamy, forced marriages, child marriage and wife inheritance.

Hence, in pluralistic legal systems, it is important to have statutory laws that are in line with international human rights standards.

Countries such as Egypt consider religious law in the form of Sharia as the principle source of legislation in their Constitution, and consider pluralism for Christians and Jews. Tunisia's Constitution provides that the country is an Islamist State but has progressive laws including prohibition of polygamy. While it is important to recognise religious laws, many of the provisions are discriminatory against women, and hence these countries need to align their constitutions with international standards on the protection of women.

Key Challenges

- ▶ Legal pluralism can create a stumbling block in the quest towards an equitable family law system. Customary law is deeply patriarchal and consists of many practices which amount to discrimination against women, such as those relating to inheritance and child marriage. In addition, women fall victim to harmful traditional practices such as widow inheritance and surrogate marriage. These practices treat women as property, to be handed over or inherited, rather than as full human beings. Steps must be taken to combat and prohibit these practices as well as the mindsets that give rise to them.
- ▶ Lack of statutory laws in line with international standards in some countries can lead to discriminatory practices against women and girls.
- ▶ Constitutions that include a caveat for recognition of customary and religious law put women at the risk of discriminatory practices in contravention to internationally recognised human rights treaties.

3 Whenever divorce does occur, most versions of customary law place children with their fathers as they are considered part of the male lineage. However, young children in South Sudan are permitted to remain with their mothers until they turn between three and seven years old. See <https://www.undp.org/sites/g/files/zskgke326/files/migration/ss/2bacffcf78acd8d4d2f978c1f3a8b98c53555207612542f372f3e5c331ad8.pdf> at 34



CHILD MARRIAGE

Key Findings

Since the Maputo Protocol, that clearly prohibits marriage under the age of 18, was adopted, many of the countries studied have engaged in law reforms. Some of them, such as Côte d'Ivoire, Democratic Republic of Congo, Egypt, Kenya, Malawi, Mozambique and The Gambia have an absolute ban on marriage under the age of 18. Despite the legal ban, child marriage is still prevalent in some of these countries and more needs to be done to sensitise communities on the law and the dangers of child marriage; and to address the root causes of child marriage.

Other countries such as Angola and Tunisia, while setting the legal age of marriage at 18, provide for exceptions either under civil or customary law, under certain conditions such as assessment of the aptitude of both parties, parental, governmental, or judicial consent, public or family "interest", or pregnancy. Algeria exceptionally sets the minimum age of marriage at 19 for both males and females but allows judicial exemption for marriage at any age in "instances of necessity or when the eligibility of marriage between the two parties is established. These laws violate the best interest of the child; and are not in line with the Maputo Protocol that provides for prohibition of marriages under the age of 18 without exception.

Some countries such as Cameroon, Nigeria, Senegal, South Sudan, Sudan, and Tanzania still allow for marriages under 18 in contradiction with the Maputo Protocol. The laws in these countries also often have discriminatory provisions allowing girls to marry at lower ages than boys.

Key Challenges

- ▶ While some countries have a legal ban on child marriages, there is concern that child marriage continues in customary and religious settings, and that there is societal backlash against the prohibition. In addition to the backlash, there are low levels of enforcement of the laws.
- ▶ Some countries still provide for exceptions to the legal age of 18 under specific conditions, which is in contradiction with the Maputo Protocol.
- ▶ Some countries' laws still allow for marriage under the age of 18.

Key Recommendations on Legal Pluralism

1. Legal reforms:

While it is important to recognise the reality of legal pluralism, all laws should be in line with international human rights standards and uphold women's and girls' rights. Countries whose constitutions allow for discriminatory practices against women and girls by customary or religious laws therefore need to amend their constitutions to recognise pluralism to the extent that it is in line with international law, and even other constitutional provisions, on equality and non-discrimination.

2. Adoption of statutory laws:

In countries where there is no statutory law on family law, they should take steps to adopt one to ensure that customary and religious discriminatory practices are not applied in the country to the extent they are not compliant with international human rights treaties.

3. Sensitisation:

The government and civil society organisations need to embark on sensitisation campaigns to ensure that there is change in mentality so that patriarchal norms under customary and religious laws are abolished, and that customary and religious laws promote and protect women's rights.



REGISTRATION AND LEGAL RECOGNITION OF MARRIAGES

Key Findings

In most countries, registration of civil marriages is a legal requirement and is governed by specific laws that outline the procedures and requirements for formalising a marriage. This process often involves obtaining a marriage certificate from a government authority or registrar.

Burundi and Cote d'Ivoire recognise only civil marriages and Tunisia recognises only marriages under its Code of Personal Status Laws.

Customary marriages are recognised in many countries such as Nigeria and South Sudan, and the registration of customary marriages is also increasingly widespread with registration possible in a number of countries including: Algeria, Botswana, Ethiopia, Kenya and South Africa.

Recognition and registration of Muslim, Hindu, and other religious marriages is legally provided for in many of the countries. In the Democratic Republic of Congo, while the Code of the Family recognises religious marriages, they do not have the same effect as a civil marriage. For countries like Nigeria, Sudan, and The Gambia, religious marriages, including Muslim and Christian marriages, are regulated by codified law, Sharia law, or Muslim personal law.

In South Africa, the Civil Union Act, 2006 provides for recognition and registration of civil unions or marriages of same or opposite-sex partners thereby enhancing the rights of sexual minorities.

Countries like Angola, Malawi, and Mozambique protect women the most since they recognise marriage by reputation, cohabitation, or *de facto* marriages, in addition to customary and religious marriages. The same applies for Cameroon and Egypt where marriages do not have to be registered to have legal effect.

Key Recommendations on Child Marriage

1. Strengthen legal frameworks:

Countries should review and update their legal frameworks governing the minimum age of marriage, which should be 18, without any exceptions for all types of marriages, whether under civil, customary, or religious law.

2. Promote marriage registration:

Governments should actively promote and provide legal avenues for the registration of all types of marriages. This can be achieved through public awareness campaigns, accessible registration processes, and provision of resources and support to facilitate the registration process. Efforts should be made to remove any barriers, such as excessive fees or bureaucratic procedures, that may discourage couples from registering their marriages. This will allow the government to flag out child marriage instances.

3. Enhance data collection and monitoring:

Governments should invest in robust data collection systems to gather comprehensive information on marriages. This data can help identify gaps, trends, and challenges in the implementation of laws concerning child marriage. Regular monitoring and evaluation should be conducted to assess the effectiveness of legal provisions and inform evidence-based policy reforms.

4. Enforce laws:

Countries must enforce their prohibition on child marriage and female genital mutilation, as well as undertaking awareness and mindset changing programmes to prevent these harmful traditional practices.

Key Challenges

- ▶ In most countries, women in customary and religious marriages do not enjoy equal protection of the law compared to civil marriages. This often results in discrimination in their status in marriages as well as in the event of dissolution.
- ▶ In a majority of the countries, marriages and civil unions are reserved for heterosexual couples. Same-sex partners cannot therefore conclude marriages, civil unions, or form permanent life partnerships. As a result, these partners do not enjoy equal protection of the law.
- ▶ In some countries, there is a lack of recognition for cohabiting partners and the common law offers minimal protection for partners after dissolution of those partnerships. In order to obtain a share of joint property or the profits of joint enterprises after dissolution of the partnership, such partners must satisfy stringent standards of proof and may not always succeed.

Key Recommendations on Registration and Legal Recognition of Marriages

1. Promote marriage registration:

Governments should actively promote and provide legal avenues for the registration of all types of marriages. This can be achieved through public awareness campaigns, accessible registration processes, and provision of resources and support to facilitate the registration process. Efforts should be made to remove any barriers, such as excessive fees or bureaucratic procedures, that may discourage couples from registering their marriages.

2. Ensure equality in customary and religious marriages:

Customary and religious marriages should be legally recognised and regulated to ensure gender equality and specific protection for women. Governments should work in collaboration with community leaders, religious institutions, and customary law actors to establish clear guidelines and procedures for the registration and legal recognition of these types of marriages. These guidelines should prioritise the elimination of discriminatory practices and ensure that women's rights are protected and upheld in line with international human rights law.

3. Provide legal aid and support services:

Governments should establish and strengthen legal aid and support services to ensure that women have access to legal assistance and guidance regarding marriage registration and recognition. This can involve

the establishment of legal aid clinics, helplines, and community outreach programs to educate individuals about their rights and provide assistance in navigating the legal processes.

4. Strengthen legal frameworks:

Countries should review and update their legal frameworks governing the registration and legal recognition of all marriages. These frameworks should be comprehensive, clear, and aligned with international human rights standards including the Maputo Protocol and CEDAW.

5. Enhance data collection and monitoring:

Governments should invest in robust data collection systems to gather comprehensive information on registered marriages and their legal recognition. This data can help identify gaps, trends, and challenges in the implementation of registration and recognition processes. Regular monitoring and evaluation should be conducted to assess the effectiveness of legal provisions and inform evidence-based policy reforms.

6. Promote legal recognition of civil unions and permanent life partnerships:

Already evident in a few African countries, civil unions, permanent life partnerships, or universal partnerships have been established by legislation or precedent to protect the rights of partners such as women in same-sex relationships or vulnerable women who might otherwise be left destitute after dissolution of such a partnership.



Image: Bartosz Hadyniak / iStock

POLYGAMY

Key Findings

The laws of some of the countries provide for monogamy, so that nobody can contract a second marriage without the annulment or dissolution of the first one: Angola, Burundi, Democratic Republic of Congo, and Ethiopia.

However, in some countries like South Africa, while the statutory laws provide for monogamy, customary and religious laws still allow for polygamy. Another example is Cote d'Ivoire which abolished polygamy in 1964 while still recognizing the rights of those in polygamous marriages, and yet there are still polygamous marriages that occur in the country. In Mozambique, the prohibition of polygamy only applies to civil marriages, and to religious and traditional marriages duly transcribed in the civil registry, and therefore leaves a void when it comes to women in religious and traditional marriages whose marriages are not registered with the civil registry.

In countries such as Cameroon, Egypt, Kenya, Senegal, South Sudan and Sudan, the laws allow for more than one marriage. Kenya's laws emphasise that customary and Muslim marriages are presumed to be polygamous or potentially polygamous. In Sudan and Senegal, a man can have up to four wives.

Key Challenges

- ▶ Even if the statutory laws criminalise polygamy, the practice still exists in many parts of some countries, especially in rural areas. In these instances, the man will be legally married to one woman and have informal marriages to other women. In this case, the women whose marriages are not registered do not have any protection of the law in instances of the spouse's death or separation.
- ▶ Women in some countries have no say in whether the husband can remarry thereby putting them in a disadvantaged position where the decision of the husband is forced on them.

Key Recommendations on Polygamy

1. **Policies and programmes:** Adopt policies and programmes to target polygamy and to ensure that women in such relationships are protected upon the man's death or divorce.
2. **Legal reforms:** Prohibit polygamy while protecting the rights of those women who are already in polygamous relationships, since women are usually disadvantaged in polygamous relationships.
3. **Extend protection:** The prohibition on polygamy must extend also to non-registered traditional and religious marriages.

GENDER-BASED VIOLENCE WITHIN THE FAMILY (MARITAL RAPE AND DOMESTIC VIOLENCE)

Key Findings

There have been notable reforms of laws on violence against women since the expansion of international legal standards for the protection of women from violence. In countries such as Malawi, Mozambique, Nigeria and The Gambia, there are extensive legislative steps to combat violence against women. Botswana has gone a step further and has established special courts to increase the speed of the State's response to violence against women.

Countries such as Cote d'Ivoire, Ethiopia, Kenya, Nigeria, South Africa, South Sudan, and The Gambia⁴ have prohibited female genital mutilation through their constitutions, penal codes, and statutory laws.

While some countries like the Democratic Republic of Congo have a constitutional provision on combating violence against women, it does not yet have a comprehensive law on violence against women. It has only adopted a national strategy to combat the same. Countries like Senegal do not yet have a comprehensive law on the protection of women from violence and only have criminal provisions against physical violence against a spouse, which is insufficient.

Violence against women in the private sphere is also prevalent in countries such as Burundi, Malawi, and The Gambia.

While countries such as Mozambique expressly prohibit marital rape, there is a gap when it comes to criminalisation of marital rape in countries such as Algeria, Malawi, Nigeria, Sudan, Tanzania and The Gambia, which leads to violations of women's equality, dignity, and bodily autonomy.

Key Challenges

- ▶ In some of the countries, the law explicitly permits marital rape by providing that the offence of rape does not apply to married couples.
- ▶ Many countries do not have a comprehensive law to combat violence against women, including femicide, the most fatal form of intimate partner violence.
- ▶ Many countries do not yet expressly prohibit female genital mutilation.
- ▶ Not all countries have laws that target violence in the private sphere.
- ▶ Not all countries have adopted a national strategy to combat violence against women.
- ▶ While many countries do have laws targeting violence against women, there are challenges in the form of budgetary constraints or customs when it comes to implementation.

Key Recommendations on Gender-Based Violence within the Family

1. Legal reform:

- a. Enact or amend laws to explicitly criminalise marital rape and remove marital exemptions or defenses.
- b. Countries that have not yet done so must prohibit and criminalise female genital mutilation.
- c. Countries that have not yet done so must explicitly recognise and criminalise femicide.

2. Awareness and education:

Conduct campaigns to raise awareness about marital rape, challenge harmful gender norms, and educate communities and law enforcement about its criminality.

3. Survivor support services:

Establish accessible support services, including counselling, medical assistance, and legal aid, for survivors.

4. Training and sensitisation:

Provide comprehensive training for officials in the criminal justice, healthcare, and social service sectors to enhance their understanding and response to violence against women.

5. Strengthening legal systems:

Improve evidence collection, establish specialised units to effectively respond to, investigate and redress domestic violence, and ensure survivor-friendly courtroom processes.

6. Data collection and research:

Enhance data collection to inform evidence-based policymaking and program development.

4 The Women's Amendment Act, 2024 introduced in the National Assembly of the Gambia seeks to repeal the prohibition of FGM in The Gambia. The Bill was still under debate in the National Assembly at the time of publication of this Report. See <https://assembly.gm/wp-content/uploads/2024/03/Order-Paper-9-Monday-18th-March-2024.pdf> (accessed 17 April 2024)

DIVORCE

Key Findings

Women and men have equal rights to petition for divorce in countries such as Angola, Burundi, Cameroon, Mozambique, and Senegal.

However, many countries have discriminatory provisions related to divorce by requiring a case to fulfil certain conditions before a woman may request a divorce, which is not the case for men. Divorce laws in Sudan are discriminatory in that a woman cannot obtain a judgment of divorce in the same way as a man. Catholics in the country may divorce in instances of regular abuse and mistreatment, while Protestants and Coptic Christians may only divorce in cases of adultery. In Algeria, women can request a divorce only in cases of abandonment, failure to pay alimony or violation of the marriage contract. In the event a woman seeks a no-fault divorce where she does not have to prove the conditions, she will have to pay a financial compensation to the husband, which is also the case in Egypt.

Some countries also have a prescribed time limit that a woman must respect before contracting another marriage. For instance, in countries such as Cote d'Ivoire and the Democratic Republic of Congo, a woman can only remarry 300 days after divorce or death of the husband. In the case of DRC, this delay expires in the event the woman gives birth during the 300 days or the woman can approach the court to lift this requirement. Senegal has a similar provision where a woman can only remarry 300 days after the dissolution of the first marriage, with the delay being 3 months when there is a divorce or annulment. Such provisions are discriminatory since the husband usually does not have to respect these prescribed time limits to remarry.

A peculiar case, in Kenya, the Marriage Act provides that a party to a civil marriage may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage. However, in 2022, the Kenyan Court of Appeal found that this provision was unconstitutional because of the 'disproportionate effect' it would have where a divorce in a civil law marriage may be necessary and justified before the three-year limitation. Despite this finding, the Court decided to suspend the effect of its declaration for three years so that Parliament could make the necessary amendments to the Marriage Act.⁵

Key Challenges

- ▶ Many African countries still have discriminatory provisions when it comes to petitioning for a divorce, with men having more power to divorce a woman.
- ▶ Once divorced, women in some countries have to wait for a certain time period to contract another marriage, with this prescription not applicable to men.
- ▶ Laws that do not allow couples to petition for a divorce within a certain period of time.



Image: valentinrussanov / iStock

Key Recommendations on Divorce

1. Law reform:

Countries must reform their laws to grant women equal rights to petition for a divorce, and to remove any time limit within which a couple cannot submit a divorce petition. They should also remove the requirement for women to wait for 300 days after divorce or death of the husband to be remarried (in the case of Cote d'Ivoire, DRC, and Senegal).

2. Education about non-financial contribution of women in marriages:

In addition to the judiciary, the population needs to be educated about the non-financial contribution of women in marriages, even if they are married out of community.

⁵ *National Assembly of Kenya vs Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment)*. Available at <http://kenyalaw.org/caselaw/cases/view/233583/> (accessed 17 April 2024)

CHILD CUSTODY

Key Findings

Increasingly reformed Children's Acts now ensure guardianship rights for both parents, whether married or unmarried, a presumption of joint, shared custody and the child's right to know and be cared for by both biological parents. This goes a long way to ensuring equality in parental relations, as required by the Maputo Protocol⁶. Such countries are Angola, Botswana, Burundi, Cameroon, Côte d'Ivoire, the Democratic Republic of Congo, Mozambique and Senegal.

However, there are still challenges in some countries such as Egypt, South Sudan and Sudan – when the children are of tender age⁷ - and Tanzania where custody, driven by gender stereotypes, automatically falls on the woman. This presumption also increases women's care burden. The paramount interest in deciding custody should be the best interest of the child regardless of the gender of the parents.

In countries such as Algeria and Tunisia, the father is still considered as the legal guardian even if the mother has custody. In Senegal, while both parents take care of the child during marriage, the father is the legal guardian. Some countries, such as Algeria and Sudan, take away women's rights to custody in the event they remarry, without having the same condition for men, thereby discriminating against women.

Tanzania is a peculiar case since the law stipulates that the customs of the community must be considered when determining division of matrimonial property and custody of children. This has the potential to undermine women's right to equality, since custom may not recognise women's right to property and children are often considered a part of their father's clan, thus there is a preference for granting father's custody in custom. Courts must be sure to consider custom as one of many factors in the matrimonial property and custody determinations, rather than as the determinative factor.

Key Challenges

- ▶ In many countries, custody is driven by gender stereotypes and automatically falls on women, especially for children of tender age, thereby increasing women's care burden.
- ▶ While some countries grant women the custody of the child, and require the woman to take care of the child, the father still remains the legal guardian, thereby putting the woman in an uncomfortable situation

where she has to consult with the father for issues pertaining to the child.

- ▶ Laws taking away child custody from women in case they remarry are discriminatory.
- ▶ Tying custody of children to the division of matrimonial property is discriminatory against the woman since custom may not recognise women's right to property.

Key Recommendations on Child Custody

1. Non-discrimination:

Repeal laws that rely on presumptions of gender roles and stereotypes in child custody considerations.

2. Violence, abuse and protection:

In cases of domestic violence, the law should have provisions such as protection orders as well as availability of social protection measures. This can include necessary safeguards, such as supervised visitation or protective orders, to ensure the safety of the victim and her child.

3. Legal guardianship:

If the court is giving custody of the child to the mother, the latter must have legal guardianship so that she does not have to consult with the father, and have more authority.

4. Legal reform:

- a. Countries need to remove the clause of taking away children in case the mother remarries since this is discriminatory towards the mother as the father is not subjected to such a clause.
- b. African countries must also consider child custody independent of the division of matrimonial property, and base it on the best interests of the child.
- c. Both parents must be considered as the head of the family.

⁶ 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

⁷ The definition of tender age is relative in different African countries

INHERITANCE

Key Findings

In many countries, women are now entitled to equal inheritance rights. Male primogeniture has been declared unconstitutional in countries such as Botswana and Kenya. Law reform has also seen the equal inheritance of women prescribed in constitutions and statutory succession legislations in countries such as in the Democratic Republic of Congo, Mozambique, Nigeria, Senegal, and The Gambia.

Nevertheless, despite these reforms and progressive provisions in the constitutions and statutory laws, women still inherit less than men due to the recognition of customary and religious laws in the context of matters of the family, among them being inheritance, even where it is against the constitution. This is the case in the Democratic Republic of Congo, Nigeria, Senegal and The Gambia.

In Nigeria, while the Constitution guarantees rights to property and equal protection without discrimination on grounds of sex, most of Nigeria's customary legal systems do not allow women to inherit from their deceased husbands or fathers. For some time, the courts enforced this position, however, a string of case law has in recent years confirmed that it is unconstitutional to discriminate against women on the issues of land, housing, property and inheritance. These cases have allowed widows, daughters, and children born out of wedlock to inherit and it is progress that should be celebrated. Unfortunately, in practice, women continue to be deprived of the right to inherit and manage property. Nigeria must therefore ensure that this position is applied and enforced consistently.

There are also countries such as Algeria, Cameroon, Côte d'Ivoire, Egypt, South Sudan, Sudan and Tunisia that outrightly provide for unequal inheritance of the girl child or female spouses, or place women below the inheritance line. As a surviving spouse, widows should inherit from the deceased husband in a prioritised manner. In countries like Egypt and Sudan, there are different succession regimes for Christians and Muslims where a Christian woman must inherit equally as her brothers, which is not the case for Muslim women.

In some countries such as Angola, despite it being unconstitutional, women are totally excluded from inheriting their deceased husband's property and are sometimes even kicked out of the matrimonial home. In countries such as Burundi, there is no law regulating women's succession rights. Customary law dictates the succession rights of women and in most instances they are discriminatory.

Key Challenges

- ▶ Ensuring that women have equal rights to inheritance has proven challenging. Even where the constitution and statutory laws provide for equal rights of women, under both customary law and religious law, women do not enjoy equal inheritance rights.
- ▶ Some countries have laws that provide for unequal inheritance rights of women.
- ▶ Different inheritance regimes for Muslim and Christian women.
- ▶ Women not inheriting from their deceased husbands in a prioritised manner.
- ▶ Lack of laws regulating succession in some countries.

Key Recommendations on Inheritance

1. Sensitisation:

Adopt and enforce sensitisation policies on widows' inheritance rights to safeguard them from family members looking to disinherit them.

2. Law reform:

- a. Countries which have unequal inheritance rights must amend their laws to ensure that women enjoy equal inheritance from their parents and/or their deceased spouses as men.
- b. In countries where Christian women and Muslim women's inheritance is governed by different regimes, the government must harmonise the laws to make sure that all women in its territory inherit on an equal basis with men.

3. Customary and religious laws:

Customary and religious laws must be consistent with the respective constitutions in instances where the constitutions provide for women's equal inheritance rights and with regional and international laws where there are no constitutional provisions.

4. Judicial training:

The judiciary must be trained to ensure that they apply law in a consistent and progressive manner for women's equal inheritance, even where customary and religious laws are relied upon.

MATRIMONIAL PROPERTY

Key Findings

In many African countries, traditional practices and cultural norms have often disadvantaged women in matters of property ownership and inheritance. Sudan is one such country where women still have an unequal right to matrimonial property.

However, legal reforms have sought to address these disparities by recognising and protecting women's rights to matrimonial property. Matrimonial property laws in Africa have undergone significant developments in recent years, aiming to promote gender equality and protect women's rights within marital relationships. These laws address the distribution of property and assets acquired during marriage, acknowledging women's contributions to the family and economic well-being. Many countries now have legal provisions calling for equitable distribution of matrimonial property that take into account direct and indirect contributions such as in Côte d'Ivoire, Kenya, Malawi and South Africa. In Cameroon, case law has established that both spouses have equal matrimonial property ownership rights. Such provisions are protective for women whose contribution may be non-pecuniary such as the performance of domestic duties.

There are also legal provisions recognising married women's right to acquire, own, maintain and dispose of their own property such as in: Ethiopia, Nigeria, South Africa, and The Gambia.

Spousal consent is required for certain legal transactions, such as the disposal of jointly owned property where the marriage is in community of property, but since this requirement applies equally to husbands and wives, it acts as a protective mechanism for women who were previously disenfranchised without their knowledge in countries such as Botswana and Kenya.

Women married out of community of property are at a further disadvantage. In Botswana, the economically weaker spouse (generally the wife) will be greatly disadvantaged if during the marriage she had, for example, spent her time looking after the family, household and children while her husband worked. Despite her contribution to the joint household, share in property will be determined on economic terms and she will likely be left destitute. This position is untenable and amounts to indirect discrimination against women married out of community of property.

In some cases, upon divorce, the matrimonial property of a woman is tied to the custody of the child. In Egypt for instance, upon divorce, the wife may keep the matrimonial home when she has custody of the child but loses this privilege when the children reach the age of majority or when she loses custody.

During divorce proceedings in Nigeria, the approach of courts to dividing marital property after divorce has tended to privilege men. Courts use direct financial contribution as the basis for division of matrimonial property. However, this power should be exercised to recognise non-financial contributions to the property and to the marriage in general, so that economically weaker spouses (generally women) are not unfairly disadvantaged.

In many African countries, traditional practices and cultural norms have often disadvantaged women in matters of property ownership and inheritance.

Key Challenges

- ▶ Some countries such as Burundi, Cameroon, Egypt, South Sudan, Sudan and The Gambia have unequal laws concerning women's rights to matrimonial property, whether it is in civil, customary, or religious marriage.
- ▶ In some countries, while there are laws recognising women's equal rights to matrimonial property, there are implementation challenges due to practice and culture.
- ▶ Where there are unclear laws, judges do not always adopt a feminist approach, and instead write judgements in patriarchal lines.
- ▶ Women face vulnerabilities when only the financial contribution of each spouse is considered upon the dissolution of a marriage since the non-economic contributions of the women might not be considered.
- ▶ Matrimonial property being tied to the custody of children.

Key Recommendations on Matrimonial Property

1. Legal reforms:

- a. African countries should enact or strengthen laws that explicitly recognise and protect women's rights to matrimonial property. These laws should prioritise gender equality, ensuring that women's contributions (both financial and non-pecuniary contributions such as domestic duties) to the acquisition, management, and growth of assets during marriage are acknowledged and fairly considered in the distribution of property.
- b. Reform should include customary and religious contexts by ensuring that women's rights to equality in matrimonial property in these contexts is explicitly recognised, including guarantees for women's equal ownership, management, sharing, and distribution of matrimonial property, regardless of the family law or practice that applies to them.

2. Judicial reform:

Governments should invest in training judges, lawyers, and other legal professionals to adopt a gender transformative approach when adjudicating matrimonial property cases. This includes recognising women's domestic and care roles as equitable contributions to the acquisition of matrimonial property, and addressing gender biases, stereotypes, and cultural norms that may disadvantage women in property disputes.

3. Judicial training:

Courts must be granted greater discretion to determine the division of matrimonial property. This discretion must be used to consider the non-financial contribution of women to marriages. Moreover, courts should be trained to ensure that they remove the requirement for child custody for a woman to have control over the matrimonial home after divorce.

4. Access to justice:

- a. Ensure that women have accessible and affordable avenues to seek legal remedies in cases of matrimonial property disputes. This includes providing legal aid services, establishing specialised family courts, and simplifying legal procedures to enable women to assert their rights effectively.
- b. Conduct comprehensive legal literacy and awareness campaigns targeting women and communities to educate them about their rights to matrimonial property. These campaigns should include information on relevant laws, procedures, and legal recourse available to women, empowering them to assert their rights and make informed decisions.

CONCLUSION

This Report focuses on assessing the status of family laws in Africa in relation to the standards established in the Maputo Protocol, CEDAW, and other relevant international human rights treaties. Despite the ratification of the Maputo Protocol by 45 out of 55 African countries, discriminatory laws and practices that violate women's and girls' rights still exist. While strong challenges remain, there are positive trends such as the introduction of the age of marriage of 18 without any exceptions in several countries; jurisprudence that expresses an understanding of women's rights; laws recognising women's rights within a marriage that has not even been registered; women's equal rights to child custody; and laws on violence against women, including the prohibition and criminalisation of marital rape and female genital mutilation.

The Report emphasises the need for reforms in family laws and highlights several reforms for guidance and consideration to influence legislative and policy changes.



2. INTRODUCTION

BACKGROUND

This Report is an assessment of the status of family laws in 20 countries in Africa to analyse whether they are in compliance with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other relevant international and regional human rights treaties.

There is a persistent lack of implementation of the Maputo Protocol, CEDAW, and other international treaties and standards pertaining to women's rights within the realm of the family, by the countries that have ratified them. Despite 45 out of 55⁸ African countries having ratified the Maputo Protocol, discriminatory laws and practices that violate its provisions still persist in many of these nations, particularly within family laws. These laws are in direct contravention of various Articles of the Maputo Protocol and CEDAW, including the general comments such as General Comment number 6 on Article 7(d) of the Maputo Protocol, which addresses women's rights to property during separation, divorce, and annulment.

In response to these ongoing violations of women's rights, Equality Now, in collaboration with SOAWR, FEMNET, Musawah, CLADEM, Women's Learning Partnership, Act Church of Sweden, Muslims for Progressive Values and UN Women, launched the Global Campaign for Equality in Family Law in March 2020. This campaign was a direct response to the realization that family laws and practices continue to violate rights of women and girls, but remain a low priority for States. Women's rights violations predominantly occur within family settings.

Subsequently, in October 2021, Equality Now, FEMNET, Musawah and SIHA Network organised a virtual Africa Regional Pre-Convening on Family Laws, which aimed to strengthen and mobilise networks for family law reform and women's rights activists, and to develop regional and country-based strategies advocating for the reform of discriminatory laws and practices relating to marriage and family. During this Regional Pre-Convening, the nuances of family laws, practices, and policies were highlighted, recognizing the diverse contexts of civil, customary, and religious laws. In October 2022, an in-person regional convening was held, which resulted in the launch of the Africa Family Law Network.

Acknowledging the value of evidence-based advocacy, this research undertakes a comprehensive assessment of family laws in select countries in Africa. It seeks to provide a clear understanding of the status of family laws on the Continent, identify opportunities and challenges for reform, and develop responsive and effective strategies to influence leaders and lawmakers to enact legislative and policy changes. By examining the existing legal framework and its compatibility with international human rights standards, this Report aims to contribute to the ongoing efforts to promote gender equality and women's rights within the family sphere across Africa.

“family laws and practices continue to violate rights of women and girls, but remain a low priority for States”

8 Status of ratification as at May 2023. South Sudan and Botswana ratified the Maputo Protocol in June 2023 and December 2023 respectively

FRAMEWORK AND METHODOLOGY

The study adopted a qualitative and multi-pronged research methodology. The conceptual framework guiding the data collection and analysis includes the use of feminist theory which is not only intersectional but also a human rights-based approach. The consultants undertook the review and analysis of both the primary and secondary literature on family laws on the continent, in the first phase. The primary sources include international, regional, and domestic laws, in the form of constitutions, relevant Acts of Parliaments and court decisions where available. Secondary literature consists of academic publications, reports, and newspaper articles. The examination of these documents was with a view to understand the scope of women's rights within the family and the respective extent of compliance and deviation by different countries. The second phase of the desk review informed the substantive data and analysis at the core of the Report. It included a thorough review of family laws in the selected countries, literature on trends, practices, and any relevant on-going advocacy and law reform measures.

In addition to the desk review, the study entailed a complementary empirical element through the use of a survey and key informant interviews. The survey was disseminated to Equality Now's partners as well as SOAWR members. Key informant interviews were deployed:

- (i) Where desk review revealed a dearth of critical information; and
- (ii) To gain key insights from two to three targeted partners that have been engaged in family law reform advocacy.

The information collected cuts across regional, sub-regional, and national contexts. The review was analytical in nature and focused on identifying key insights and good practices. Further, while carrying out the desk review, the consultants paid attention to political, social, religious, legislative, and policy considerations towards informing existing challenges and resultant priorities and opportunities for programmatic engagement.

The Report does not purport to be a definitive representation of the laws in any of the 20 select countries, but rather to show a general overview of family laws in the countries and to highlight the key gaps and contestations that exist within these laws. The Report also includes case studies to illustrate the impact of discriminatory family laws or the lack of implementation of good laws in various countries. The assessment was largely undertaken between April 2022 to December 2023.



SCOPE AND PARAMETERS OF THE STUDY

COUNTRY SELECTION

A review of 20 African countries was undertaken covering all regions of the African continent. We have used the African Union's categorisation of regions in the identification of countries. The countries have been chosen based on geographical and language considerations to ensure that the Report covers as many determinants as possible. The countries selected are anglophone, francophone, Arab-speaking and lusophone.

Moreover, the preliminary review done by Equality Now on “*Discriminatory Customary and Family Laws in Africa*” was used as a blueprint for the countries. The countries are as follows classified as per regions of the African Union:

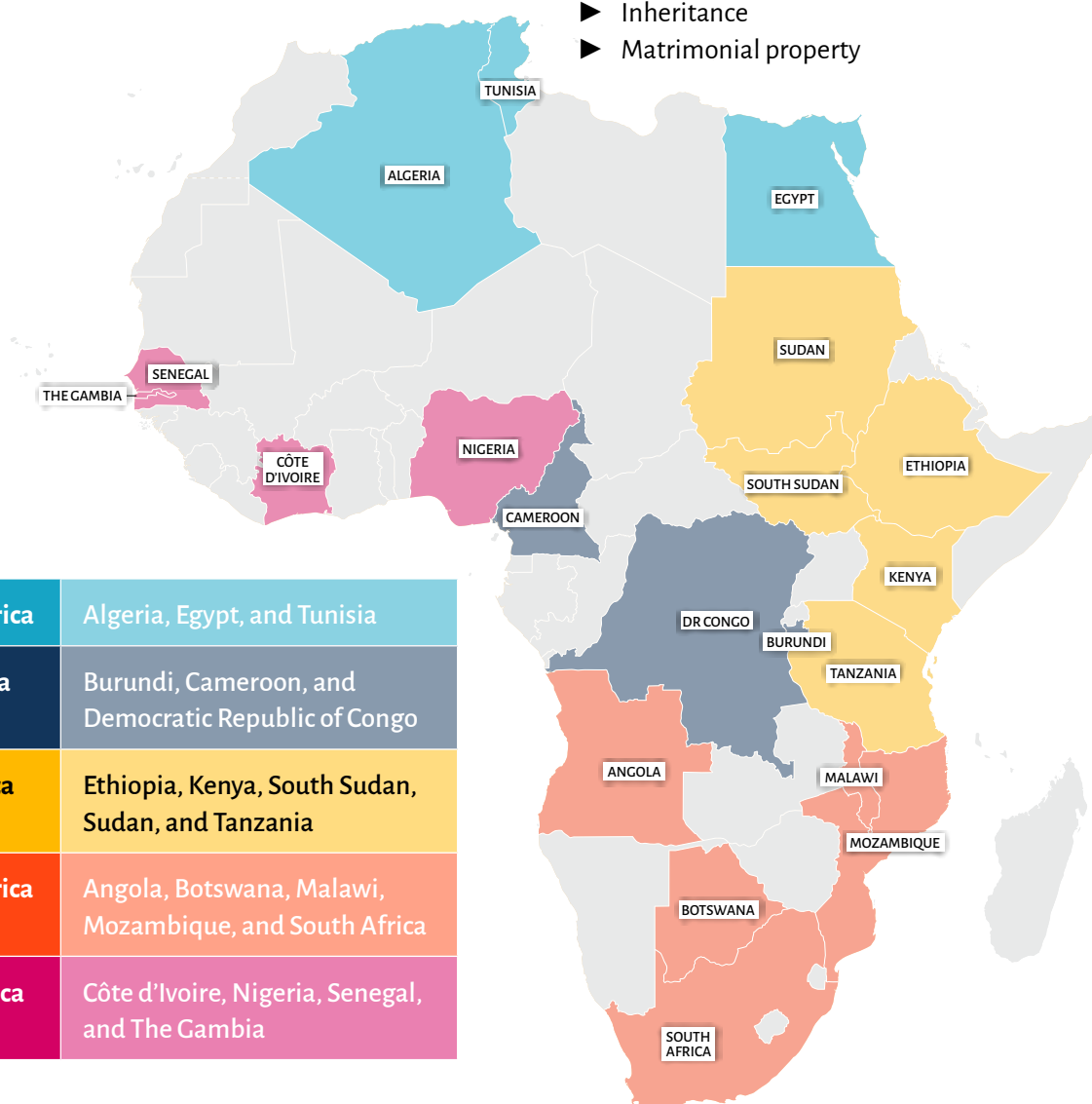
Northern Africa	Algeria, Egypt, and Tunisia
Central Africa	Burundi, Cameroon, and Democratic Republic of Congo
Eastern Africa	Ethiopia, Kenya, South Sudan, Sudan, and Tanzania
Southern Africa	Angola, Botswana, Malawi, Mozambique, and South Africa
Western Africa	Côte d'Ivoire, Nigeria, Senegal, and The Gambia

THEMES

Family law is the body of law regulating familial relationships, including marriage and divorce, the treatment of children, and related economic matters.⁹ Consequently, it is very broad and there was a need to narrow down the themes for purposes of this research and Report.

This Report builds on nine broad themes identified during the Africa Family Law Campaign Consultative Outreach Meeting held virtually on 16 October 2020:

- ▶ Legal pluralism
- ▶ Child marriage
- ▶ Registration and legal recognition of marriages
- ▶ Polygamy
- ▶ Gender-based violence within the family (marital rape and domestic violence)
- ▶ Divorce
- ▶ Child custody
- ▶ Inheritance
- ▶ Matrimonial property





3. FAMILY LAWS NORMATIVE FRAMEWORK FROM A GLOBAL AND REGIONAL PERSPECTIVE

GLOBAL LEVEL

At the global level, the main treaty focusing on women's rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was adopted in 1979 and entered into force in 1981. The CEDAW had three founding principles which are substantive equality, non-discrimination and State obligation. Several Articles of the CEDAW focus on women's rights within the family:

- ▶ The Preamble, for instance, recognises the great contribution of women to the welfare of the family. Articles 1 and 2 provide for non-discrimination against women in all its forms. This includes taking all steps required to ensure that women do not face discrimination and are treated equally.
- ▶ Article 5 then requires States to modify social and cultural patterns to protect women from prejudices in customary and other practices.
- ▶ Article 13 further requires States to ensure the equality of men and women in receiving family benefits.
- ▶ Article 14 protects rural women from discrimination.
- ▶ Specific to marriage, Article 16 obligates States to eliminate all forms of discrimination against women in matters relating to marriage and family and this includes ensuring equality to enter marriage, free and full consent, child custody, matrimonial property, and child marriage.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the Committee on the Rights of the Child (CRC) have adopted several general recommendations to guide States in their implementation of CEDAW's and the Convention on the Rights of the Child provisions. Some of the general recommendations relevant to family laws are as follows:

- ▶ Joint General comment No. 18 of the Committee on the Rights of the Child on harmful practices and General recommendation No. 31 of the Committee on the Elimination of Discrimination against Women, 2019 (revising the 2014 Joint General Comment)¹⁰
- ▶ General recommendation No. 35 on gender-based violence against women, 2017 updating general recommendation No. 19¹¹
- ▶ General recommendation No. 34 on the rights of rural women, 2016¹²
- ▶ 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), 2013¹³
- ▶ General recommendation No. 21: Equality in marriage and family relations, 1994¹⁴

¹⁰ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?SymbolNo=CEDAW/C/GC/31/CRC/C/GC/18 (accessed 16 April 2024)

¹¹ <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based> (accessed 16 April 2024)

¹² <https://digitallibrary.un.org/record/835897?ln=en&v=pdf> (accessed 16 April 2024)

¹³ https://www2.ohchr.org/english/bodies/cedaw/docs/comments/cedaw-c-52-wp-1_en.pdf (accessed 16 April 2024)

¹⁴ <https://www.refworld.org/legal/general/cedaw/1994/en/61456> (accessed 16 April 2024)

REGIONAL LEVEL

At the regional level, Article 18(3) of the African Charter on Human and Peoples' Rights (African Charter)¹⁵ provides for women's rights as follows: 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.

To supplement the provisions of the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted in 2003 and entered into force in 2005. There was a need for the Maputo Protocol since there was little consideration given to existing women's human rights standards on the continent.¹⁶ This Protocol has been described as a 'pioneering and legally binding instrument, which marks a new beginning in the promotion and protection of women's human rights on the African continent'.¹⁷ The instrument is expected to accelerate the eradication of women's human rights violations on the continent. It can be considered as an expression of the African Union's commitment to put women's human rights in the forefront. Several Articles in the Maputo Protocol focus on women's rights within the family as discussed below.

Article 1 of the Maputo Protocol is the definition section and it defines terms like 'harmful practices', 'violence against women' and 'women' amongst others. It is to be noted that women have been defined as 'persons of female gender, including girls'.¹⁸

Article 2 of the Maputo Protocol focuses on the elimination of discrimination against women. States parties have the obligation to adopt 'appropriate legislative, institutional, and other measures' to fight discrimination against women. Under this obligation, States need to ensure that the principle of equality is integrated in its laws and that there is an effective application of the concept.¹⁹ The laws have to take into account harmful traditional practices which 'endanger the health and general well-being of women'²⁰ and they have to change the social construct to eliminate such practices.²¹ States should adopt a gender perspective concerning laws, legislations and policies.²²

The right to dignity of the woman is recognised in Article 3 of the Maputo Protocol. Under the title of protection of the rights to life, integrity, and security of the person,²³ the State has to ensure that women are protected from inhuman or degrading punishment and treatment. The Maputo Protocol has gone a step further than the UN Declaration on the Elimination of Discrimination of Violence Against Women of 1993 (EDVAW)²⁴ while defining violence against women.

Article 1 of EDVAW defines violence against women in the following terms:

...any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

The Maputo Protocol's definition of violence against women is as follows:²⁵

...all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

15 <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 24 May 2022)

16 F Banda 'Protocol to the African Charter on the Rights of Women in Africa' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 445

17 C Ocran 'Recent Developments-Actualities: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 15 *African Journal of International and Comparative Law* (2007) 1147

18 Article 1(k) of the Maputo Protocol

19 Article 2(1)(a) of the Maputo Protocol

20 Article 2(1)(b) of the Maputo Protocol

21 Article 2(2) of the Maputo Protocol

22 Article 2(1)(c) of the Maputo Protocol

23 Article 4 of the Maputo Protocol

24 https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21_declaration%20elimination%20vaw.pdf (accessed 17 April 2024)

25 Article 1(j) of the Maputo Protocol

The definition of violence against women in the Maputo Protocol expands the definition from the EDVAW by including economic harm and referring to protection of women both in time of peace and in time of armed conflicts or of war.²⁶

Concerning harmful traditional practices which negatively affect the human rights of women and which are contrary to recognised international standards, the Maputo Protocol expressly provides that States should **prohibit and condemn** them in all their forms.²⁷ Recognising that female genital mutilation affects many women across the Continent, Article 5 of the Maputo Protocol provides that States must have laws to prohibit such practices and that they must provide for sanctions in the event of a breach of these laws. The Article further takes into account the fact that peoples’ around the Continent are not generally aware of the side effects of FGM and it provides for the ‘creation of public awareness’.

Article 6 of the Maputo Protocol protects women in the context of marriage and provides that States should enact laws which set the minimum age of marriage to be 18 years for women. Given the high prevalence of child marriage across the African continent, this provision is important to curb the phenomenon. The African Commission, together with the African Committee of Experts on the Rights and Welfare of the Child, also adopted a General Comment on ending child marriage.²⁸

Article 6 further encourages monogamy. States parties also have the obligation *to ensure that men and women enjoy the same rights in case of separation, divorce or annulment of marriage*.²⁹ To emphasise women’s rights in marriage, the African Commission has adopted a general comment on the property rights of women during separation, divorce, or annulment in 2020.³⁰ However, one criticism of the Maputo Protocol is that it still recognises polygamy under Article 6. On the other hand it is hailed as “inclusive” as it also aims to protect women who already are in polygamous marriages.

Article 14 is a groundbreaking Article on sexual health and reproductive rights. This Article expressly confers upon women the following rights:

- ▶ reproductive choice by stating that women have the right to take autonomous decisions concerning their fertility;
- ▶ the number of children they want to have;
- ▶ use of contraception;
- ▶ to be protected from HIV/AIDS; and
- ▶ have family planning education.

The Article goes a step further and recognises *medical abortion in cases of sexual assault, rape, incest, and also in instances where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus*.³¹ The African Commission recognised the importance of this Article and as a result, adopted two general comments to enable better interpretation of its provisions. The first one was adopted on 6 November 2012,³² with the second one being adopted on 28 November 2014.³³

Since culture has a great impact on women’s access and enjoyment of human rights in Africa, Article 17 of the Maputo Protocol provides that ‘[w]omen shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies’.

Acknowledging the vulnerabilities faced by widows across the continents, Article 20 of the Maputo Protocol provides for widows’ rights. States have an obligation to take legal measures to ensure that the rights of widows are not violated. It provides that a widow must not be treated inferiorly, that she shall be the custodian of her children and that she can remarry. In the same vein, Article 21 of the Maputo Protocol protects the right to inheritance of a woman and also states that men and women both shall have the equitable shares in their parents’ property.

26 Article 1(i) of the Maputo Protocol

27 Article 5 of the Maputo Protocol

28 African Commission and African Children’s Committee ‘Joint General Comment on Ending Child Marriage’ adopted in 2017. Available at https://www.chr.up.ac.za/images/researchunits/cru/files/acerwc_general_comments/Joint_General_Comment_No_4_of_the_African_Children_s_Rights_Committee_and_the_African_Commission_on_Human_and_PeoplesRights.pdf (accessed 16 April 2024)

29 Article 7 of the Maputo Protocol

30 General Comment No. 6 On The Protocol To The African Charter On Human And Peoples Right On The Rights Of Women In Africa (Maputo Protocol): The Right To Property During Separation, Divorce Or Annulment Of Marriage (Article 7(D)). Available at <https://achpr.au.int/en/node/906#:~:text=This%20General%20Comment%20provides%20guidance,Maputo%20Protocol%20as%20well%20as> (accessed 16 April 2024)

31 Article 14(2)(c) of the Maputo Protocol

32 African Commission ‘General Comments No.1 on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2012). Available at <https://achpr.au.int/en/node/855> (accessed 16 April 2024)

33 African Commission ‘General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2014). Available at <https://caselaw.ihrrda.org/fr/entity/kxwxd2jd6h5ckzcsjrzxjqok9?page=7> (accessed 16 April 2024)

The Maputo Protocol also extends protection to women who are more vulnerable such as, elderly women,³⁴ women with disabilities³⁵ and women in distress.³⁶ Generally, under the Protocol, women who fall within the above categories should be empowered and States should take steps to ensure that their physical, economic and social needs are met. They should also be protected from violence.

As of the end of 2023, 45 out of 55 African countries have ratified the Maputo Protocol. However, ratifying or domesticating a legal instrument does not automatically lead to the realisation of the rights therein. All stakeholders need to take relevant steps to make sure that the provisions of the Maputo Protocol become a reality for all girls and women in the Continent. This assessment focuses on identifying where countries are lagging behind in terms of family law reforms.

Additionally, Article 21 of the African Charter on the Rights and Welfare of the Child (ACRWC)³⁷ calls for Member States to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child including those customs and practices discriminatory to the child -on the grounds of sex or other status. The Article specifically provides that marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

Within the Southern Africa Region, the SADC Model Law on Eradicating Child Marriage and Protecting Children already in Marriage aims to serve as a yardstick and an advocacy tool for legislators in the SADC Region and guide Member States to develop their National laws as it creates a robust and uniform legal framework relating to the prohibition and prevention of child marriage and is a key path to addressing Sexual Reproductive Health Rights.³⁸

34 Article 22 of the Maputo Protocol

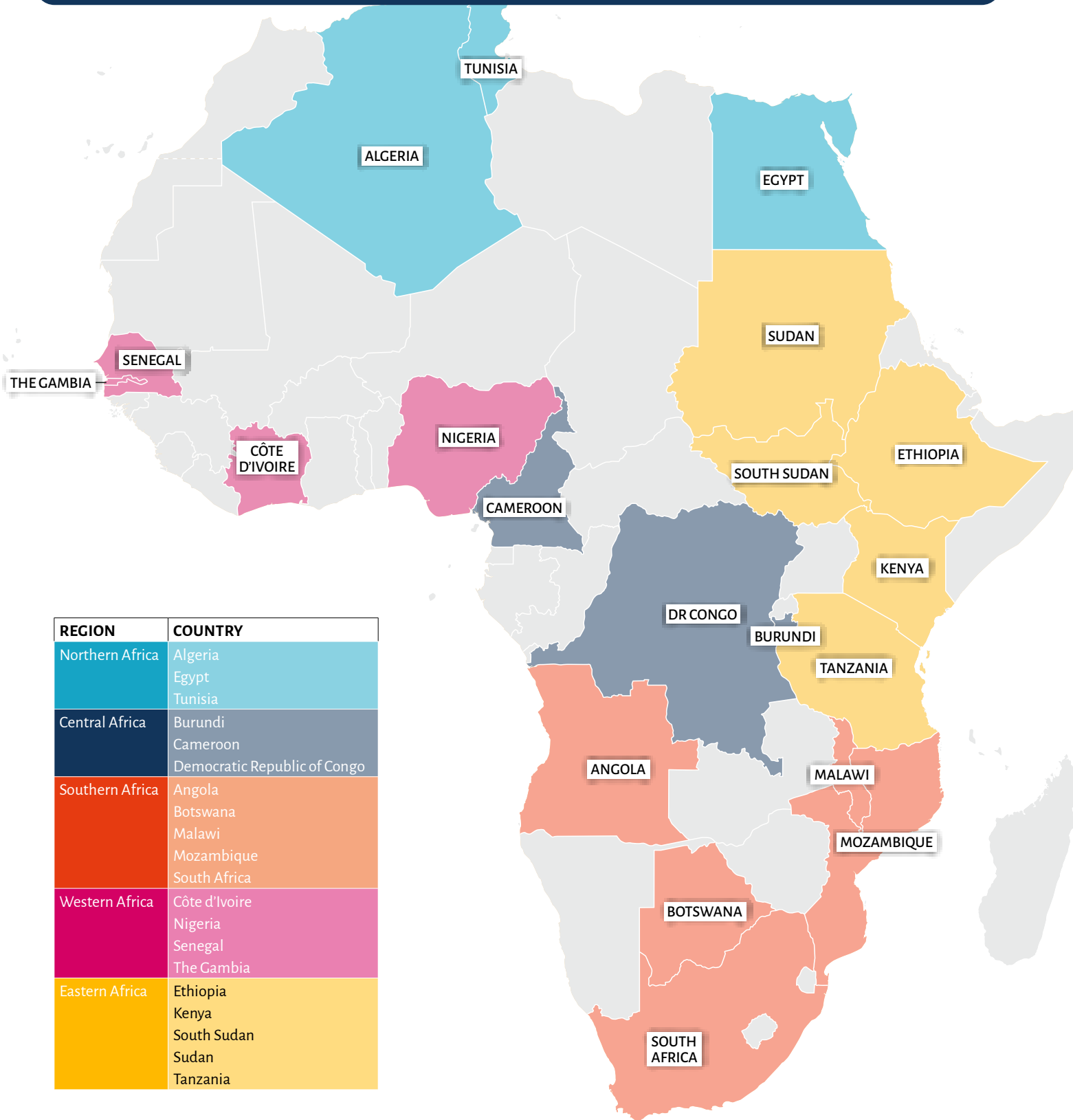
35 Article 23 of the Maputo Protocol

36 Article 24 of the Maputo Protocol

37 Available at <https://au.int/en/documents-45> (accessed 17 April 2024)

38 Available at <https://www.sadcpf.org/index.php/en/documents/model-laws/en-model-law-on-eradicating-child-marriage-and-protecting-children-already-in-marriage/viewdocument/155> (accessed 17 April 2024)

4.FAMILY LAWS IN AFRICA: A SELECT COUNTRY OVERVIEW





COUNTRY PROFILE

The Constitution of Algeria protects the family, while focusing on the best interests of the child, including their education and their protection from violence and exploitation.³⁹ Moreover, Article 85 provides for the rights and freedoms to be exercised in line with the Constitution and in particular, the protection of the family, amongst others. The Preamble also provides for the protection of Algerian people against all forms of discrimination and recognises the need for both men and women to participate in institutions for the achievement of equality. The Constitution protects non-discrimination on the basis of sex or gender and its Article 40 focuses on the protection of women 'from all forms of violence in all places and situations in the public, professional, and private spheres'. It further requires the law to 'guarantee victims access to shelter and care facilities, appropriate appeal methods, and free legal assistance'.

Family Law in Algeria is governed by the Algerian Family Code which draws its content from Muslim Law and remnants of French civil law and procedures emanating from Algeria's colonial history. Article 2 of the Constitution provides for Islam as being the official religion of the State. Parliament has the responsibility to legislate on matters relating to 'the general rules pertaining to personal status and family law and particularly to marriage, divorce, filiation, legal capacity and inheritance'.⁴⁰ The country has a Family Code, which is based partly on Sharia although Sharia law is superior to such statutes.⁴¹

Treaty	Date of ratification	Reservations/Declarations
CEDAW	22 May 1996	"Article 2: The Government of the People's Democratic Republic of Algeria declares that it is prepared to apply the provisions of this Article on condition that they do not conflict with the provisions of the Algerian Family Code. Article 15, paragraph 4: The Government of the People's Democratic Republic of Algeria declares that the provisions of Article 15, paragraph 4, concerning the right of women to choose their residence and domicile should not be interpreted in such a manner as to contradict the provisions of chapter 4 (Article 37) of the Algerian Family Code. Article 16: The Government of the People's Democratic Republic of Algeria declares that the provisions of Article 16 concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code. Article 29: The Government of the People's Democratic Republic of Algeria does not consider itself bound by article 29, paragraph 1, which states that any dispute between two or more Parties concerning the interpretation or application of the Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration or to the International Court of Justice. The Government of the People's Democratic Republic of Algeria holds that no such dispute can be submitted to arbitration or to the Court of International Justice except with the consent of all the parties to the dispute."⁴²
African Charter	1 March 1987	None
Maputo Protocol	20 November 2016	The Government of the People's Democratic Republic of Algeria placed reservations against the following articles: "Article 6 Article 7 Article 14" ⁴³

³⁹ Article 74 of the Constitution of Algeria 1996, amended 2016. Available at https://www.constituteproject.org/constitution/Algeria_2016 (accessed 16 April 2024)

⁴⁰ Article 144(2) of the Constitution of Algeria 1996, amended 2016

⁴¹ D Touchent 'Algerian Law Guide' *GlobalLex* (January 2006) <https://www.nyulawglobal.org/globallex/Algeria.html> (accessed 6 July 2022)

⁴² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec (accessed 16 April 2024)

⁴³ https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf (accessed 16 April 2024)

MAIN TRENDS IN FAMILY LAW

The 1984 Family Code of Algeria⁴⁴ is still discriminatory. In 2005, there were amendments to the Family Code.⁴⁵ However, these amendments were limited and to avoid a disruptive debate in Parliament, they were adopted as a supplementary instrument in the Council of Ministers and not a law that would require Parliament's assent.⁴⁶ The most considerable changes are as follows:⁴⁷

- ▶ The lowest permitted marriage age is 19 for both sexes (formerly 18 for women and 21 for men), though an exception remains for children of any age to marry with judicial consent.
- ▶ Marriage by proxy is no longer possible.
- ▶ The woman herself can choose her guardian (*wali*) when she is to enter marriage.
- ▶ The woman's statutory obedience to the husband is removed as is the term 'head of the family'.
- ▶ The spouses have equal rights and duties in marriage.
- ▶ Polygamy is only allowed after permission from a judge, and only under certain conditions.
- ▶ Women are given greater access to divorce.

The 2005 reforms removed the Article stating that 'a wife obeys her husband, regards him as the head of the family and respects his parents and his immediate relatives' and replaced it by equality between the spouses.⁴⁸ Removing the legal obligation for the wife to obey her husband is progress even if in reality, by and large, men still exercise control over women's lives and choices in the family.

Women are generally economically dependent on their spouses given that the man is culturally supposed to be the main provider of the family.⁴⁹ Even if women perform better than men at school, they are often expected to retire from employment to look after their household once they are married.

In 2015, the Parliament adopted Law No 15-19⁵⁰ that criminalises certain types of gender-based violence such as domestic violence, sexual harassment, harassment in public spaces, verbal harassment, cyberviolence, online harassment and psychological violence, and that provides for penalties for assault against a spouse or female family members. However, the law provides a clause for 'forgiveness or pardon' that acts as a challenge for its implementation since in many instances, the victim, especially in the context of family pressure, forgives the perpetrator.⁵¹

Women have access to safe termination of pregnancies in the event the same is necessary to preserve the women's life as per Article 308 of the Penal Code. Safe termination of pregnancies is not extended to choice, the health of the woman, or when the woman has been raped or a victim of incest, which is the international law standard.

44 https://www.pisai.it/media/410863/86_05-juin-1986.pdf (accessed 17 April 2024)

45 N Ait-Zai 'Reforms in family law in the Maghreb' 2005 <https://www.iemed.org/publication/reforms-in-family-law-in-the-maghreb/> (accessed 6 July 2022)

46 LandInfo 'Report: Algeria: Marriage and divorce' (2018) 10. Available at <https://landinfo.no/wp-content/uploads/2018/04/Report-Algeria-Marriage-and-divorce-2018-final.pdf> (accessed 16 April 2024)

47 Id at 11

48 Id at 8

49 As above

50 <https://www.joradp.dz/ftp/jo-francais/2015/f2015071.pdf> (accessed April 12 2024)

51 EuroMed Rights 'Violence against women in Algeria' (2021) 4 Available at <https://euromedrights.org/wp-content/uploads/2021/03/Violence-against-women-in-Algeria.pdf> (accessed 16 April 2024)

KEY GAPS AND CONTESTATIONS

(i) **Unregistered marriages:** Civil marriages are immediately registered and recognised. Customary and religious marriages are however not registered. In some cases where customary marriages are not registered, the Family Code provides for the validation of customary marriages by a Court.

(ii) **Gaps in laws on legal age of marriage:** Even if the 2005 amendments increased the legal age of marriage to 19, exceptions can be granted by a judge in special cases.⁵² According to the Family Code, this exception can be obtained only after an assessment of the aptitude of both parties to marriage. Nevertheless, this exception allowing children under 18 to marry is against international human rights standards as provided expressly by the Maputo Protocol. Consent is also required for the marriage of minors, as the father exercises paternal power (guardianship) over his minor children.

(iii) **Marital rape not criminalised:** While law No 15-19 is a positive step, it does not criminalise marital rape. Moreover, the 'pardon or forgiveness' for men exposes women to threats and further violence from the spouse or relatives.

(iv) **Discriminatory child guardianship:** The father is still considered as the legal guardian of the child except in urgent cases when he is unavailable or absent⁵³ even if under Article 36, both parents are responsible for the upbringing and the interests of the child. Moreover, the law on custody is discriminatory against women since the latter loses custody in the event she remarries.⁵⁴

(v) **Discrimination in initiating divorce:** The law further discriminates against women in divorce since the way a woman may initiate a divorce differs from that of a man.⁵⁵ A wife requesting divorce must fulfil one of the conditions in the Family Code such as abandonment, failure to pay alimony or violation of the marriage contract.⁵⁶ Women can also seek a no-fault divorce that does not require them to prove the above conditions but in this case, they need to pay a financial compensation to the husband.

(vi) **Unequal inheritance:** A woman or girl cannot inherit equally from their parents. If they have a brother, the girl gets half of the brother's inheritance and in the absence of the latter, the share of the brother is redistributed to male relatives.⁵⁷ Concerning surviving spouses, female spouses are entitled to only half of the amount of male surviving spouses where the spouse has descendants.⁵⁸

RECOMMENDATIONS

Legal reform:

- ▶ There must be further amendments to the Family Code in line with CEDAW and the Maputo Protocol to remove the requirement of a legal guardian for women, criminalise forced marriage, and provide for penalties, remove the exception for marriage of children under 18 years; and provide for equal rights of men and women in marriage, divorce and in custody matters.
- ▶ Law No 15-19 needs to be amended to criminalise marital rape and to remove the clause of 'forgiveness or pardon'.
- ▶ The Penal Code must be amended to allow for safe termination of pregnancies as per international human rights standards, and not only in the case when it threatens the mother's life.
- ▶ Customary and religious marriages need to be registered so that widows in such marriage can have access to the husband's inheritance.

⁵² <https://www.undp.org/sites/g/files/zskgke326/files/migration/arabstates/Algeria-Country-Assessment---English-ilovepdf-compressed.pdf> (accessed 15 April 2024)

⁵³ Article 87 of the Family Code

⁵⁴ EuroMed Rights (n above) 5

⁵⁵ <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Algeria.pdf> (accessed 17 April 2024)

⁵⁶ Article 53 of the Family Code

⁵⁷ Articles 144-148 of the Family Code

⁵⁸ Article 145-146 of the Family Code

FATIMA'S* STORY

Case study collected with the support of
Nadia Ait-Zai, La Fondation Pour l'Égalité/ CIDDEF

Algeria



Article 53 of the Algeria Family Code allows the wife to request a divorce on the following grounds: (i) non-payment of maintenance (ii) infirmities hindering the realisation of the objects of marriage; (iii) refusal of the husband to cohabit with his wife for more than four months; (iv) conviction of the husband which is of such a nature as to dishonour the family and render impossible leading of common life and conjugal relations; (v) absence of the husband for more than a year without a valid excuse or maintenance; (vi) violation of provisions of Article 8 (this Article provides that a husband is permitted to contract marriage with more than one wife within the limits of the Shari'a if there is a just ground and the conditions and intentions of equity can be fulfilled. He must inform his wife and the future wife and submit a request for marriage authorisation) ; (vii) an immoral act which is severely reprehensible; (viii) persistent disagreement between the spouses; (ix) for violation of the clauses stipulated in the marriage contract; and (x) for any legally recognised prejudice."

"My name is Fatima*, and I am a 42-year-old speech therapist living in Algiers, Algeria. I got married in 2011, and our marriage lasted for eight years.

I now live with my two children, an 11-year-old girl and a 9-year-old boy. It's still a social taboo and a disgrace to be a divorced woman in our society. I am considered as someone who was not capable of preserving her family. I had to fight to prove that I could find another job and raise my children independently.

My ex-husband was toxic. He would frequently resort to threats and blackmail if situations didn't align with his desires. For instance, he'd insist, "I'll divorce you if you go out without my permission."

Before getting married, I made it clear to him that I wanted to continue working. Despite agreeing initially, he later demanded that I quit my job.

During that time, I worked as a counsellor, supporting women in need. But I was facing psychological violence within my own relationship.

I tried my best to save the marriage, but the escalating tension and violence forced me to leave our marital home, taking my two children with me.

At first, he demanded a divorce by mutual consent, as this would enable him to avoid paying alimony. But I refused. Since I had already left my marital home, he filed for divorce by unilateral will or repudiation (Article 48 of the Family Code), where the husband has the right to end the marriage without any explanation.

My lawyer advised me that it was better this way. If I had initiated the divorce under Article 53 of the Family Code, I'd

have to prove every allegation or risk the case being rejected in court.

Furthermore, even if the divorce were granted, I'd still have had to pay a "Khol" to my ex-husband – a sum of money as compensation. The divorce process was already financially draining. I had to sell my jewellery to pay the lawyer and support my children simultaneously. So, it would not have been possible for me to pay a Khol.

After four months of legal proceedings, the divorce was finalised, granting me custody and guardianship of my children. Since our divorce was granted under the regime of separation of property, my ex-husband retained the ownership of our matrimonial home. Currently, I receive a monthly allowance from him for renting a room for myself and my children. However, it's insufficient to afford decent housing.

The divorce took a toll on my children's mental health, making it necessary for them to attend regular therapy sessions to mitigate the impact on their emotional well-being and education. Adding to my struggles, my ex-husband does not want to pay child support to me, so he is pursuing legal action to revoke my custody rights.

There are three things that I want to change in Algeria's divorce laws. Firstly, I'd like the option of family mediation for reconciliation before going to court. Secondly, I would like the alimony recovery procedure to be faster than it is currently.

Lastly, I would like to remarry, but if I do, I would lose custody of my children. So, I hope Article 66 of the Family Code gets repealed because a mother should not lose custody of her children upon remarriage."



COUNTRY PROFILE

The Preamble of the 2010 Constitution of Angola provides for equal opportunities and equality. Article 23 protects everyone's right to equality and non-discrimination on the basis of, amongst others, sex. Some of the fundamental tasks of the State are to 'promote equal rights and opportunities between Angolans, regardless of origins, race, party affiliations, sex, colour, age or any other form of discrimination'⁵⁹ and to 'promote equality between men and women'.⁶⁰ Article 35 further protects the family, where '[m]en and women shall be equal within the family, in society and before the State, enjoying the same rights and being responsible for the same duties'.⁶¹

In addition to the constitutional protection of the family, the Angolan Family Code 1988, replaced Book IV of the Portuguese Civil Code relating to family law.⁶² The Family Code is based on civil and customary laws.⁶³ However, customary laws should not contradict the Constitution as per its Article 223.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	17 September 1986	None
African Charter	2 March 1990	None
Maputo Protocol	30 August 2007	None

⁵⁹ Article 21(8) of the Constitution of Angola 2010. Available at https://www.constituteproject.org/constitution/Angola_2010

⁶⁰ Article 21(11) of the Constitution of Angola 2010

⁶¹ Article 35(3) of the Constitution of Angola 2010

⁶² MDC Medina 'Challenges for the Angolan Family Code' 2003 *The International Survey of Family Law* 25

⁶³ DP Zongwe and ND Dias 'Republic of Angola – Legal system and research' *GlobaLex* (2022) <https://www.nyulawglobal.org/globalex/Angola1.html> (accessed 7 July 2022)

MAIN TRENDS IN FAMILY LAW

Article 35 of the Family Code prohibits forced marriage and unions that require the payment of bride price. All marriages need to be registered for them to be valid according to Article 35(4) of the Family Code. Article 35 of the Constitution further extends recognition to customary marriages and *de facto* unions. The jurisprudence of the country emphasises on *de facto* unions as follows:⁶⁴

'As the identity card of the petitioner proves that he is unmarried as is the respondent, and it is also proved that the couple had lived together for more than ten years in marital cohabitation, from which three children were born, and as it is not proved that the petitioner had established a lasting relationship with another woman, it must be recognised that there was a de facto union according to the law established between them, as stated in Art 1130 no 10 of the Family Code. Ownership of the matrimonial home must be given to the respondent who still lives there with their children and the unilateral transfer of the property carried out exclusively by the petitioner declared void.'

A *de facto* union is considered as a marriage under customary law if both parties have mutual agreement. Moreover, the court will consider 3 factors: (1) three years of cohabitation; (2) capacity for marriage; and (3) exclusiveness of the relationship.⁶⁵ Such a recognition is progressive since it protects women's family rights even if the marriage is not registered.

Article 127 of the Angolan Family Code recognises the equal rights of men and women to parental authority. Under Article 131, they are both responsible for the duty of care and of raising the child even if they are not married to each other.

Article 78 of the Family Code allows any party, either the wife or the husband, to petition for a divorce.⁶⁶ In the instance of divorce, under Articles 127 and 131 of the Family Code, both parents have equal responsibilities towards the child and if the child is in the custody of the mother, the father also has to provide financial support.

In 2021, the new Penal Code was adopted that decriminalises same-sex relationships.⁶⁷ This implies that same-sex couples can now engage in same-sex relationships without being subject to criminalisation. Article 238 of the 2021 Penal Code also criminalises polygamy. Article 156 of the 2021 Penal Code allows for abortion in 'concrete instances such as a grave threat to the health or life of the mother or the fetus or for victims of rape'.⁶⁸

Law 25/11 deals with domestic violence and the Penal Code criminalises sexual violence and sexual harassment at work. The State also initiated the 'Zero Tolerance for Gender and Sexual Based Violence campaign' to increase awareness of sexual violence and promote preventive best practices addressing sexual violence. There was also a National Action Plan on Domestic Violence (2013- 2017).

64 Civil and Administrative Chamber of the Supreme Court on Process no 273 1996

65 Medina (n above) 29

66 <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Angola.pdf> (accessed 17 April 2024)

67 R Garrido 'Decriminalisation of consensual same-sex acts in Angola and the progress of LGBTI human rights in Lusophone Africa' *AfricLaw*. Available at <https://africlaw.com/2021/03/05/decriminalisation-of-consensual-same-sex-acts-in-angola-and-the-progress-of-lgbti-human-rights-in-lusophone-africa/> (accessed 5 March 2021)

68 <https://archive.gazettes.africa/archive/ao/2020/ao-government-gazette-dated-2020-11-11-no-179.pdf> (accessed 15 April 2024)

KEY GAPS AND CONTESTATIONS

- (i) **Same-sex marriage not recognised:** Article 20 of the Angolan Family Code recognises a marriage as a ‘voluntary union between a man and a woman’. This provision is a challenge for same-sex marriages even if the Penal Code has decriminalised same-sex relations. This is discriminatory towards same-sex couples who want to found a family.
- (ii) **Exceptions to the legal age of marriage:** Article 24 of the Family Code sets the legal age of marriage at 18. However, marriage can be allowed from 16 for boys and 15 for girls under exceptional circumstances with parental consent.⁶⁹ In the event there is no parental consent, the parties under 18 may appeal to the court to obtain permission to marry. The exceptions to the legal age of marriage is against international human rights law such as the Maputo Protocol which expressly sets the minimum age of marriage at 18.
- (iii) **Matrimonial property:** While Article 49 of the Family Code provides that property acquired during the marriage is split equally upon divorce, it also provides that when deciding on the family home, the court must take into account the following: (1) the ‘life conditions’ of the spouse; (2) the children; and (3) causes of divorce.
- (iv) **Discriminatory customary inheritance laws:** Article 75 of the Family Code protects widows’ inheritance rights. However, since customary laws are also acknowledged, in some parts of the country, even if it is against the Constitution, women are excluded from inheriting from their deceased husband’s property and are sometimes even kicked out of the matrimonial home.⁷⁰
- (v) **Implementation of law against polygamy:** Even if the Penal Code criminalises polygamy, the practice still exists in many parts of the country, especially in rural areas.⁷¹ In these instances, the man will be legally married to one woman and have informal marriages to other women. In this case, the women whose marriages are not registered do not have any protection of the law in instances of the spouse’s death or separation.

RECOMMENDATIONS

Legal reforms:

- ▶ Adopt a law that allows for same-sex marriages.
- ▶ Revise the Penal Code to allow for abortion upon choice.
- ▶ Revise the Family Code to remove any exceptions to the legal age of 18 for marriage and to be clear about distribution of property upon dissolution of the marriage.
- ▶ Adopt a law and new national plan of action that targets violence against women generally.

Policies and programmes:

- ▶ Adopt policies and programmes to target polygamy and to ensure that women in such relationships are protected upon the man’s death or divorce.
- ▶ Adopt sensitisation policies on widows’ inheritance rights so that family members do not mistreat them.

69 Article 24(2) of the Angolan Family Code. Available at [https://www.africa-laws.org/Angola/Family%20law/Family%20code%20\(%20in%20Portuguese\).pdf](https://www.africa-laws.org/Angola/Family%20law/Family%20code%20(%20in%20Portuguese).pdf) (accessed 16 April 2024)

70 Republic of Angola ‘Sixth and seventh report on the implementation of the African Charter on Human and Peoples’ Rights and initial report on the Protocol on the Rights of Women in Africa (2011-2016)’ (2017) paragraph 113. Available at <https://achpr.au.int/index.php/en/state-reports/republic-angola-6th-periodic-report-2011-2016> (accessed 16 April 2024)

71 <https://newswirengr.com/2023/03/06/african-countries-where-polygamy-is-illegal/> (accessed 24 May 2023)



COUNTRY PROFILE

The Constitution of the Republic of Botswana contains no reference to families, though it does guarantee protection from discrimination, including discrimination on the grounds of sex.⁷² Family law in Botswana is governed through statute, the Roman Dutch common law and customary law.⁷³ Historically, these sources of law have been deeply patriarchal and have functioned to entrench intra-familial inequality.⁷⁴ Fortunately, in recent years Botswana has embarked upon a process of progressive law reform,⁷⁵ though the State remains largely politically conservative and many citizens continue to live in rural contexts governed mostly by application of customary law rather than progressive legislation.⁷⁶

Treaty	Date of ratification	Reservations/Declarations
CEDAW	13 August 1996	None
African Charter	17 July 1986	None
Maputo Protocol	While not officially updated on the AU Website, Botswana ratified in October 2023 and deposited its Instrument of Accession with the AU in December 2023. ⁷⁷	-

72 Constitution of the Republic of Botswana 1966, amended 2016. Available at https://www.constituteproject.org/constitution/Botswana_2016 (accessed 16 April 2024)

73 J Sloth-Nielsen "A New Children's Law in Botswana: Reshaping Family Relations for the Twenty-First Century" (2012) *The International Survey of Family Law* 27 at 28. Available at https://www.academia.edu/31576434/A_New_Children_Law_in_Botswana_Reshaping_Family_Relations_for_the_Twenty_First_Century (accessed 16 April 2024)

74 Ibid

75 Ibid

76 Ibid

77 <https://soawr.org/2023/12/01/botswana-has-ratified-the-maputo-protocol/> (accessed 16 April 2024)

MAIN TRENDS IN FAMILY LAW

In recent years, Botswana has enjoyed significant progress towards a more just and equitable family law. A key step towards this progress was the enactment of the Abolition of Marital Power Act 2004. Prior to this Act, the common law dictated that concluding a civil marriage (whether in or out of community of property)⁷⁸ vested husbands with marital power. Marital power designated men heads of the family unit, exclusively charged with decision-making power in the family. It also stripped married women of their legal capacity. Instead, their husbands had complete control of the legal personhood of the wife, joint property and even the wife's property if they were married in community of property.⁷⁹ The Act has abolished the marital power doctrine and established married women as full legal persons and equal partners in their marriages. Spousal consent is still required for certain legal transactions, such as the disposal of jointly owned property where the marriage is in community of property, but this requirement applies equally to husbands and wives.⁸⁰

The Married Persons Property Regime enacted under the Married Persons Property Act further provides that under the community of property regime, all property acquired by either spouse before or during the marriage, as well as any income generated from that property, is deemed to be joint property. This means that both spouses have an equal share in the property and must share equally in any profits or losses. It also provides for the dissolution of the marriage and the distribution of property in the event of divorce. In the case of the community of property regime, all joint property is divided equally between the spouses.⁸¹

The Children's Act 2009 has, besides conferring for the first time explicit rights on children,⁸² also contributed to the reform of family law in general. The Children's Act prohibits forced marriages of children and the Marriage Act 2001 sets the minimum age of marriage at 18 years, without any

exception. However, customary and religious marriages are excluded from the scope of the Marriage Act. Previously, the general rules were that custody of children of tender age should be given to the mother, custody of a son should be given to a father and that of a daughter to the mother and custody of a child should not be given to an immoral parent.⁸³ Additionally, married fathers had full guardianship rights and control over children, while unmarried fathers had no rights or duties at all.⁸⁴ However, the Children's Act confirms the position of the Abolition of Marriage Power Act, ensuring guardianship rights for both parents, whether married or unmarried, a presumption of joint, shared custody, and the child's right to know and be cared for by both biological parents. The new Children's Act read with the Abolition of Marriage Powers Act goes a long way to ensuring equality in parental relations, as required by the Maputo Protocol.

Customary law has not escaped the reform process. Tswana law previously prescribed that the family be inherited by either the youngest or oldest son. The High Court, confirmed by the Court of Appeal, ruled in *Mmusi vs Ramantele* that this law was unconstitutional and contrary to obligations contained in international conventions such as CEDAW.⁸⁵ Women are thus able to inherit equally in customary law and male primogeniture has been declared unconstitutional.

Finally, Botswana has taken positive steps to combat violence against women⁸⁶, such as adopting the Domestic Violence Act 2008 to allow civil and customary courts to issue protection orders as well as the National Gender-Based Violence Strategy 2015-2020, a multisectoral approach to eradicating gender-based violence. In 2020, Botswana established special courts to increase the speed of the State's response to violence against women.⁸⁷ In spite of these positive steps, it must be noted that rates of violence and abuse experienced by women remain far higher than the global average.⁸⁸

78 Married in community of property refers to a legal regime where assets and liabilities acquired during the marriage are considered jointly owned by both spouses. It typically implies that each spouse has an equal ownership interest in the property, regardless of the individual contributions made during the marriage

79 See T Jobetta "Recent Developments in Family Law in Botswana: The Abolition of Marital Power Act" (2006) *International Survey of Family Law* at 94-96

80 See Section 7-9 of the Abolition of Marital Power Act 2004. Available at <https://botswanalaws.com/consolidated-statutes/principle-legislation/abolition-of-marital-power> (accessed 17 April 2024)

81 <https://thelawraven.com/the-married-persons-property-regime> (accessed 17 April 2024)

82 See Part III of the Children's Act 2009. Available at <https://botswanalaws.com/consolidated-statutes/principle-legislation/children-s> (accessed 17 April 2024)

83 EK Quansah *Introduction to Family Law in Botswana* (2001) at 67

84 Sloth-Nielsen (n 2 above) at 29

85 *Mmusi vs Ramantele* 2012 MAHLB-000836-10; CACGB-104-12. Available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Mmusi-Court-of-Appeal-Judgment.pdf> (accessed 17 April 2024)

86 <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Botswana.pdf>

87 See <https://www.reuters.com/article/botswana-rape-court-idUSL8N2IG3BE>. (accessed 17 April 2024)

88 The United Nations Population Fund states that Botswana's levels of violence against women are double the global average, with nearly 70% of women having experienced physical or sexual abuse. Available at <https://docs.google.com/document/d/1-sqp1oRiyFNpQek2wp5NoiWlpbP2Dgm/edit> (accessed 17 April 2024)

KEY GAPS AND CONTESTATIONS

(i) Same-sex marriage not recognised:

Marriage in Botswana remains reserved for heterosexual couples.⁸⁹ Same-sex partners cannot conclude marriages, civil unions, or form permanent life partnerships. As a result, these partners do not enjoy equal protection of the law. However, the High Court in 2019 decriminalised same-sex sexual relations and the Court of Appeal confirmed this decision in 2021.⁹⁰ Notably, the High Court held that the word “sex” in Section 3 of the Constitution should be interpreted to include sexual orientation, effectively creating a constitution imperative to protect persons from discrimination on the grounds of sexual orientation. The Botswana Democratic Party, currently the ruling party, and the President of Botswana have expressed their support for this decision. This is indicative of shifting public opinion and there is great potential for the decision to lead to further legal progress. In August 2023, Parliament shelved debate on a bill seeking to decriminalise same-sex relations.⁹¹

(ii) No recognition for cohabiting partners:

Another gap in family law is the lack of recognition for cohabiting partners.⁹² There is no legislative provision for cohabiting partners and the common law offers minimal protection for partners after dissolution of those partnerships. In order to obtain a share of joint property or the profits of joint enterprises after dissolution of the partnership, such partners must satisfy stringent standards of proof. In many neighbouring countries, permanent life partnerships or universal partnerships have been established by legislation or precedent to protect the rights of such partners, and in particular, the rights of vulnerable women who might otherwise be left destitute after dissolution of such a partnership.⁹³ Botswana must consider similar measures. There is a proposal to legally recognise cohabitation after 10 years in a Report of the Presidential Commission of Inquiry into the Review of Constitution of Botswana 2022.⁹⁴

RECOMMENDATIONS

Legal reforms:

- ▶ Drawing on existing progressive jurisprudence, Botswana must legalise same-sex marriage.
- ▶ Botswana must recognise and regulate cohabitation relationships outside of marriage in order to protect the rights of vulnerable women.
- ▶ Botswana must clarify that the prohibition on marriage of children under 18 applies to customary and religious marriages as well.
- ▶ Botswana must adopt an updated comprehensive national policy to combat gender-based violence.

Judicial discretion: Courts must be granted greater discretion to determine the division of matrimonial property. This discretion must be used to consider the non-financial contribution of women to marriages.

89 Quansah (n 11 above) at 32

90 *Letsweletse Motshidiemang vs Attorney-General* (LEGABIBO as amicus curiae) MAHGB000591-16. Available at https://www.chr.up.ac.za/images/researchunits/sogie/documents/LM_vs_The_Attorney_General_judgment_June_2019_complete.pdf (accessed 17 April 2024)

91 Botswana Parliament Defers Debate on Controversial Homosexuality Bill. Available at <https://www.voanews.com/a/botswana-parliament-defers-debate-on-controversial-homosexuality-bill/7207181.html> (accessed 15 January 2024)

92 <https://www.pressreader.com/botswana/the-midweek-sun/20210324/281505048993969> (accessed 17 April 2024)

93 Quansah (n 11 above) at 37

94 Report of the Presidential Commission of Inquiry into the Review of Constitution of Botswana 2022 at 95. Available at <https://constitutionnet.org/sites/default/files/2022-12/Final%20Commission%20Report%2028%20Sep%202022.pdf> (accessed 17 April 2024)



COUNTRY PROFILE

Article 13 of the Constitution of Burundi provides that 'All Burundian people are equal in merit and in dignity. All citizens enjoy the same rights and have the same protection of the law'. No Burundian will be excluded from the social, political, or economic life due to sex, amongst others. The government of Burundi is tasked to 'guarantee to all the option to live in Burundi sheltered from', amongst others, discrimination.⁹⁵ All citizens are equal before the law and there should be no discrimination based on, amongst others, sex.⁹⁶ Article 28 recognises the respect of family life and Article 30 recognises the family as the 'natural base cell of society'. Article 19 further guarantees the freedom of marriage with the 'free and full consent of the future spouses'. However, the Article's second paragraph prohibits marriage between persons of the same-sex.

Family law in Burundi is based on French and German law and the traditional legal system.⁹⁷ The country uses civil law in most of its courts. Nevertheless, customary law usually dictates matters such as succession and, in that case, traditional laws are used at the local level. Concerning gender equality, the norms related to gender roles are deeply rooted in patriarchy and the society is patrilineal 'in which man incarnates authority within the household, makes crucial decisions, and provides livelihood to the members of the household'.⁹⁸ Women's role in the family is so subordinate that there is a saying that Burundian men use which is translated into *'the hen does not sing when the cock is there'*.⁹⁹

Treaty	Date of ratification	Reservations/Declarations
CEDAW	8 January 1992	None
African Charter	28 July 1989	None
Maputo Protocol	Not ratified Signed: 3 December 2003	-

MAIN TRENDS IN FAMILY LAW

Concerning marriage, the Constitution protects the rights of women as demonstrated in the section above. The Law on the Protection of Victims and the Prevention and Punishment of Sexual and Gender-based Violence provides for several safeguards for women in the family. For instance, Article 38 provides for the punishment of anyone who kidnaps a girl for marrying her or to have her married. Article 39 criminalises forced marriage, including the forced marriage of widows to their step-brother, step-father, or the husband of a deceased sister. Article 59 further protects widows from harmful practices such as anyone preventing her from accessing the property from the marriage.

Article 535 of the Penal Code criminalises domestic violence, and Article 2 of the Law on the Protection of Victims and the Prevention and Punishment of Sexual and Gender-based Violence defines as 'all acts of physical, sexual, psychological or economical violence that occur within the family or within the family home'. Article 23 also provides that it is a crime to amicably settle domestic violence cases. Article 555 of the Penal Code criminalises marital rape. However, the sentence for the same is minimal since it is less than 30 days imprisonment or a fine.

Article 103 of the Code of Persons and Family provides that nobody can contract a second marriage without the annulment or dissolution of the first one, essentially prohibiting polygamy. Women and men have the same rights to initiate divorce, either by a joint request from the spouses or by one of the spouses according to a determined cause.

According to Article 123 of the Code of Persons and Family, both spouses are responsible for caring for their children. Even in instances of divorce, women have the same rights as men concerning legal guardianship according to Article 185 of the Code of Persons and Family.

⁹⁵ Article 17 of the Constitution of Burundi 2018. Available at https://www.constituteproject.org/constitution/Burundi_2018 (accessed 17 April 2024)

⁹⁶ Article 22 of the Constitution of Burundi 2018

⁹⁷ Sunulex.Africa 'The Burundian legal system' Available at <https://sunulex.africa/en/theburundianlegalsystem/> (accessed 8 July 2022)

⁹⁸ YO Basse and J Kwizera 'Norms and practices impeding gender equality in Burundian society' (2017) 5. Available at <https://careevaluations.org/wp-content/uploads/Norms-and-practices-impeding-Gender-Equality-in-Burundi.pdf> (accessed 17 April 2024)

⁹⁹ Ibid

KEY GAPS AND CONTESTATIONS

(i) Constitutional prohibition of same-sex marriage:

The constitutional prohibition on same-sex marriage is a challenge for same-sex couples to found a family.

(ii) Exceptions to the legal age of marriage:

While Article 88 of the Code of Persons and Family provides for a man to be at least 21 years old and a woman to be 18 years old at the time of marriage, they can be allowed to marry below those years by the governor of the province, with the consent of their parents in case of serious reasons. Moreover, Article 2 of the Law on the Protection of Victims and the Prevention and Punishment of Sexual and Gender-based violence prohibits child marriage and punishes any guardian, parent or anyone who encourages a child to marry.

(iii) Non-recognition of traditional/customary marriages or informal partnerships:

The Code of Persons and Family also only recognises civil marriages and does not provide for the registration of traditional/customary marriages or informal partnerships. This is problematic for women who are in such marriages since they are not afforded protection of the law.

(iv) Recognition of husband as the head of the family:

Article 122 of the Code of Persons and Family recognises the husband as the head of the communal household. The wife only replaces him when he is absent or prohibited.¹⁰⁰ This provision entrenches patriarchal power.

(v) No statutory provisions for women's succession rights:

This affects women's inheritance on their family side and in the instance their husband passes on. Customary law dictates succession rights of women and in most instances it is discriminatory.¹⁰¹

RECOMMENDATIONS

Ratification: Ratify the Maputo Protocol without any reservations.

Legal reforms:

- ▶ Remove the same-sex marriage prohibition in the Constitution.
- ▶ Amend the Code of Persons and Family to: recognise both spouses as heads of the family; remove the exceptions to marriage under the age of 18.
- ▶ Adopt a law on the succession rights of women.
- ▶ Increase the punishment for marital rape.

Institutional reforms: Adopt mechanisms to recognise the rights of women in traditional/customary marriages while campaigning for civil marriages.

¹⁰⁰ <https://www.equalitynow.org/discriminatory-law/burundi-decree-law-no-1-024-of-28th-april-1993-amending-the-code-of-the-person-and-the-family/> (accessed 17 April 2024)

¹⁰¹ <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Burundi.pdf> (accessed 17 April 2024)



COUNTRY PROFILE

The Preamble of Cameroon's 1996 Constitution states that 'the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights' and further that 'the State shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the Constitution'. The Constitution does not have a Bill of Rights. The principles of equality and non-discrimination, however, are further guaranteed by Article 16 of the Civil Code, Article 1 of the Penal Code and Article 84 of the Labour Code.

Family law in Cameroon is governed by common statutory English law in the anglophone parts of the country, civil law in the francophone parts of the country and by customary law which generally varies among the different regions and ethnic groups within the country.¹⁰² However, the common statutory English law and French civil laws 'prevail over customary law'.¹⁰³ When a custom is silent on a question that concerns the law of persons and the family before the jurisdiction where a party would like the custom to be applied, It is civil law that is applied.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	23 August 1994	None
African Charter	20 June 1989	None
Maputo Protocol	13 September 2012	"The acceptance of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa should in no way be construed as endorsement, encouragement or promotion of homosexuality, abortion (except therapeutic abortion), genital mutilation, prostitution or any other practice which is not consistent with universal or African ethical and moral values, and which could be wrongly understood as arising from the rights of women to respect as a person or the free development of her personality. Any interpretation of the present Protocol justifying such practices cannot be applied against the government of Cameroon."¹⁰⁴

This declaration is a set back for the rights of same-sex couples since it effectively negates their rights to equality and non-discrimination, including within the family.

¹⁰² Cameroonian customary law has been looked upon as consisting of countless legal systems, each developed by and applicable to a particular ethnic group. In other words, a system of ethnic identification underlies customary law: customary law has a jurisdiction limited to particular cultural boundaries and it is the possession and right of a restricted ethnic group. Thus, each of the over 250 ethnic groups recognized in Cameroon has its own customary rules. Available at <https://asq.africa.ufl.edu/wp-content/uploads/sites/168/Volume-15-Issue-2-Kiye.pdf> (accessed 17 April 2024)

¹⁰³ JN Temngah 'Customary law, women's rights and traditional courts in Cameroon' (1996) 27 *Revue Générale de Droit* 3 349-356. Available at <https://www.erudit.org/en/journals/rgd/1996-v27-n3-rgd02428/1035782ar/> (accessed 17 April 2024)

¹⁰⁴ [https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf](https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf) (accessed 16 April 2024)

MAIN TRENDS IN FAMILY LAW

Both spouses can initiate a divorce proceeding and the court will grant a divorce where either:

- ▶ There is mutual consent
- ▶ One spouse has deserted the other for a period of one year
- ▶ Married life has broken down
- ▶ There is fault on the part of one spouse¹⁰⁵

Both parents have the same authority over the child, even upon divorce. However, the court can decide on only one parent having parental authority if it is in the best interests of the child.

Both spouses own the matrimonial property. In addition, in the case of *Immaculate Vefonge vs Samuel Lyonga Yukpe*,¹⁰⁶ the Court of Appeal of Buea ruled to sustain a Bakweri custom whereby a husband is forbidden to send away a nursing mother from the matrimonial home or initiate divorce proceedings against her.¹⁰⁷

There is a draft Code of the Person and the Family¹⁰⁸ which has been pending since 2020 and is awaiting adoption by the National Assembly at the time of publishing this Report. If adopted, it will have a favourable impact on women's rights within the family. For instance:

- ▶ Dowry and gifts cannot be returned;¹⁰⁹
- ▶ Spouses owe each other mutual love, respect, fidelity, help, and assistance, in the case of polygamy, each wife has the right to equal treatment in relation to the other wives;¹¹⁰
- ▶ Each spouse has freedom to work without obtaining the consent of the other;¹¹¹
- ▶ In case of dissolution of a marriage, the wife is entitled to her share of the marriage property before the husband;¹¹²
- ▶ In cases of polygamy, all the widows have the right to inheritance shared between them in proportion to the number of years in marriage with the deceased.¹¹³

There is also a draft bill on the Prevention and Punishment of Violence on Women and Gender based Discriminations which protects women.

As per Section 297 the 2016 Penal Code, marriage is no longer an exemption from prosecution if a rapist marries his victim, as was the case in the past. Section 356 of the Penal Code also criminalises forced marriage.

¹⁰⁵ Article 229 of the Cameroon Civil Code 2005. Available at https://landwise-production.s3.us-west-2.amazonaws.com/2022/03/Cameroon_Civil-code_2005-1.pdf (accessed 17 April 2024)

¹⁰⁶ *Immaculate Vefonge vs Samuel Lyonga Yukpe*, Appeal N°CASWP/CC/21/81 (unreported)

¹⁰⁷ <https://vlex.co.uk/vid/traditional-law-and-discriminatory-878468235>

¹⁰⁸ <https://www.scribd.com/document/503738705/Avant-Projet-de-Code-Des-Personnes-Et-de-La-Famille> (accessed 17 April 2024)

¹⁰⁹ Draft Code of the Person and the Family sec 215

¹¹⁰ Draft Code of the Person and the Family (n 17) sec 234(3)

¹¹¹ Draft Code of the Person and the Family (n 17) sec 240

¹¹² Draft Code of the Person and the Family (n 17) sec 459(2)

¹¹³ Draft Code of the Person and the Family (n 17) sec 545(2)

KEY GAPS AND CONTESTATIONS

- (i) **Husband as the head of household:** Article 212-214 of the Civil Code identifies the husband as the head of the household. Article 74 of Cameroon's Civil Status Registration further provides that a husband may object to his wife's exercise of a trade different from his in the interest of their marriage or children. According to Article 1421 of the Civil Code of the Republic of Cameroon, the husband alone administers the common property. He can sell, dispose of and mortgage them without the cooperation of the wife. Moreover, according to article 1428, the husband has the administration of all the personal property of the wife. He alone can exercise all the property and possessory actions belonging to the wife.
- (ii) **Abortion:** Article 337 of the Penal Code, while referring to its Article 339, provides that abortion can only occur in the event of a pregnancy resulting from rape and with the authorisation of the public prosecutor, for medical reasons.
- (iii) **Child marriage:** While Section 356 of the Penal Code criminalises forced marriage, it does not prohibit child marriage. It only provides for a minimum punishment of not less than 2 years in cases of forced marriage of children under 18, regardless of mitigating circumstances. The Civil

Status Registration Ordinance of 1981¹¹⁴ states the minimum marriageable age as 15 for girls and 18 for boys¹¹⁵ with a clause that such marriages should involve the consent of both parties and equally recognised by an official document.¹¹⁶ However, a further waiver from these minimum age requirements can also be granted by the President for serious reasons.

- (iv) **Inheritance:** The Draft Code of the Person and the Family is discriminatory towards widows if the deceased husband does not leave a will. Its Section 919 provides as follows:

“Intestate succession shall devolve by application of the law to the parents and to the surviving spouse in the following order:

- ☐ Descendants
- ☐ Forebears
- ☐ Collaterals
- ☐ Surviving spouse
- ☐ The State”

As a surviving spouse, widows should be inheriting from the deceased husband in a prioritised manner.

- (v) **Polygamy:** Moreover, under the Civil Code and Ordinance 81-02, polygamy is still allowed in the country.

RECOMMENDATIONS

Legal reforms:

- ▶ Adoption of a single law that comprehensively address violence against women including domestic violence, marital rape, and sexual harassment, amongst others.
- ▶ Adopt the draft Code of the Person and the Family, with amendments pertaining to inheritance rights of widows.
- ▶ Amend the Constitution to provide a comprehensive Bill of Rights that provides for gender equality and non-discrimination.
- ▶ Amend the Civil Code to remove the husband as the head of the household and to grant both spouses equality in matters of the household.
- ▶ Amend the Civil Status Registration Act to disallow a husband from having a say in a wife's employment.
- ▶ Increase the age of marriage to 18 without exception.
- ▶ Prohibit polygamy while protecting the rights of those women who are already in polygamous relationships.

¹¹⁴ <https://dignitylawchambers.com/wp-content/uploads/2021/04/Republic-of-Cameroon-Civil-Status-Registration.pdf> (accessed 17 April 2024)

¹¹⁵ Section 52 of the Civil Status Registration Ordinance, 1981. Available at <https://dignitylawchambers.com/wp-content/uploads/2021/04/Republic-of-Cameroon-Civil-Status-Registration.pdf> (accessed 17 April 2024)

¹¹⁶ Section 49 of the Civil Status Registration Ordinance, 1981



COUNTRY PROFILE

The Preamble of the 2016 Constitution of Côte d'Ivoire¹¹⁷ expresses the government's commitment to 'promote equality between men and women', amongst others. Article 4 of the Constitution on equality provides for non-discrimination on the basis of, amongst others, sex. Article 5 further prohibits practices such as 'female genital mutilation as well as all other forms of degradation of a human being'. Concerning family, Article 5 protects the family as the basic unit of society. Article 31 also provides for special protection of the needs of women as a vulnerable group. Concerning the rights of women within the family, Article 35 specifically provides that '[t]he State and public communities ensure the promotion, development and protection of women. They take the necessary measures to eliminate all forms of violence against women and girls.

The Ivorian legal system is based on French civil law. Customary law is also applied in instances where it is not contrary to the civil law.¹¹⁸ Article 4 of the Constitution provides for the promotion and protection of 'customs that do not run counter to public order and the accepted standards of behaviour'. These customs have to be in harmony with the fundamental principles of the Constitution.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	18 December 1995	None
African Charter	6 January 1992	None
Maputo Protocol	5 October 2011	None

MAIN TRENDS IN FAMILY LAW

The Constitution clearly establishes that both parents exercise parental authority. Article 31 provides that "[p]arental authority is exercised by the father and mother or, failing that, by any other person in accordance with the law".

In addition to the Constitutional provisions on gender equality, non-discrimination and custody, in 2019, there were several law reforms that have an impact on women's rights within the family. The first one is Law 2019-570 of 26 June 2019 which has brought about many positive changes concerning laws regulating roles within the family. For instance, Article 51 of the law provides that both spouses are responsible for the family and the children. They are together responsible for managing the moral and material direction of the family. Before this law, the man was the head of the family.¹¹⁹ Furthermore, according to Article 82 of the same new law, the matrimonial property is managed by both spouses.

Moreover, Article 2 of Chapter 2 of Law No 2019-570 of 2019 relating to Marriage in the Civil Code provides that the legal age of marriage is 18 for both men and women. Before the 2019 amendment, the legal age of marriage was 20 for men and 18 for women. They could also be subjected to exceptions in different cases. The amendment did away with the dispensations thus ensuring a strong legal protection of girls against child marriage.

Polygamy was abolished in the country in 1964 while still recognizing the rights of those in polygamous marriages.¹²⁰ However, polygamy still occurs in the country.¹²¹

With regard to gender-based violence, the Penal Code was amended in June 2019 with the strengthening of the criminalisation and repression of several forms of violence: female genital mutilation and forced and early marriages. It contains some provisions that can be used in case of domestic violence such as Article 342 on murder, Article 345 on assault and battery, Article 353 on involuntary manslaughter or unintentional injury, Article 354 on rape, Article 373 on attack on individual freedom and Article 387 on abandonment of

117 <https://faolex.fao.org/docs/pdf/ivc160760.pdf> (accessed 17 April 2024)

118 Sunulex.Africa 'The Ivorian legal system' Available at <https://sunulex.africa/en/theivorianlegalsystem/> (accessed 10 July 2022)

119 A Kone-Silue 'Women and discrimination in Côte d'Ivoire' for McGill Centre for Human Rights and Legal Pluralism (15 November 2018) Available at <https://www.mcgill.ca/humanrights/article/70th-anniversary-universal-declaration-human-rights/women-and-discrimination-cote-divoire> (accessed 10 July 2022)

120 Ireland: Refugee Documentation Centre 'Can a "customary" or "religious" marriage be legally recognised; Is there an authority which verifies the authenticity of traditional or customary marriages?; Are polygamous marriages valid?' Available at https://www.ecoi.net/en/file/lo-cal/1168042/1226_1302516830_q13649-cote-d-ivoire.pdf (accessed 17 April 2024)

121 <https://www.pewresearch.org/religion/2019/12/12/household-patterns-by-region/#:~:text=Around%20the%20world%2C%20polygamy%20is,than%20one%20spouse%20or%20partner.> (accessed 15 April 2024)

family. The country also adopted a National Strategy for Combating Gender-Based Violence (2014-2016). Act No. 2021-894 further addresses measures to protect victims of domestic violence, rape and sexual violence.¹²² whereas Act No. 2019-574 of 26 June 2019 on the Criminal Code, as amended by Act No. 2021-893 of 21 December 2021 criminalises various forms of violence within the family including marital rape, moral or psychological violence, harassment and sexual harassment, forced marriage, early marriage, various forms of violations of personal privacy and incest.¹²³

In 2019, Law 2019-573 of 26 June 2019 to the Civil Code was adopted. This law is important because in rural areas, land was transferred according to customary law, which is usually discriminatory against women.¹²⁴ While this Law now allows for a widow to inherit from her deceased husband, according to Article 26, a surviving spouse only receives a quarter of the estate of the deceased, in conjunction with the children and parents of the deceased.¹²⁵

KEY GAPS AND CONTESTATIONS

- (i) **Same-sex marriage not recognised:** Article 1 of Chapter 1 of the 2019 Law on Marriage provides that a marriage is between a man and a woman. This section is prejudicial to same-sex couples who might want to found a family. In this instance, the law would not protect their rights within the family.
- (ii) **Prescription of waiting days before new marriage:** Article 9 of the Law on Marriage and Article 391 of the Penal Code further contain provisions stipulating that women must wait 300 days after divorce or the death of their husband before contracting a new marriage. This restriction does not apply to men.¹²⁶

RECOMMENDATIONS

Legal reforms:

- ▶ Include same-sex marriage in the laws to ensure the protection of same-sex couples in the family.
- ▶ Remove the requirement for women to wait for 300 days after divorce or death of the husband to remarry.
- ▶ Prohibit polygamy, even in customary and religious marriages while protecting women that are already in polygamous marriages.

Sensitisation campaigns that (1) raise awareness among people in customary marriages to have their marriage registered; and (2) target polygamous marriages to ensure that the rights of women and children in polygamous marriages are protected.

122 <https://famille.gouv.ci/Tmfte/Loi-No-2021-894-portant-sur-les-violences-domestiques.pdf> (accessed 16 April 2024)

123 <https://ishr.ch/wp-content/uploads/2023/07/Voluntary-Pledge-Cote-divoire-HRC-elections-2023.pdf> (accessed 16 April 2024)

124 M Maimona 'Côte d'Ivoire marriage reform as a step for women' for Human Rights Watch. Available at <https://www.hrw.org/news/2019/07/24/cote-divoire-marriage-reform-step-women> (accessed 15 April 2024)

125 LOI n° 2019-573 du 26 juin 2019 relative aux successions. Available at [loi_2019-573_sur_la_succession.pdf](https://famille.gouv.ci/loi_2019-573_sur_la_succession.pdf) (famille.gouv.ci)

126 <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Cote-divoire.pdf> (accessed 17 April 2024)



DEMOCRATIC REPUBLIC OF CONGO

COUNTRY PROFILE

The Preamble of the Constitution of the Democratic Republic of Congo affirms its adherence to the African Charter and the CEDAW, amongst other international instruments. Article 11 of the Constitution provides for equality in dignity and rights while Article 12 protects equality before the law. Article 13 on non-discrimination ‘in matters of education or access to public functions or any other matter’ does not list sex as a basis. Nevertheless, it has specific provisions on non-discrimination against women. Article 14 provides as follows:

The public authorities see to the elimination of all forms of discrimination against women and ensure the protection and promotion of their rights.

They take in all areas, and most notably in the civil, political, economic, social and cultural areas, all appropriate measures in order to ensure the full realization of the potential of women and their full participation in the development of the nation.

They take measures in order to fight all forms of violence against women in their public and private life.

Women are entitled to equitable representation in national, provincial and local institutions. The State guarantees the achievement of parity between men and women in said institutions.

The law determines the conditions for the application of these rights.

Article 15 further states that ‘[t]he public authorities are responsible for the elimination of sexual violence used as an instrument in the destabilisation and displacement of families’.

These Articles of the Constitution are progressive and in line with international women's rights standards. Very few countries across the continent provide for such elaborate provisions relating to women's rights in their constitutions.

However, while the Constitution is overall in favour of women's rights, Article 40 recognises the family as the basic unit of the human community but only recognises marriages between persons of opposite sexes. This is a regressive provision as it excludes same-sex couples's right to marry. As a result, women in queer relationships are not afforded the protection of their family or their rights within their family.

The Constitution depicts the pluralist nature of the legal system by providing in its Article 34 that ‘[t]he State guarantees the right to individual or collective property acquired in accordance with law or custom’. This is further reinforced by Article 153 that provides for courts and tribunals to apply ‘laws as well as customary laws unless the latter is contrary to public order or morality’. Furthermore, according to Article 203(1), the Central Authority and Provinces have to work together on matters relating to civil and customary rights. Subject to the Constitution, Provinces also have exclusive competence to execute customary law.¹²⁷

Treaty	Date of ratification	Reservations/Declarations
CEDAW	17 October 1986	None
African Charter	20 July 1987	None
Maputo Protocol	9 June 2008	None

¹²⁷ Article 204(28) of the Constitution of the Democratic Republic of Congo 2005, amended 2011. Available at https://www.constituteproject.org/constitution/Democratic_Republic_of_the_Congo_2011 (accessed 17 April 2024)

MAIN TRENDS IN FAMILY LAW

Article 334 of the Code of the Family provides that everyone has the right to marry the person of their choice and to have a family. Polygamy is not recognised in the country.

Article 333 of the Code of the Family recognises religious marriages but states that they do not have the same effect as a civil marriage under the Code of the Family. Anyone who forces someone to marry faces imprisonment and a fine under Article 336 of the Code of the Family. According to Article 352, the legal age of marriage for both men and women is 18 years, without exceptions. This is following an amendment to the Code of the Family in 2016.

Article 648 of the Code of the Family also provides that both parents have a duty towards their children. In case of divorce or separation, the court can decide that either parent can be entrusted with the custody of the child under Article 325 of the Code of the Family. Even if one parent has custody, the other parent has the right to visit. In terms of inheritance, under Articles 758 to 761 of the Code of the Family, both daughters and sons, and the surviving spouse have the same right to inheritance.

KEY GAPS AND CONTESTATIONS

- (i) **Same-sex marriage not recognised:** Following the Constitution, Article 330 of the Code of the Family provides that a marriage is only between a man and a woman.

- (ii) **Violence against women:** Despite the constitutional provision on combating violence against women, there is not yet any comprehensive law on violence against women, including domestic violence¹²⁸, even though the country adopted a National Strategy against Gender-Based Violence in 2009.

- (iii) **Dowry, remarriage, head of household:** Despite the constitutional provisions of gender equality, the Code of the Family contains several discriminatory provisions against women.

For instance:

1. Article 361 of the Code of the Family provides for dowry to be paid by the husband.
2. Article 335 further requires women to wait for 300 days after the death of her husband or a divorce to remarry. Although this delay expires in the event the woman gives birth during the 300 days or the woman can approach the court to lift this requirement, such a provision is discriminatory since the husband does not have to wait for that period.
3. Article 444 is another discriminatory provision that states that the husband is the head of the family, even if Article 445 provides for both spouses to be responsible for the interest of the household.

- (iv) **Customary marriages:** The fact that the Code of the Family does not regulate customary marriages is a challenge for women. For instance, while the law provides for women to inherit from their husbands, in customary marriages, this does not happen, and the male chiefs view the issue from a patrilineal eye. In this case, the widow is not considered as a beneficiary of the deceased husband's estate.¹²⁹

RECOMMENDATIONS

Legal reforms:

- ▶ Adopt a comprehensive law to combat violence against women that includes domestic violence and marital rape in line with the Constitution.
- ▶ Recognise same-sex marriage.
- ▶ Amend the Code of the Family to: (1) remove the dowry system since it perpetuates forced marriage; (2) remove the 300 days wait period for a woman who is a widow or divorced to remarry; (3) recognise both spouses as the heads of the family; extend its protective provisions to women in customary marriages.

128 <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Congo-dem-rep.pdf> (accessed 17 April 2024)

129 P Mubalama 'Congolese widows stripped of inheritance' *Institute for War and Peace Reporting* (27 June 2011) <https://iwpr.net/global-voices/congo-lese-widows-stripped-inheritance> (accessed 10 July 2022)



COUNTRY PROFILE

The Preamble of the Constitution recognises that the Constitution is being drafted to achieve equality between Egyptians 'in rights and duties with no discrimination'. Article 4 recognises that national unity is based 'on the principle of equality, justice and equal opportunity between citizens'. Under Article 9, the State has the obligation to ensure 'equal opportunity for all citizens without discrimination'. Article 11 of the Constitution focuses on the place of women and motherhood as follows:

The State commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution. The State commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the State, and to appointment in judicial bodies and entities without discrimination.

The State commits to the protection of women against all forms of violence, and ensures women empowerment to reconcile the duties of a woman toward her family and her work requirements.

The State ensures care and protection and care for motherhood and childhood, and for breadwinning, and elderly women, and women most in need.

This is a progressive provision concerning the rights of women within the family in that it ensures equality between men and women, representation of women, protection against all forms of violence, and adopts an intersectional approach towards protecting motherhood, elderly women, and women most in need. However, it has some claw back clauses. For instance, 'within the provisions of this Constitution' women are exposed to discriminatory practices under Sharia law. Moreover, while the provision requires the State to empower women, it provides that such empowerment is done with the view of reconciling 'the duties of women toward her family and her work requirements'. Article 60 of the Constitution on inviolability of the human body can also be applied in instances of physical violence against women since it provides against '[a]ny assault, defilement or mutilation' of the human body.

Women's right to equality is further protected by Article 53 that provides that '[c]itizens are equal before the law, possess equal rights and public duties, and may not be discriminated against' on the basis of, amongst others, sex and any other reason. The inclusion of any other reason can be extended to same-sex couples. Furthermore, the State has to 'take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose'.

The family as the basis of society receives constitutional protection under Article 10 of the Constitution. The family is 'based on religion, morality and patriotism'. The Constitution also protects the right to own private property. Under Article 35 of the Constitution, '[p]rivate property is protected. The right to inherit property is guaranteed. Private property may not be sequestered except in cases specified by law, and by a court order'.

The Preamble of the 2014 Constitution of Egypt affirms that the 'principles of Islamic Sharia are the principle source of legislation, and that the reference for interpretation thereof is the relevant texts in the collected rulings of the Supreme Constitutional Court'. Article 2 further provides that 'Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation'. Recognising pluralism for Christians and Jews, Article 3 of the Constitution states that '[t]he principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders'. Article 7 of the Constitution establishes the Al-Azhar as 'an independent scientific Islamic institution, with exclusive competence over its own affairs'. The Al-Azhar is 'responsible for preaching Islam and disseminating the religious sciences and the Arabic language in Egypt and the world'. Hence, while other aspects of law in Egypt are regulated by French civil law, family law is regulated by Islamic Sharia law. In 1920, Egypt introduced its first codified Muslim Family Law.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	18 September 1981	“In respect of Article 16: Reservation to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband. In respect of Article 29 The Egyptian delegation also maintains the reservation contained in Article 29, paragraph 2, concerning the right of a State signatory to the Convention to declare that it does not consider itself bound by paragraph 1 of that Article concerning the submission to an arbitral body of any dispute which may arise between States concerning the interpretation or application of the Convention. This is in order to avoid being bound by the system of arbitration in this field. General reservation on Article 2: The Arab Republic of Egypt is willing to comply with the content of this Article, provided that such compliance does not run counter to the Islamic Sharia.”¹³⁰
African Charter	20 March 1984	Egypt entered the following reservations upon ratification: “that the application of Article 8 and paragraph 3 of Article 18 should be in the light of Islamic Sharite Law and not to its detriment; and that Egypt interprets the first paragraph of Article 9 as being applicable only to information, the obtaining of which is authorised by Egyptian laws and regulations.” ¹³¹
Maputo Protocol	Not ratified	-

These reservations pose a major challenge to the protection of the rights of women in the family, considering that Article 18 (3) of the Charter specifically provides for the States’ obligation to eliminate all forms of discrimination against women and to ensure the protection of the rights of women and children as stipulated under international law.

¹³⁰ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec (accessed 16 April 2024)

¹³¹ <https://treaties.un.org/doc/Publication/UNTS/Volume%201520/v1520.pdf> (accessed 16 April 2024)

MAIN TRENDS IN FAMILY LAW

There have been several legal reforms related to family law in Egypt even before the Constitution. On 1 January 2000, there was the adoption of Law No.1 of 2000 that concerned backlogs of cases and inefficient legal procedures, which are mainly challenges that women face since they are the plaintiffs in most matters.¹³² Article 20 of Law No.1 of 2000 also gave women the right to file for no-fault divorce, albeit it was at the expense of forfeiting their financial rights, and Article 17 allowed women in unregistered marriages to file for divorce.

Concerning custody, women have more rights than men because of gender stereotypes and usually men have to struggle to have custody of the child. For instance, in 2011, a family court had to allow an ex-husband to have custody of his children to stay at his home once a month.¹³³

Under Article 6 of the Constitution, any person born to either an Egyptian father or an Egyptian mother can have Egyptian citizenship.

Law 126/2008 has set the minimum age of marriage at 18 but does punish perpetrators.¹³⁴

With regard to inheritance, Law No. 77 of 1943 was amended in 2017 to penalise intentionally depriving women/heirs of their inheritance. Article 49 stipulates that anyone who denies an heir their legitimate share of inheritance shall be punished by imprisonment for a minimum of 6 months and a fine of up to LE100,000 [US\$5,645]. The article adds that any person who withholds a document proving a person's legal right to inheritance shall be punished by imprisonment of 3 months and a fine of no less than LE10,000 [US\$564].¹³⁵ For Christians, recently, an Egyptian Christian woman contested the fact that she inherits less than her brothers and the court ruled in her favour. However, her case is only a judicial precedent for Christian women and not applicable to Muslim women.¹³⁶

KEY GAPS AND CONTESTATIONS

(i) Reservations to CEDAW and non-ratification of the Maputo Protocol:

Egypt's reservation to CEDAW and non-ratification of the Maputo Protocol limits the promotion and protection of women's rights within the family.

(ii) Only Sharia law to regulate family:

In 2021, the government put forward a new draft bill on personal status and family. However, this was considered controversial and had to be withdrawn.¹³⁷ The legislature rejected the bill as it did not want to move away from Islamic law when it comes to 'divorce rights and procedures for husbands and wives, visitation rights, child support payments, and the distribution of various facets of child custody and guardianship'.¹³⁸ The draft bill contained provisions against the Constitution such as restricting women's rights to initiate divorce and to child custody and requiring the patriarch's approval for women's marriage.¹³⁹

(iii) Wife obedience and head of household:

According to Law No 100 of 1985, the husband is responsible for providing for the children and thus is impliedly the head of the family.¹⁴⁰ The law also provides that a wife must obey her husband. In the event there is no obedience, the husband may file for a no-obedience complaint and withdraw his financial support to the wife. Both can decide where to live but a woman is expected to follow her husband when choosing the matrimonial home. Upon divorce, the wife may keep the matrimonial home when she has custody of the child but loses this privilege when the children reach majority or when she loses custody.¹⁴¹

132 M Al-Sharmani 'Recent reforms in personal status laws and women's empowerment: "Family courts in Egypt"' (2007) at 3. Available at <https://assets.publishing.service.gov.uk/media/57a08bcae5274a27b200d65/FamilycourtsFinalPaper.pdf> (accessed 17 April 2024)

133 Id at 20

134 <https://www.ilo.org/dyn/travail/docs/464/Amendments%20to%20Child%20Law%20No%2012%20of%201996%20-%2015%20June%202008.pdf> (accessed 17 April 2024)

135 <https://english.legal-agenda.com/egypt-denying-women-inheritance-is-a-crime-subject-to-imprisonment/> (accessed 17 April 2024)

136 BBC News 'Egyptian woman wins 'court battle' over unequal inheritance laws' (25 November 2019) <https://www.bbc.com/news/world-middle-east-50544239> (accessed 11 July 2022)

137 N Ahmed 'The regime between stability and stumbling: Family law in Egypt' *Carnegie Endowment for International Peace* (3 August 2021) Available at <https://carnegieendowment.org/sada/85081> (accessed 12 July 2022)

138 NJ Brown 'The battle over family law in Egypt shows only the personal can be political, and then only so far' *Carnegie Endowment for International Peace* (12 July 2022) <https://carnegieendowment.org/2022/07/12/battle-over-family-law-in-egypt-shows-only-personal-can-be-political-and-then-only-so-far-pub-87488> (accessed 11 July 2022)

139 Ahmed 9 (n above)

140 <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Egypt-arab-rep.pdf> (accessed 17 April 2024)

141 <https://ouclf.law.ox.ac.uk/modernizing-muslim-family-law-the-case-of-egypt/> (accessed 17 April 2024)

(iv) Polygamy:

According to amendments to Laws No. 25/1920 and 25/1929 in 1979, a husband can marry a second wife only with the consent of the first wife.¹⁴² If that was not the case, this could be considered as harming the first wife and automatic divorce could be granted. This sparked debate since it was seen as a restriction on polygamy.¹⁴³ After several contestations of this law being unconstitutional, in 1985, the court declared this law as being unconstitutional. There were several laws adopted to regulate the matter until the 2000 Law that provides that a woman just needs to prove that she can no longer live with her husband for a divorce in case of remarriage. Despite the law being considered revolutionary, it still recognises polygamy.

RECOMMENDATIONS**International treaties:**

- ▶ Lift reservations to the CEDAW.
- ▶ Ratify the Maputo Protocol without any reservation.

Law reforms:

- ▶ Ensure the protection of women as per international human rights standards, rather than as per Islamic Sharia law and discriminatory interpretation when it comes to inheritance, divorce and polygamy.
- ▶ Adopt a law in line with the Constitution that provides for the protection of women against violence, including domestic violence.

¹⁴² N Bernard-Maugiron 'Courts and the reform of personal status law in Egypt: Judicial divorce for injury and polygamy' in E Giunchi (ed) *Adjudicating family law in muslim courts* (2014) at 111. Available at https://horizon.documentation.ird.fr/exl-doc/pleins_textes/divers17-07/010061047.pdf (accessed 17 April 2024)

¹⁴³ As above



COUNTRY PROFILE

The Constitution of the Federal Democratic Republic of Ethiopia recognises family as the natural and fundamental unit of society entitled to protection from the State.¹⁴⁴ The Constitution protects the right of persons of marriageable age to marry and found a family, noting that men and women have equal rights while entering into, during marriage and at the time of divorce.¹⁴⁵ In addition, the Constitution protects women's rights to equality, equality within marriage, to acquire, administer, control, use and transfer property, and to equal treatment in inheritance.¹⁴⁶ It obliges the State to eliminate the influences of harmful customs and prohibits laws, customs and practices that oppress or cause harm to women.¹⁴⁷



Image: hadynyah / iStock

¹⁴⁴ Section 34 of the Constitution of the Federal Democratic Republic of Ethiopia 1995. Available at <https://www.ethiopianembassy.be/wp-content/uploads/Constitution-of-the-FDRE.pdf> (accessed 17 April 2024)

¹⁴⁵ Section 34 of the Constitution of the Federal Democratic Republic of Ethiopia 1995

¹⁴⁶ Section 35 of the Constitution of the Federal Democratic Republic of Ethiopia 1995

¹⁴⁷ Section 35 of the Constitution of the Federal Democratic Republic of Ethiopia 1995

Treaty	Date of ratification	Reservations/Declarations
CEDAW	10 September 1981	"Socialist Ethiopia does not consider itself bound by paragraph 1 of Article 29 ¹⁴⁸ of the Convention." ¹⁴⁹
African Charter	15 June 1998	None
Maputo Protocol	10 January 2017	"Reservations 1.The Federal Democratic Republic of Ethiopia does not consider itself bound by Article 6(c) of the Protocol. 2.The Federal Democratic Republic of Ethiopia does not consider itself to be bound by Article 6(d) of the Protocol that puts registration as a condition for recognition of marriage. 3.The Federal Democratic Republic of Ethiopia does not consider itself to be bound by Article 6(f) of the Protocol. 4.The Federal Democratic Republic of Ethiopia enters a reservation on Article 7(a) of the Protocol that requires separation of spouses to be decided by judicial organs. The laws of Ethiopia that permit spouses to separate by agreement shall apply. 5.The Federal Democratic Republic of Ethiopia does not consider itself to be bound by Article 10(3) of the Protocol. 6.The Federal Democratic Republic of Ethiopia enters a reservation on Article 21(1) of the Protocol regarding the right of a widow to inherit her deceased spouse. The law of Ethiopia according to which spouses inherit each other if he/she is designated as a legatee by a will shall apply. 7.The Federal Democratic Republic of Ethiopia does not consider itself to be bound by Article 27 of the Protocol. Declarations on the Protocol 1.Article 4 sub Article 2(a) of the Protocol relating to the crime of rape shall be applied in accordance with Article 620 of the Criminal Code of Ethiopia. 2.Article 6(b) of the Protocol shall be applied in accordance with the family laws of Ethiopia that allows dispensation from the minimum age of marriage that is 18 years. 3.Article 6(j) of the Protocol shall be applied in accordance with the law of Ethiopia according to which income acquired during marriage is common property of the spouses and it is managed and disposed by their joint decision. 4.Article 7(d) of the Protocol that provides for the right of women to acquire equitable share from the common property in the marriage shall be applied in line with the laws of Ethiopia that provide for equal share of spouses on the common property. 5.Article 13(l) of the Protocol regarding the secondary responsibility of the private sector to contribute to the upbringing and development of children shall be applied in accordance with the laws of Ethiopia. 6.Article 14(b) of the Protocol in relation to the right of women to decide whether to have a child shall be applied based on the agreement of the spouses in the case of married women."¹⁵⁰

¹⁴⁸ Article 29 (1) provides for dispute resolution between states through arbitration and referral to the International Court of Justice where an agreement is not reached through arbitration

¹⁴⁹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec (accessed 16 April 2024)

¹⁵⁰ [https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf](https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf) (accessed 16 April 2024)

MAIN TRENDS ON FAMILY LAW

Ethiopia's legislation is generally progressive and aligns with its international obligations and constitutional precepts of promoting equal rights for women in marriage, matrimonial property, custody matters, divorce, and inheritance.

For instance, rather than dividing matrimonial property by contribution upon divorce – which tends to disenfranchise financially weaker women, the Revised Family Code provides that spouses retain their own personal property during marriage and are entitled to retake said personal property upon divorce.¹⁵¹ All income, property acquired during marriage, and property donated or bequeathed jointly (Article 62) becomes common property and is divided equally between spouses upon divorce (Article 90).¹⁵² This is a just and equitable approach and avoids the danger of courts failing to recognise women's non-economic contributions to the household.

The Revised Family Code allows Courts to make decisions on the custody of children, care of their education, health, maintenance and rights of visitation. The Court renders these decisions taking into account the income, age, health, and condition of living of the spouses as well as the age and interests of the children.¹⁵³

Article 11 of the Revised Family Code 2000 prohibits polygamy, providing that a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage. The Criminal Code of Ethiopia has criminalised polygamous marriages, with the exception of those concluded according to religious orders. The Supreme Court of Ethiopia, Cassation Bench has set a precedent which protects the property rights of the woman in the second marriage to equally divide her husband's share of property. Ethiopia has entered an interpretive declaration on the provision.¹⁵⁴

While Ethiopia has a plural legal system, religious and customary law is significantly constrained by legislative and constitutional provisions. Ethiopia has banned female genital mutilation¹⁵⁵ and legislated against violence against women.¹⁵⁶

With regard to child marriage, Article 7 of the Revised Family Law of Ethiopia stipulates that the minimum age of marriage for both women and men is 18 years. However, in a special case upon the request of the spouses or one of their parents with the permission of the Minister of Justice the marriageable age can be reduced by two years.¹⁵⁷ With the exception of these circumstances indicated in the Revised Family Code, marriage with a minor is punishable by imprisonment up to seven years according to the Article 648 of the Criminal Code.

Widows have the right to remarry according to the family laws of Ethiopia. Although the family code has put a restriction on women remarrying within one hundred and eighty days (180) of the dissolution of the marriage [by death] on account of avoiding paternity conflicts, this restriction will not apply if the woman has given birth after the death of her spouse, or it is proved by medical evidence that the woman is not pregnant.¹⁵⁸

151 Articles 57 and 86 of the Revised Family Code 2000, amended 2017. Available at <https://chilot.blog/wp-content/uploads/2017/10/revised-family-code-amendment.pdf> (accessed 17 April 2024)

152 Articles 62 and 90 of the Revised Family Code 2000, amended 2017

153 Article 113 of the Revised Family Code 2000, amended 2017

154 Federal Democratic Republic of Ethiopia: 7th to 10th Periodic Reports (2015-2023) Available at <https://achpr.au.int/en/state-reports/ethiopia-7th-10th-periodic-reports-2015-2023> (accessed at 15 April 2024)

155 Articles 565-6 of the Criminal Code of the Federal Democratic Republic of Ethiopia 2004. Available at <https://www.refworld.org/legal/legislation/nat-legbod/2005/en/63782> (accessed 17 April 2024)

156 The Criminal Code of the Federal Democratic Republic of Ethiopia 2004 criminalises many forms of violence against women including: at Article 564, physical violence within marriage or cohabitation; at Article 597, trafficking, at Articles 620-628, rape, and at Article 648, child marriage

157 The Revised Family Code 2000

158 Federal Democratic Republic of Ethiopia: 7th to 10th Periodic Reports (2015-2023) Available at <https://achpr.au.int/en/state-reports/ethiopia-7th-10th-periodic-reports-2015-2023> (accessed 17 April 2024)

KEY GAPS AND CONTESTATIONS

While Ethiopia's legislative scheme is impressive, the country continues to score badly on gender equality measures.¹⁵⁹ Practices such as female genital mutilation, unfair inheritance of land, and child marriage persist.¹⁶⁰

RECOMMENDATIONS

Implementation:

Ethiopia must implement and enforce legislative provisions on women's rights.

Legislative reform:

Ethiopia must amend the Family Law Code to guarantee that the minimum age of marriage is 18 with no exceptions whatsoever. Ethiopia must also remove the restrictions on the number of days before the remarriage of widows.

Access to justice:

Ethiopia must ensure women have adequate access to justice to give effect to their rights.

Peace and stability:

Ethiopia must pursue broad socio-economic, peace and stability policy in order to improve the conditions of women's lives.

Removal of Reservations on the Maputo Protocol:

Ethiopia must lift reservations to the Maputo Protocol so as to ensure the full protection of the family law related rights of women.

¹⁵⁹ See: <https://borgenproject.org/womens-rights-in-ethiopia/> and <https://www.undp.org/ethiopia/publications/ethiopia-national-human-development-report-2018>

¹⁶⁰ Ibid



COUNTRY PROFILE

The Republic of Kenya's Constitution recognises the family as the natural and fundamental unit of society, entitled to recognition and protection from the State.¹⁶¹ The same provision mandates the equality of spouses within and after a marriage.¹⁶²

Treaty	Date of ratification	Reservations/Declarations
CEDAW	9 March 1984	None
African Charter	23 January 1992	None
Maputo Protocol	6 October 2010	"The Government of the Republic of Kenya does not consider as binding upon itself the provisions of Article 10(3) and Article 14(2)(c) ¹⁶³ which is inconsistent with the provisions of the Laws of Kenya on health and reproductive rights." ¹⁶⁴

MAIN TRENDS ON FAMILY LAW

In 2010, Kenya adopted a new Constitution with a progressive bill of rights, triggering an extensive review of existing law and reform process in a number of areas, including family law.¹⁶⁵ Parliament enacted a new Matrimonial Property Act and new Marriage Act to consolidate a number of laws previously contained in a number of statutes, the common law and customary law.¹⁶⁶

A key development is the Matrimonial Property Act, which provides that ownership of matrimonial property vests in the spouses according to their contribution to its acquisition, and shall be divided between them upon the dissolution of their marriages.¹⁶⁷ The Act adopts a broad understanding of "contribution", defining the term to include monetary and non-monetary contributions, including domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work.¹⁶⁸ This broad definition is progressive and recognises the non-financial contribution of women to marriages. However, courts are unprepared to adjudicate non-monetary contributions and equitable distribution of property.¹⁶⁹

Article 45(3) of the Constitution of Kenya, 2010 further provides that "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."¹⁷⁰ In the case of *JOO vs MBO*, the High Court of Kenya held that the respondent failed to prove her direct contribution to the property registered under the appellant and awarded her 30% of the matrimonial property and a 20% share of the rental units based on indirect non-monetary contribution. The Court of Appeal however overturned the High Court's decision and directed the rental units be shared on a 50:50 ratio. The Supreme Court of Kenya being the highest court found that the 50:50 share was reasonable but held that while Article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, equality does not mean the redistribution of proprietary rights at the dissolution of a marriage and neither does a reading of the provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married.¹⁷¹ In light of this case, there is a need for Courts to address the matrimonial property

161 Section 45(1) of Constitution of the Republic of Kenya 2010. Available at <http://kenyalaw.org/lex/actview.xql?actid=Const2010> (accessed 17 April 2024)

162 Section 45(3) of Constitution of Kenya 2010

163 Article 14 (2) (c) of the Maputo Protocol provides for access to health and reproductive rights including medical abortion in cases of sexual assault, rape, incest, and where pregnancy endangers the mental and physical health of the mother or the life of the mother or fetus

164 [https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf](https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf) (accessed 16 April 2024)

165 LN Murungi "Consolidating Family Laws in Kenya" (2015) *European Journal of Law Reform* 17(2) at 321. Available at https://www.elevenjournals.com/tijdschrift/ejlr/2015/2/EJLR_1387-2370_2015_017_002_010 (accessed 17 April 2024)

166 <https://www.loc.gov/item/global-legal-monitor/2014-05-02/kenya-comprehensive-marriage-law-enacted/>

167 Section 7 of the Matrimonial Property Act 2013. Available at <http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/M/Matrimonial%20Property%20Act%20-%20No.%2049%20of%202013/docs/MatrimonialPropertyAct49of2013.pdf> (accessed 17 April 2024)

168 Section 2 of the Matrimonial Property Act 2013

169 Human Rights Watch "Once you get out, you lose everything: Women and matrimonial property rights in Kenya" (2020). Available at: <https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya>. (accessed 17 April 2024)

170 The Constitution of Kenya, 2010

171 <http://kenyalaw.org/caselaw/cases/view/249955/> (accessed 17 April 2024)

jurisprudential controversy on the 50:50 distribution formula versus the 'division based on contribution' approach.¹⁷² Courts must divide matrimonial property justly and equitably, so that economically-disadvantaged women are not left destitute at the end of a marriage.

Kenya has also adopted several pieces of legislation to combat child marriage,¹⁷³ female genital mutilation,¹⁷⁴ and violence against women, including domestic violence.¹⁷⁵ This legislation accords with Kenya's international obligations and is commendable, however, due to low levels of enforcement, child marriage, and female genital mutilation in particular remain relatively common in Kenya.¹⁷⁶

KEY GAPS AND CONTESTATIONS

(i) Religious law:

The Kenyan Constitution and Marriage Act are cognisant of Kenya's pluralistic society, recognising civil, customary, Christian, Muslim and Hindu marriages.¹⁷⁷ While the Constitution issues the caveat that this recognition is "so long as such systems are consistent with the Constitution",¹⁷⁸ it claws back on this guarantee by stating that "the provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce, and inheritance." As such, women's rights to equal treatment and protection under the Constitution may be limited by application of Islamic law.¹⁷⁹ Similarly, the Marriage Act provides that the dissolution of Muslim marriages shall be governed by Islamic law,¹⁸⁰ and the Matrimonial Property Act

provides that "a person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property".¹⁸¹ While recognising legal and cultural diversity is commendable, these provisions severely undermine protection afforded to Muslim women by the new family law regime.

(ii) Polygamy:

In recognition of custom and belief, Kenya recognises polygamy. The Marriage Act defines marriage as the voluntary union of a man and a woman, whether monogamous or polygamous.¹⁸² The Act also provides that customary and Muslim marriages are presumed to be polygamous or potentially polygamous.¹⁸³ Polygamy is widespread in Kenya, since a majority of Kenyans live under customary law, especially in matters relating to personal law, and a significant number live under Islamic law. It is thus crucial that the State recognises and regulates these marriages. Polygamy violates women's rights, and is one of the leading causes of women being deprived of their inheritance.¹⁸⁴ Steps must be taken to protect women already in polygamous marriages.

(iii) Same-sex marriages:

Another aspect to note about the Marriage Act's definition of marriage is that it limits marriage to a "union of a man and a woman", thus excluding same-sex marriage.¹⁸⁵ The Constitution also provides that "every adult has the right to marry a person of the opposite sex".¹⁸⁶ This position was affirmed in the Marriage Act and is inconsistent with broad,

172 "A commentary on the matrimonial property conundrum in Kenya in JOO vs MBO", Marvis Ndubi. Available at <https://journals.kabarak.ac.ke/index.php/klr/article/view/353/273> (accessed 15 April 2024)

173 Section 4 of the Marriage Act 2014 prescribes 18 as the minimum age for marriage. The Counter Trafficking in Persons Act 2010 classifies child marriage and sexual exploitation as exploitation, and defines the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation as "trafficking in persons", which is a crime

174 Part IV of the Prohibition of Genital Mutilation Act 2011 criminalises aiding, abetting and performing female genital mutilation. It prescribes life imprisonment in cases where FGM leads to death. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct_No32of2011.pdf (accessed 17 April 2024)

175 The Protection Against Domestic Violence Act 2015 aims to provide protection of spouses, children and dependent persons in cases of domestic violence. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf Section 3 of the Sexual Offences Act 2006 criminalises rape, Sexual 5 addresses sexual assault, Section 13 criminalises child trafficking, Section 18 criminalises trafficking for sexual exploitation, and Section 23 addresses sexual harassment

176 See https://www.equalitynow.org/www-equalitynow-org-learn_more_fgm_and_child_marriage_in_kenya/caleen/. (accessed 17 April 2024)

177 Section 45(4) of the Constitution of 2010 and Section 6(1) of the Marriage Act 2014

178 Section 45(4) of the Constitution of Kenya 2010

179 Section 24 of the Constitution of Kenya 2010

180 Sections 71 and 72 of the Marriage Act 2014. Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MarriageActCap150.pdf> (accessed 17 April 2024)

181 Section 3 of the Matrimonial Property Act 2013

182 Section 3(1) of the Marriage Act 2014

183 Section 6(3) of the Marriage Act 2014

184 LN Murungi "Consolidating Family Laws in Kenya" (2015) *European Journal of Law Reform* 17(2) at 323-324. Available at https://www.elevenjournals.com/tijdschrift/ejlr/2015/2/EJLR_1387-2370_2015_017_002_010 (accessed 17 April 2024)

185 Section 3(1) of the Marriage Act 2014

186 Section 45(2) of the Constitution of Kenya 2010

progressive and equitable understandings of family.¹⁸⁷

(iv) Time limit before divorce petition:

It is of concern that the Marriage Act provides that a party to a civil marriage may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.¹⁸⁸ There are however ongoing reform discussions based on the Court of Appeal's decision in the case of *National Assembly of Kenya vs Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment)*¹⁸⁹ where the Court held that the three year wait provided in the Marriage Act was unconstitutional and directed that Parliament amend the Marriage Act to give effect to this.

(v) Marital rape: While the Sexual Offences Act¹⁹⁰ expands the definition of sexual offenses, it does not protect women from marital rape.

RECOMMENDATIONS

Harmonisation of laws:

- ▶ Kenya must ensure its constitutional and legislative protections apply to all women in religious and customary marriages and eliminate exceptions.
- ▶ Kenya must take steps to adequately protect the interests of women already in polygamous marriages and move towards prohibiting polygamy in the future.
- ▶ Kenya must expedite the reform of the sections of the Marriage Act declared unconstitutional by the Courts.

Implementation: Kenya must effectively enforce its prohibition on child marriage and female genital mutilation, as well as undertake awareness and mindset changing programmes to prevent these harmful traditional practices.

Judicial training: Judges must be adequately trained and sensitised to implement the Matrimonial Property Act in a way that divides matrimonial property justly and equitably.

Legal reform: Kenya must undertake a constitutional and legislative amendment process to recognise same-sex marriage. Kenya must also amend the Sexual Offences Act to recognise and criminalise marital rape.

¹⁸⁷ LN Murungi "Consolidating Family Laws in Kenya" (2015) *European Journal of Law Reform* 17(2) at 324

¹⁸⁸ Section 66(1) of the Marriage Act 2014

¹⁸⁹ [2022] KECA 548 (KLR). Available at <http://kenyalaw.org/caselaw/caselawreport/?id=233583> (accessed 17 April 2024)

¹⁹⁰ The Sexual Offences Act 2006. Available at <https://www.refworld.org/legal/legislation/natlegbod/2006/en/41526> (accessed 17 April 2024)



COUNTRY PROFILE

The Constitution of the Republic of Malawi protects the family as the natural and fundamental group unit of society.¹⁹¹ The same provision provides that each member of the family is entitled to full and equal respect and protection by the law against neglect, cruelty and exploitation. In addition, the provision establishes that all men and women have the right to marry and start a family and that no person shall be forced to enter into marriage. These provisions apply to all forms of marriage, and indeed Malawi embraces legal pluralism by recognising and regulating civil marriages, customary marriages, religious marriages, and marriage by cohabitation or reputation.¹⁹²

Malawi's Constitution also contains impressive provisions protecting the rights of women, including within the context of family law. Section 13 provides that the State must progressively adopt and implement policies and legislation aimed at obtaining gender equality through full and equal participation of women in all spheres of Malawian society; non-discrimination; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation, and rights to property.

Section 24 of the Constitution is dedicated to the rights of women and provides for, among other things:

- ▶ Full and equal protection by the law;
- ▶ The right not to be discriminated against on the basis of their gender or marital status;
- ▶ The right to be accorded the same rights as men in civil law, including equal capacity to enter into contracts; to acquire and maintain rights in property, to acquire and retain custody, guardianship and care of children, and to have an equal right in the making of decisions that affect their upbringing;
- ▶ To acquire and retain citizenship and nationality;
- ▶ Women are also entitled to a fair disposition of property that is held jointly with a husband; and to fair maintenance upon dissolution of a marriage;
- ▶ That any law that discriminates against women on the basis of gender or marital status shall be invalid; and
- ▶ The passage of legislation to eliminate customs and practices that discriminate against women, particularly practices such as sexual abuse, harassment, violence, and deprivation of property, including property obtained by inheritance.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	12 March 1987	None
African Charter	17 November 1989	None
Maputo Protocol	20 May 2005	None

191 Section 22 of the Constitution of the Republic of Malawi 1994, amended 2020. Available at https://malawilii.org/akn/mw/act/1994/20/eng@2020-11-03#chp_IV_sec_24 (accessed 17 April 2024)

192 Section 12 of the Marriage, Divorce and Family Relations Act 2015. Available at <https://malawilii.org/akn/mw/act/2015/4/eng@2017-12-31> (accessed 17 April 2024)

MAIN TRENDS ON FAMILY LAW

The Marriage, Divorce and Family Relations Act 2015 consolidated previously fragmented legal regimes and advanced progressive legal reform. The Act recognises and regulates civil marriages, customary marriages, religious marriages and marriage by reputation or permanent cohabitation, granting all unions equal legal status.¹⁹³ The recognition of marriage by reputation or permanent cohabitation is of special import, and will protect many vulnerable women who do not have the protection of a formally concluded marriage. Recognition of marriage by repute, where a couple may be considered married without formally registering their relation, is not automatic and requires a declaration by a court which must consider a number of factors, including the length of the relationship (which must be a minimum of five years), cohabitation, and the existence of children.¹⁹⁴

Another key and much celebrated attribute of the Marriage, Divorce and Family Relations Act is that it effectively prohibits child marriage. Malawi has historically had one of the highest rates of child marriage in the world. The UN Women Global Database on Violence Against Women estimates that 42.1% of women are married before reaching 18 years of age.¹⁹⁵ While civil marriages have been confined to persons 18 years of age and above for some time, customary marriages used puberty as a marker of maturity, thus allowing child marriage. The Marriage, Divorce and Family Relations Act set the universal

minimum age of marriage to 18, subject to the provisions of Section 22 of the Constitution. Section 22 of the Constitution allowed marriage of children between the ages of 15 and 18 with the consent of their parents and guardians. In 2017, however, two years after the adoption of the Act, Parliament adopted the Constitutional Amendment Act¹⁹⁶ which amended the Constitution to make 18 the absolute minimum age of marriage, without exceptions, based on an amicable settlement arising from the case of *Institute for Human Rights and Development in Africa vs the Government of Malawi*.¹⁹⁷

A key step towards recognising the contribution of women to the marriage is Section 50(3) read with Section 2 of the Act, which states that non-monetary contributions of spouses must be taken into account when determining the contribution of the spouses to the marriage, including domestic work and management of the home, childcare, companionship, and the endurance of the marriage.

Finally, Malawi has taken extensive legislative and policy steps to combat violence against women, including adopting the Prevention of Domestic Violence Act 2014¹⁹⁸, which provides a civil framework for addressing various acts of violence amongst people within a domestic relationship, and the Gender Equality Act 2014¹⁹⁹, which proscribes sexual harassment and harmful practices.

193 Section 12 of the Marriage, Divorce and Family Relations Act 2015

194 Section 13 of the Marriage, Divorce and Family Relations Act 2015

195 See UN Women Global Database on Violence Against Women. Available at: <https://evaw-global-database.unwomen.org/en/countries/africa/malawi>. (accessed 17 April 2024)

196 Constitutional (Amendment) Act 2017. Available at <https://malawilii.org/akn/mw/act/2017/15/eng@2017-04-07> (accessed 17 April 2024)

197 https://www.acerwc.africa/sites/default/files/2022-10/Agreement-on-amicable-settlement_Malawi.pdf (accessed 15 April 2024)

198 Prevention of Domestic Violence Act - MalawiLII. Available at <https://malawilii.org/akn/mw/act/2006/5/eng@2014-12-31> (accessed 15 January 2024)

199 Gender Equality Act - MalawiLII. Available at <https://malawilii.org/akn/mw/act/2013/3/eng@2014-12-31> (accessed 15 January 2024)

KEY GAPS AND CONTESTATIONS

- (i) **Polygamy:** The Marriage, Divorce and Family Relations Act adopts the same position as previous legal regimes regarding polygamy. Polygamy is prohibited in civil marriages, and the penalty for violating this prohibition has been increased, but allowed in customary and religious marriages.²⁰⁰ While polygamy is a part of some religious and cultural customs, polygamy violates women's rights to equality and economic well-being. The Maputo Protocol obliges States to adopt measures to ensure that monogamy is encouraged as the preferred form of marriage.²⁰¹ Regardless, steps must be taken to ensure that women in polygamous marriage have their rights safeguarded, especially those relating to inheritance and maintenance.
- (ii) **Marital rape:** Another key gap in Malawi's laws relates to marital rape, which is not unequivocally outlawed. Malawi's Penal Code defines rape as unlawful carnal knowledge with a woman or girl without her consent,²⁰² however, courts have held that this does not extend to marriage:

"The question has been raised whether a wife can lawfully refuse intercourse at any time, that is to say, irrespective of custom and place, etc. in this connection, it would seem reasonable for a respectable wife to refuse her husband, e.g., in a public place in front of other people. But in a normal way, I doubt whether she can do so... It has been observed that a man can never be guilty of raping his wife and conversely that she can never refuse her consent. Whether this is a sound argument or not, I am inclined to the view... that a wife

cannot lawfully refuse her husband intercourse."²⁰³

Additionally, under customary law in Malawi marriage results in presumed and perpetual consent to sex. The Marriage, Divorce and Family Relations Act seems to confirm this position. Rather than prohibiting marital rape outright, it states that a spouse may deny the other spouse the right to consummation on certain limited grounds, such as poor health, post-natal recuperation, post-surgical convalescence, a reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological injury or harm to either spouse, or reasonable respect for custom.²⁰⁴ Additionally, the Act provides that a husband commits rape if he has sexual intercourse with his wife without her consent *while they are legally separated*.²⁰⁵ Consequently, women's ability to refuse sex within marriage is limited and a wife's lack of consent only amounts to rape if the spouses are legally separated. This is an egregious violation of women's rights to equality, dignity and bodily autonomy.

- (iii) **Same-sex marriage:** Marriage in Malawi is restricted to opposite sex couples. Section 14 of the Marriage, Divorce and Family Relations Act states that two persons of the opposite sex who are both not below the age of eighteen years, and are of sound mind, may enter into marriage with each other. Similarly, cohabitation is defined as the fact of a man and a woman, not married to each other in accordance with this Act, living together as, or as if they were, husband and wife.²⁰⁶ Same-sex couples are thus denied the protection of the law and the right to form families.

RECOMMENDATIONS

Implementation: The prohibition of child marriage must continue to be enforced.

Legal reform:

- ▶ Marital rape must be expressly prohibited. In addition, the law regarding rape should be made gender neutral.
- ▶ Same-sex marriage should be recognised by law.
- ▶ Steps must be taken to protect the rights of women in polygamous customary or religious marriages.

200 Section 51 Marriage, Divorce and Family Relations Act 2015

201 Article 6(c) of the Maputo Protocol

202 Section 132 of the Malawi Penal Code reads: Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, shall be guilty of the felony termed rape

203 *R vs Mwasomola* 4 ALR (Mal) 572

204 Section 48(7) of the Marriage, Divorce and Family Relations Act 2015

205 Section 62 of the Marriage, Divorce and Family Relations Act 2015

206 Section 2 of the Marriage, Divorce and Family Relations Act 2015

THANDI'S* STORY

Malawi



Case study collected with the support of People Serving Girls at Risk (PSGR)

In Malawi, an estimated 38% of girls are married before reaching 18 years of age, and 7% are married before their 15th birthday. Before 2017, Section 22 of the Constitution allowed marriage of children between the ages of 15 and 18 with the consent of parents and guardians. In 2017, two years after adopting the Constitutional Amendment Act, Parliament amended the Constitution to make 18 the absolute minimum age of marriage without exceptions. In Thandi's case, while she was married after the reform, child marriage continued to be a practice despite the law prohibiting it. The government needs to be vigilant in enforcing these laws, with community awareness being a critical component of law enforcement.

"My name is Thandi*. I live in a mud house with a grass-thatched roof in a dry, rural place in the Neno District of Malawi. My life took a drastic turn upon the death of both my parents. My grandmother decided to force me into marriage in 2022 when I was only 14 years old. She received a bride price of 15,000 Malawian Kwacha (approximately USD 8), which she used to buy food for the extended family.

Marriage as a child proved to be a difficult journey. The challenges were overwhelming. My husband was violent, and the dreams I had for my education were abruptly halted when I left school in Standard 7 (Grade 6). This impacted not only my education but also my mental and emotional well-being. Watching my friends continue with their schooling while I grappled with the challenges of marriage has left lasting scars.

I am now a mother to a baby boy. Being a parent at such a young age, I couldn't play with my friends or enjoy some good banter. Sometimes, I would watch them come from school from my grass-thatched house veranda and cry. The struggles of child marriage are still vivid: the beatings, the lost opportunities, and the hunger - my husband would often beat me senselessly, and I would go to bed without food often.

I underwent a lot of hardship while I was pregnant because the man never gave me any financial support. My husband ran away when I was five months pregnant after hearing that People Serving Girls at Risk (PSGR), a national civil society organisation, had intervened and was looking for the perpetrators of child marriage. I have not seen him since. I hear that he currently resides in Mozambique.

During my pregnancy, a community-based organisation came to my rescue. It provided me with meagre support, offering one bag of corn flour, two litres of cooking oil, and five kilos of beans. Once in a while, they would come and give these supplies to the girls who had been married and pregnant at an early age in our community, but this was not sustainable, and I would sleep hungry sometimes.

I didn't know the law could protect me against child marriage

I didn't know the law could protect me against child marriage as I was not aware of the legal instruments available. I have since learned that child marriage is illegal after I encountered a lady working for a community-based organisation who informed me about the criminalisation of child marriage in Malawi. She also encouraged me to be a voice for change and to educate our community about the dangers of child marriage. I firmly believe that everyone in Malawi, including children, should know the risks and consequences of such practices.

Despite the hardships, I hold on to my dreams. I aspire to become a nurse and to be self-reliant, and I am patiently waiting for my baby to grow up so that I can pursue my aspirations and finally break free from the chains of child marriage."

* Not her real name



MOZAMBIQUE

COUNTRY PROFILE

Article 11(5) of the 2004 Constitution of Mozambique establishes 'the defence and promotion of human rights and of the equality of citizens before the law'. To reflect this, Article 35 on the principles of universality, provides for equality of citizens and non-discrimination on the basis of, amongst others, sex. Article 36 on principles of equality further provides that '[m]en and women shall be equal before the law in all spheres of political, economic, social and cultural life'. Article 39 goes a step further and provides that discrimination on the basis of sex, amongst others, undermines national unity and creates division and is punishable by law. Article 122 of the Constitution specifically mentions the promotion, protection and development of women 'in all spheres of political, economic, social and cultural life of the country'.

Article 119 presents the family as the 'fundamental unit and basis of society'. It further provides that free consent must be the basis of marriages. Both parents can pass down their Mozambican citizenship to their children.²⁰⁷

Article 119 of the Constitution states that '[t]he law shall establish forms in which traditional and religious marriage shall be esteemed, and determine the registration requirements and effects of such marriage'. Article 17 of the Family Law Act No. 22/2019 recognises civil, religious and traditional marriages and this extends to *de facto* marriages.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	21 April 1997	None
African Charter	22 February 1989	None
Maputo Protocol	9 December 2005	None

Article 43 of the Constitution provides that the latter shall be interpreted in line with the UDHR and the African Charter.

MAIN TRENDS IN FAMILY LAW

Articles 318 and 322 of the Family Law Act No.22/2019 provide that both parents have parental authority over their children during marriage or *de facto* union and in the event of divorce, separation, marriage annulment or termination of a *de facto* union.²⁰⁸

Articles 179 and 193 provide that all men and women have equal rights to initiate and finalise a divorce or annulment.

In 2009, the government adopted a Domestic Violence Law²⁰⁹ that prohibits violence against women, including marital rape.

²⁰⁷ Article 23(1) of the Mozambique Constitution 2004, amended 2007. Available at https://www.constituteproject.org/constitution/Mozambique_2007 (accessed 17 April 2024)

²⁰⁸ <https://faolex.fao.org/docs/pdf/moz208614.pdf> (accessed 17 April 2024)

²⁰⁹ <https://learningpartnership.org/resource/violence-against-women-prevention-law-mozambique-document-portuguese> (accessed 17 April 2024)

KEY GAPS AND CONTESTATIONS

- (i) **Polygamy:** While Article 18 of the Family Code prohibits polygamy, its provisions only apply to civil marriages and to religious and traditional marriages duly transcribed in the civil registry. This provision leaves a void when it comes to women in religious and traditional marriages whose marriages are not registered with the civil registry.
- (ii) **Child marriage:** Article 30 of the Family Law Act Law No. 22/2019 sets the legal age of marriage for both men and women at 18 years with no exceptions. As a general rule, only people over eighteen years of age can get married, in accordance with Article 30, paragraph 1, a) of the Family Law. Exceptionally, a man and a woman over sixteen years of age can get married when there are circumstances of recognised public and family interest and when there is the consent of the parents or legal representatives.²¹⁰
- (iii) **Inheritance:** Articles 66 and 2133 of the Civil Code²¹¹ provide for equal inheritance of surviving spouses, sons and daughters. Moreover, Articles 10 and 15 Law No 19/97 on Land provide that men and women have a right to inheritance regardless of their gender. However, Article 12 acts as a potential clawback clause since it provides that land inheritance must be in line with customary and traditional practices, although these must not be against the Constitution which includes equality on the basis of sex.

RECOMMENDATIONS

Sensitisation: Sensitise the population about equality in the Constitution, Civil Code and Law on Land and the customary and traditional practices that are against inheritance rights of women.

Law reform and effective implementation: Amend the law to eliminate all exceptions for marriage for those under 18 years and effectively implement the laws on child marriage using a multi-sectoral approach in accordance with the SADC Model Law on Eradicating Child Marriage and Protecting Children already in Marriage.

210 Report from the Government of the Republic of Mozambique pursuant to Article 62 of the ACHPR. (Consolidated Report 2015 to 2021. Available at <https://achpr.au.int/sites/default/files/files/2023-12/engmozambiqueconsolidated-report-2015-2021.pdf>

211 <https://resourceequity.org/record/881-mozambique-civil-code/> (accessed 17 April 2024)



COUNTRY PROFILE

Family law in Nigeria is governed primarily by statute, influenced by English law, and customary law, which includes Islamic law.²¹² Nigeria is a federal system and hence, even though there might be some progressive amendments at the federal level, these need to be adopted by States, where there are often outdated laws that are deeply patriarchal, leading to uneven protection in different States.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	13 June 1985	None
African Charter	22 June 1983	None
Maputo Protocol	16 December 2003	None

MAIN TRENDS ON FAMILY LAW

A key area of progress has been in relation to inheritance. While the Constitution of Nigeria guarantees rights to property and equal protection without discrimination on grounds of sex, most of Nigeria's customary legal systems do not allow women to inherit from their deceased husbands or fathers.²¹³ For some time, the courts enforced this position, however, a string of case law has in recent years confirmed that it is unconstitutional to discriminate against women on the issue of land, housing, property, and inheritance.²¹⁴ These cases have allowed widows, daughters, and children born out of wedlock to inherit and should be celebrated. Unfortunately, in practice women continue to be deprived of the right to inherit and manage property.²¹⁵ Nigeria must ensure that this position is applied and enforced consistently.

Nigeria has also made some progress towards eradicating child marriage.. In 2003 Nigeria adopted the Child's Rights Act, which has been assented by 35²¹⁶ out of 36 States,²¹⁷ which prohibits child marriage²¹⁸ and makes those who marry or promote the marriage of a child liable to a fine, imprisonment for five years or both a fine and imprisonment.²¹⁹ While these are positive steps, Nigeria's rates of child marriage remain among the highest on the continent.²²⁰ Notably, harmful traditional practices still exist where puberty is used in some cultures as a marker of suitable maturity.²²¹

Finally, in 2015 Nigeria adopted the Violence Against Persons (Prohibition) Act 2015²²², which is an important step towards combating gender-based violence, including violence within the home. In particular, the Act should be applauded for prohibiting female genital mutilation.

213 JN Ezeilo "Rethinking women and customary inheritance in Nigeria" (2020) *Commonwealth law Bulletin* at 2-4. Available at <https://www.tandfonline.com/doi/abs/10.1080/03050718.2020.1818596> (accessed 17 April 2024)

214 See for example *Mojekwu vs Mojekwu* (1997) 7 NWLR 283; *Uke vs Iro* (2001) 11 NWLR (Pt.723) 196; *Mojekwu vs Ejikeme* (2000) 5 NWLR 402; *Onyibor Ane-kwe and Anor vs Maria Nweke* (2014) 9 NWLR (Pt.1412) 393; and *Ukeje vs Ukeje* (2014) 11 NWLR (Pt.1418) 384

215 *Report of the Africa Family Law Campaign Consultative Outreach Meeting by Equality Now & partners* (2020)

216 Adamawa and Bauchi states assented to the Child's Rights Act in November 2022 and December 2023 respectively although this has not been officially updated in the child rights law tracker. Available at https://factchecknews.com.ng/2022/11/03/breaking-fintiri-signs-adamawa-state-child-protection-law-2022/#google_vignette and <https://guardian.ng/news/bauchi-domesticates-child-right-act-signs-2024-budget-int-o-law/> (Accessed 16 April 2024)

217 <https://www.partnersnigeria.org/childs-rights-law-tracker/> (25 May 2023)

218 Section 21 Child's Rights Act 2003. Available at <https://placng.org/laws/nigeria/laws/C50.pdf> (accessed 17 April 2024)

219 Section 21 Child's Rights Act 2003

220 The United Nations Development Fund states that 43 percent of women ages 20 to 24 had been married by the age of 18 in Nigeria

221 "Prepubescent" marriage is very common in Nigeria. A girl is first married, and the man is expected not to touch her until she reaches puberty. Available at <https://www.aucecma.org/nigeria-country-profile-on-child-marriages/> (accessed 16 April 2024)

222 VIOLENCE AGAINST PERSONS (PROHIBITION) ACT, 2015 – Laws Available at <https://laws.lawnigeria.com/2018/04/18/lfn-violence-against-persons-prohibition-act-2015/> (accessed 17 January 2024)

KEY GAPS AND CONTESTATIONS

(i) Discriminatory inheritance laws and practices:

Customary law is deeply patriarchal and consists of a number of practices which amount to unfair discrimination against women, such as those relating to inheritance and child marriage. In addition, women in Nigeria fall victim to harmful traditional practices such as widow inheritance and surrogate marriage.²²³ These practices treat women as property, to be handed over or inherited, rather than as full human beings. Steps must be taken to combat and prohibit these practices as well as the mindsets that give rise to them.

(ii) Discriminatory statutory laws:

While customary law in Nigeria is riddled with flaws, the statutory marriage regime is also problematic. In particular, the approach of courts to dividing marital property after divorce has tended to privilege men.²²⁴ Courts use direct financial contribution as the basis for division of matrimonial property.²²⁵ Section 72 of the Matrimonial Causes Act²²⁶ gives courts the discretion to divide matrimonial

property in a just and equitable way. This power should be exercised to recognise non-financial contributions to the marriage so that economically weaker spouses (generally women) are not unfairly disadvantaged.

(iii) Marital rape:

A further gap is that, in conformity with customary law, the Northern Nigeria Penal Code and Criminal Code do not recognise marital rape as rape.²²⁷ And the Penal Code of Northern Nigeria provides that an assault by a man on a woman is not an offense if they are married, if native law or custom recognises such “correction” as lawful, and if there is no grievous hurt.²²⁸ Nigerian law thus allows domestic violence and rape within marriage.

(iv) Same-sex marriage:

Not only are same-sex marriages not recognised in Nigerian law, parliament has also passed the Same-Sex Marriage (Prohibition) Act criminalising and penalising those who solemnise and witness same-sex marriages.²²⁹

RECOMMENDATIONS

Judiciary:

- ▶ Nigeria must ensure that judicial precedent allowing women to inherit under customary law is consistently applied and enforced.
- ▶ Courts must use their discretion under Section 72 of the Matrimonial Causes Act to divide matrimonial property in a just and equitable way, recognising the non-financial contributions of women to the joint estate.

Sensitisation and awareness raising: Nigeria must take steps to eradicate harmful traditional practices such as widow inheritance and surrogate marriage.

Legal reforms:

- ▶ Provisions of the Penal Code allowing marital rape and “corrective” assault within marriage must be repealed.
- ▶ Nigeria must repeal the Same-Sex Marriage (Prohibition) Act and take steps to legalise same-sex marriage.

223 Widow inheritance occurs when a man dies and his brother or eldest son “inherits” his widow, entering as a substitute into the marriage without the need to perform additional marriage celebrations. Surrogate marriage occurs when a woman dies and her young sister is presented to the widower as her substitute, by her family, without the need to perform additional marriage celebrations. See LO Nwauzi and GO Akolokwu *General Principles of Nigerian Customary Law* 85

224 E Etomi and E Asia “Family Law in Nigeria: Overview” Thomson Reuters Foundation (2020). Available at: [https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=\(sc.Default\)#co_anchor_a311247](https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=(sc.Default)#co_anchor_a311247) (accessed 17 April 2024)

225 See for example *Essien vs Essien* (2009) 9 NWLR (Pt. 1146) 306, 331-332 and *Adaku Amadi vs Edward Nwosu* (1992) 6 SCNJ 59. Available at <https://www.lawglobalhub.com/adaku-amadi-v-edward-n-nwosu-1992-11jr-sc/> (accessed 17 April 2024)

226 Matrimonial Causes Act. Available at <https://lawsofnigeria.placng.org/laws/M7.pdf> (accessed 17 January 2024)

227 See Section 282 of the Northern Nigeria Penal Code 1959 Available at <https://ir.nilds.gov.ng/bitstream/handle/123456789/651/The%20Panel%20Code%20Law%2C%20Northern%20Region%20No.18%201959.pdf?sequence=1&isAllowed=y> and Section 357 of the Criminal Code 1990. Available at <https://www.refworld.org/legal/legislation/natlegbod/1916/en/65684> (accessed 17 April 2024)

228 Section 55(1)(d) of the Northern Nigeria Penal Code 1959

229 Same-Sex Marriage (Prohibition) Act 2013. Available at <https://laws.lawnigeria.com/2020/01/10/same-sex-marriage-prohibition-act-2014/> (accessed 17 January 2024)



COUNTRY PROFILE

The Preamble of the 2001 Constitution of Senegal²³⁰ provides that the country rejects and eliminates all forms of injustice, inequalities, and discrimination. Article 1 then builds on the Preamble to provide for non-discrimination on the basis of, sex amongst others. Article 7 further provides that both men and women are equal and that the law promotes the equal access of men and women to mandates and functions.

Article 1 of the 2001 Constitution provides that Senegal is a secular State. Article 25-3 further provides that family matters are regulated by civil law. Family law in the country is mainly covered by the 1972 Family Code²³¹ which was adopted with the view of synthesising Islamic and customary norms with French civil law, taking into consideration the improvement of the condition of women in the family.²³² Informal unions are therefore not recognised by the law.

The Preamble of the 2001 Constitution affirms the country's adherence to the UDHR, the African Charter and CEDAW. This implies that all the rights protected by these treaties should be a lived reality for Senegalese women.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	5 February 1985	None
African Charter	13 August 1982	None
Maputo Protocol	27 December 2004	None

MAIN TRENDS IN FAMILY LAW

The Constitution of Senegal contains several provisions that are in line with international human rights standards relating to women in the family. For instance, Article 15 of the Constitution provides that both men and women 'have the right to accede to the possession and to the ownership of land' as determined by law. Article 17 further protects the family as the natural and moral base of the human community and requires the State to 'see to the physical and moral health of the family and, in particular ... of the elderly persons'. The inclusion of elderly persons here implies that the State has to look after the well-being of older women too, who often suffer vulnerabilities at the hands of their family.

Article 18 of the 2001 Constitution further states that '[f]orced marriage is a violation of individual liberty'. It also states that forced marriage 'is forbidden and punished within the conditions established by law'. Forced marriage is also banned by Article 108 of the Family Code. Concerning property, Article 19 provides that the woman has the right to have her own estate, which she has the right to manage on her own. Concerning parental duties, Article 20 establishes that both parents have the right and duty to raise their children.

Article 157 of the Family Code provides that both spouses can request for a divorce. Upon separation or divorce, under Article 278 of the Family Code, the judge can decide to give custody to any of the parents taking into account the best interests of the child.

Book VI of the Family Code provides that both the husband and the wife have a claim over the matrimonial property.

²³⁰ Available in French and in English (accessed 17 January 2024)

²³¹ Code de la famille Senegalais (accessed 17 January 2024)

²³² A Bouland 'Family law in Senegal: Opposition and pragmatic pluralism' (2022) 56 *Canadian Journal of African Studies* 1164

KEY GAPS AND CONTESTATIONS

(i) **Child marriage:** One major gap in the Senegalese law is the failure to protect the child from marriage. According to Article 111 of the Family Code, the minimum age of marriage for a boy is 18 and 16 for a girl. However, there can be exceptions to the minimum age of marriage for serious causes, which can be determined by the President of the Court and the consent of the person exercising parental authority.

(ii) **Remarriage and parental authority:** A woman can only remarry 300 days after the dissolution of the first marriage. There is a time limit of three months in the case of divorce or annulment of the marriage.²³³ This provision is discriminatory since men do not have to respect such timelines and they can remarry immediately after the dissolution, divorce, or annulment.

Article 152 of the Family Code provides that the husband is the head of the family. Article 153 also states that the husband chooses the matrimonial home and the wife follows him.

Article 277 of the Family Code provides that both the mother and the father have parental authority. However, during the marriage, such parental authority is exercised by the father as the head of the family, who is also responsible for all decisions related to the child. The mother will have parental authority only when a judge decides that the case falls under one of these instances: (1) total or partial forfeiture on behalf of the father; (2) the father cannot exercise his duties as the head of the family due to inability, absence or

alienability; (3) conviction for abandonment of the family; or (4) delegation of parental authority to the mother.

(iii) **Polygamy:** Under Article 65 of the Family Code, the husband, in the act of marriage, needs to establish whether it is a monogamous marriage or a polygamous one. Article 113 of the Family Code provides for women to not remarry before the dissolution of her first marriage, it provides that a man cannot remarry if he has a number of wives above what is prescribed by the law. The number of wives prescribed by Article 116 of the Family Code is four. The Family Code clearly allows for polygamous marriages by men.

(iv) **Inheritance:** The Family Code recognises both civil law and Muslim personal laws for succession. Under Article 407 of the civil law, the surviving wife has an equal right to inheritance of the deceased husband. However, under Articles 609 and 637 concerning inheritance as per Muslim Personal Law, surviving wives do not inherit on an equal basis. Additionally, sons and daughters do not have equal rights to inherit assets from their parents.²³⁴

(v) **Violence against women:** There is also a gap concerning the protection of women from violence since there is no comprehensive law on the same. Article 297 bis of the Criminal Code criminalises physical violence against a spouse but this is not sufficient.

(vi) **Abortion:** Article 305 of the Criminal Code criminalises any type of abortion and further criminalises anyone who disseminates information about the same.

RECOMMENDATIONS

Law reform:

- ▶ Reform family laws to:
 - ▶ increase the age of marriage to 18 without any exceptions;
 - ▶ remove the timelines that women must respect for remarriage;
 - ▶ prohibit polygamy while ensuring that women already in polygamous relationships are not disadvantaged;
 - ▶ ensure that both husband and wife are responsible for the family and that they both choose the matrimonial home together;
 - ▶ provide both mother and father with the same parental rights;
 - ▶ remove the Muslim Personal Law option for inheritance since it is discriminatory against women
- ▶ Reform the Criminal Code to allow abortion as per international human rights standards.
- ▶ Adoption of a comprehensive law against violence against women that comprises of domestic violence, including marital rape.

KHADIJA'S* STORY

Senegal



Case study collected with the support of Association des Juristes Sénégalaises

The Family Code of Senegal permits polygamous marriages for men (Article 116). It also protects women in polygamous marriages to a certain extent, where each wife can claim equal treatment (Article 149), and the husband cannot use the income of one of the wives for the benefit of the others (Article 369). While this protection is offered for women in polygamous marriages, it is not adequate/extensive, as demonstrated in Khadija's case. Khadija's story illustrates the negative impact of polygamous marriages on women and the aftereffects on women who opt for divorce. It further shows the need for family law reform in polygamous contexts to offer more protection to women during marriage and after divorce.

"My name is Khadija*, and I live with my son in Dakar, Senegal. I was married to my cousin as his **second wife**. My father arranged our union, believing my ex-husband would take good care of me as he was my father's nephew. However, our marriage lasted only four years, much to my father's disappointment.

Before our marriage, we agreed that I would keep my receptionist job in Dakar, and he would continue working as a senior technician at a telecommunication company in Bakel, a town over 600 kilometers away from Dakar.

After some time, he convinced me to move in with him, promising he had secured a job for me in Bakel. After resigning, I discovered he had lied to me, leaving me with no option but to become a housewife. Even my mother-in-law intervened and urged him to find me another job. But he firmly refused.

Later, he was transferred to Thiès, a region 70 kilometers from Dakar. Upon moving there, he demanded I stay at his first wife's house or leave his home. Feeling cornered and left with no choice, I returned to my parents' home with our son.

Shortly after, he filed a report of conjugal abandonment, accusing me of abandoning our family and matrimonial home. Later, he informed my father that he had repudiated me. Repudiation is a process where the husband has the right to end the marriage unilaterally without any explanation.

Three years later, I filed for an official divorce. My father didn't want me to take the matter to court, arguing that dirty laundry should be washed in the family. But I couldn't contain my suffering anymore, so I took my future into my own hands. Ultimately, my father had no choice but to support me.

I was determined to get full custody of my son since he had always lived with me and had minimal contact with

his father. Our son was just three months old the last time my ex-husband saw him. Furthermore, he never provided any financial support for our child. I've been taking care of the childcare expenses with the help of my father since the beginning.

I was lost at the start of the divorce procedure. Things were very slow, and the endless postponements did not make it easy. Being unemployed, I was already struggling to find money to buy tickets to travel to attend the court sessions. Therefore, I was not in a position to afford a lawyer for myself.

A friend suggested that I seek help from one of the legal aid clinics of the Association des Juristes Sénégalaises (AJS). Their services were truly beneficial, as obtaining custody of my son without a lawyer would have been challenging. Especially when my ex-husband had a personal lawyer and had requested the judge to let him have the child every other weekend. I didn't want that because my child is very young, and it could disturb him mentally.

The AJS lawyer who handled my case drafted the divorce petition and defended my right to exclusive custody throughout the prolonged proceedings. She convinced the judge that the child's best interests should precede all other considerations. Finally, the court granted me sole custody of my son.

I remarried in December 2023. My only concern now is how to support my child and pay for his education.

I think financial independence is crucial post-divorce. In my case, my ex-husband forced me to quit my job, and then he ended the marriage. If I were financially independent, I wouldn't have to wait for child support money at the end of every month. That hurts me a lot.

To other women facing divorce and custody battles, I would say stay strong, especially in the face of all the stigmatization."

* Not her real name



SOUTH AFRICA

COUNTRY PROFILE

The Constitution of the Republic of South Africa makes no mention of the right to family. The Constitution does guarantee the right to equality and protection from unfair discrimination on the grounds of sex, gender, sexual orientation and marital status.²³⁵

Treaty	Date of ratification	Reservations/Declarations
CEDAW	27 March 1997	None
African Charter	9 July 1996	None
Maputo Protocol	17 December 2004	“Reservations - Article 4(j): does not find application in the Republic of South Africa as the death penalty has been abolished. - Article 6(d): South Africa does not consider itself bound by this Article that a marriage be recorded in writing and registered in accordance with national laws in order to be legally recognised. - Article 6(h): South Africa enters a reservation on this Article, which subjugated the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children. Interpretative declarations - Article 1(f): definition of “discrimination against women” in the Protocol has the same meaning and scope as provided for in and interpreted by the Constitution of South Africa from time to time. - Article 31: The South African Bill of Rights shall not be interpreted to offer less favorable protection of human rights than the protocol, which does not expressly provide for such limitations.”²³⁶

²³⁵ Section 9 of the Constitution of the Republic of South Africa 1996, amended 2023. Available at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-04-feb-1997> (accessed 17 April 2024)

²³⁶ [https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf](https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf) (accessed 16 April 2024)

MAIN TRENDS ON FAMILY LAW

The Constitution gives South African courts the power and obligation to declare law or conduct inconsistent with the Constitution invalid,²³⁷ and to both interpret and develop the common law to be in line with the rights contained in the Bill of Rights.²³⁸ As a result, South African family law has undergone significant reform to give effect to the values of equality and dignity. There is an overwhelming trend towards progressive reform: In December 2023, a draft marriage bill was published in the Government Gazette with notable changes introduced. These include: all marriages to persons under 18 will be criminalised, with no exception (Chapter 7);-polygamous marriages will be recognised (Chapter 3) and equal legal status and capacity of spouses (Chapter 6).²³⁹ At the time of publishing this Report, the Portfolio Committee for Home Affairs had opened the Bill for public comment.²⁴⁰

The Matrimonial Property Act abolished marital power as early as 1984, repealing the common law rule granting husbands power over the person and property of their wives.²⁴¹

A diverse array of partnerships are recognised and protected by the law, including customary marriages²⁴² and same-sex marriages.²⁴³ Opposite and same-sex permanent life partnerships are not regulated by statute, but are recognised under the common law and the courts have extended statutory protection to those partnerships, such as those protections found within the Maintenance of Surviving Spouses Act and Intestate Succession Act, on the grounds that there are many valid ways to form families and all are worthy of equal protection of the law.²⁴⁴ Nonetheless, this piecemeal development of the common law is not ideal and the legislature should intervene to confer full protection of permanent life partners.

In all partnerships, women are guaranteed equal status, capacity and protection of the law as men.²⁴⁵ Children are also guaranteed a range of rights under the Constitution and the Children's Act, and their best interests are paramount.²⁴⁶

Customary law in South Africa is also subject to the provisions of the Constitution. South Africa's customary legal systems have historically been governed by the principle of male primogeniture, in terms of which the deceased is succeeded by his eldest son and women are ineligible to inherit. In *Bhe vs Magistrate, Khayelitsha*,²⁴⁷ the Constitutional Court held that Section 23 of the Black Administration Act (a remnant of apartheid legislation), which applied the system of male primogeniture, was inconsistent with the rights to equality and dignity and thus unconstitutional. In *Shilubana vs Nwamitwa*,²⁴⁸ the Constitutional Court held that observance of customary law by traditional authorities must be in accordance with applicable legislation, customs and the prescripts of the Constitution. In *Shilubana*, the Court held that custom and practice had developed to allow for women to succeed to the position of chieftainship.

237 Section 2 of the Constitution of the Republic of South Africa 1996, amended 2023

238 Section 39 of the Constitution of the Republic of South Africa 1996, amended 2023

239 https://static.pmg.org.za/B43-2023_Marriage_Bill.pdf (accessed 15 April 2024)

240 <https://businesstech.co.za/news/lifestyle/767324/new-marriage-laws-for-south-africa-take-the-next-big-step/> (accessed 15 April 2024)

241 Section 11 of the Matrimonial Property Act 1984. Available at https://www.gov.za/sites/default/files/gcis_document/201503/act-88-1984.pdf (accessed 17 April 2024)

242 The Recognition of Customary Marriages Act 1998. Available at <https://www.justice.gov.za/legislation/acts/1998-120.pdf> (accessed 17 April 2024)

243 The Civil Union Act 2006. Available at https://www.saflii.org/za/legis/consol_act/cua2006139/ (accessed 17 April 2024)

244 See *Gory vs Kolver N.O. (Starke and Others Intervening)* [2006] ZACC 20 and *Bwanya vs Master of the High Court* [2021] ZACC 51. Available at <https://www.saflii.org/za/cases/ZACC/2006/20.html> (accessed 17 April 2024)

245 See for example Section 6 of the Recognition of Customary Marriages Act 1998. Available at <https://www.justice.gov.za/legislation/acts/1998-120.pdf> (accessed 17 April 2024)

246 See Section 28 of the Constitution of the Republic of South Africa 1996 and the Children's Act 2008

247 [2004] ZACC 17

248 [2008] ZACC 9

KEY GAPS AND CONTESTATIONS

(i) Non recognition of religious marriages:

Religious marriages are not recognised in South African law, largely as a result of the discriminatory apartheid regime. There have been some steps towards recognizing Muslim marriages, to protect vulnerable parties (especially women) from financial destitution in the event of divorce or death. In 2010, parliament drafted a Muslim Marriage Bill, however the Bill has not been passed into law. In the time being, the courts have interpreted the Intestate Succession Act and the Maintenance of Surviving Spouses Act to include spouses married in terms of Muslim rites, in both monogamous and polygamous marriages.²⁴⁹ In 2022, the Constitutional Court of South Africa held that the Marriage Act and the Divorce Act are inconsistent with the Constitution of South Africa in that they do not afford Muslim marriages recognition. The Court directed that the existing legislation be amended and updated or new legislation be initiated and passed to ensure recognition and protection of Muslim marriages, within a period of 24 months from the date of the judgment.²⁵⁰ While this is progress for Muslim marriages, other religious marriages such as Hindu marriages, Khoi and San marriages, and Jewish marriages are no closer to recognition, leaving other women vulnerable to the consequences of non-recognition and non-regulation.

(ii) Polygamy:

While the Marriage Act and Civil Union Act prohibit polygamy, polygamy is permitted under customary law and the Recognition of Customary Marriages Act. While polygamy is a part of religious and cultural customs, some argue that polygamy violates women's rights to equality within marriage. The Maputo Protocol, for example, obliges States to adopt measures to ensure that monogamy is encouraged as the preferred form of marriage.²⁵¹ South African law confers significant protection on women married in polygamous marriages. South Africa has also toyed with the idea of

legalising polyandry, to allow women to marry multiple spouses in the interests of full equality. The South African government, through the Department of Home Affairs, however rejected this proposal in 2022.²⁵²

(iii) Child marriage:

A further issue is that of child marriage. While minors cannot marry in terms of the Civil Union Act²⁵³ they may marry under the Marriage Act. The Marriage Act allows minors to marry with parental consent, though boys under 18 and girls under 16 may not marry except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable.²⁵⁴ The Recognition of Customary Marriages Act, though it sets the minimum age of marriage of 18, contains similar exceptions allowing minors to marry with the permission of the Minister.²⁵⁵ While child marriage is not an endemic problem in South Africa, this loophole should be closed and the minimum age of marriage across all statutes should be regularised to 18.

(iv) Violence against women:

One of the greatest challenges facing women in South Africa, within and outside of family structures, is gender-based violence. The State has taken progressive steps to curb gender-based violence, including the enactment of the Domestic Violence Amendment Act²⁵⁶, Criminal and Related Matters Amendment Act²⁵⁷, Criminal Law (Sexual Offences and Other Related Matters) Amendment Act²⁵⁸, which among other things repealed the common law offences of rape and indecent assault and replaced them with new expanded statutory offences of rape and indecent assault, applicable to all forms of sexual penetration or violation without consent, irrespective of gender. The Act also created an expanded list of sexual offences and eliminated the differentiation drawn between the age of consent for different consensual sexual acts. Notably, section 56(1) states that it is not a valid defence for a person accused of rape to contend that a marital or other relationship exists or existed between

249 See *Daniels vs Campbell and Others* (CCT 40/03) [2004] ZACC 14 and *Hassam vs Jacobs NO and Others* [2009] ZACC 13. Available at <https://www.saflii.org/za/cases/ZACC/2004/14.html> (accessed 17 April 2024)

250 *Women's Legal Centre Trust vs President of the Republic of South Africa* (CCT 24/21). Available at <https://www.saflii.org/za/cases/ZACC/2022/23.html> (accessed 17 April 2024)

251 Article 6(c) of the Maputo Protocol.

252 Polyandry in SA: Govt says no to women with multiple husbands. <https://www.ecr.co.za/news/news/polyandry-in-sa-govt-says-no-to-women-with-multiple-husbands/>

253 See Section 1 of the Civil Union Act 2006

254 Sections 24-26 of the Marriage Act 1961. Available at https://www.gov.za/sites/default/files/gcis_document/201505/act-25-1961.pdf (accessed 17 April 2024)

255 See Section 3 of the Recognition of Customary Marriages Act, 1998, <https://www.justice.gov.za/legislation/acts/1998-120.pdf>

256 Domestic Violence (Amendment) Act 2022. Available at https://static.pmg.org.za/Domestic_Violence_Act.pdf (accessed 17 April 2024)

257 Criminal and Related Matters (Amendment) Act 2022. Available at https://static.pmg.org.za/Crim_and_Related.pdf (accessed 17 April 2024)

258 Criminal Law (Sexual Offences and Related Matters) Amendment Act 2022. Available at https://static.pmg.org.za/Crim_Law.pdf (accessed 17 April 2024)

him or her and the complainant, thus prohibiting marital rape. The Protection from Harassment Act²⁵⁹ defines and criminalises sexual harassment while the Promotion of Equality and Prevention of Unfair Discrimination Act²⁶⁰ classifies gender-based violence and female genital mutilation as prohibited instances of unfair discrimination. The State has also adopted a National Strategic Plan on Gender-Based Violence and Femicide²⁶¹ which provides for comprehensive and multi-sectoral responses to gender-based violence. Unfortunately, many of these services are under-resourced and overburdened. As such, violence against women, femicide and rape including intimate partner violence and domestic abuse persist.

RECOMMENDATIONS

Legal reforms:

- ▶ South Africa must legislate protections of permanent life partners.
- ▶ It must require all marriages to be registered under civil law.
- ▶ South Africa must ensure sufficient protection for women in polygamous customary or religious marriages.
- ▶ South Africa must adopt 18 as the uniform minimum age of marriage.

Institutional reforms:

South Africa must improve its criminal justice response to gender-based violence and fully resource and implement the National Strategic Plan on Gender-Based Violence and Femicide.

²⁵⁹ Protection from Harassment Act 2011. Available at <https://www.justice.gov.za/legislation/acts/2011-017.pdf> (accessed 17 April 2024)

²⁶⁰ Promotion of Equality and Prevention of Unfair Discrimination Act 2000. Available at <https://www.justice.gov.za/legislation/acts/2000-004.pdf> (accessed 17 April 2024)

²⁶¹ <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 17 April 2024)



COUNTRY PROFILE

The Transitional Constitution of the Republic of South Sudan, 2011 guarantees every person the right to marry a person of the opposite sex and to found a family according to their respective family laws, provided that no marriage shall be entered into without the free and full consent of the man and woman intending to marry.²⁶² The Constitution also provides for women’s rights, including full and equal dignity of the person with men, the right to own property and the right to share in the estates of their deceased husbands.²⁶³ The Constitution establishes the State’s obligation to enact laws to combat harmful customs and traditions which undermine the dignity and status of women.²⁶⁴

Treaty	Date of ratification	Reservations/Declarations
CEDAW	30 April 2015	None
African Charter	23 October 2013	None
Maputo Protocol	24 February 2023	-

MAIN TRENDS ON FAMILY LAW

South Sudan has not yet adopted a statutory framework for governing family law, though the development of a national family law is in progress and a Steering Committee has been established for this purpose.²⁶⁵ The Constitution obliges courts to apply customary law subject to the provisions of the Constitution and the law.²⁶⁶ As a result, customary law governs personal and family law. This is cause for significant concern, as will be elaborated upon below.

South Sudan has however adopted legislation to combat violence against women and certain harmful practices. The Penal Code prohibits rape, female genital mutilation, and forced marriage.²⁶⁷ In addition, the Child’s Act prohibits early marriage,²⁶⁸ though no specific minimum age for marriage is provided in the Act or the Constitution. The Constitution states that every person of marriageable age has the right to marry according to their respective family laws - which has serious implications on child marriage since certain community customs define the end of childhood as the attainment of puberty.²⁶⁹ However, in a widely publicised case, a court annulled the marriage of a 16-year-old girl.²⁷⁰ There is thus potential for positive change in this area, though the law must be clarified by the Legislature and steps must be taken to implement the law and change mindsets. Currently, forced marriage remains prevalent and South Sudan has the seventh highest prevalence of child marriage in the world.²⁷¹

262 Section 15 of the Constitution of the Republic of South Sudan 2011, amended 2013. Available at <https://faolex.fao.org/docs/pdf/ssd127441.pdf> (accessed 17 April 2024)

263 Section 16 of the Constitution of the Republic of South Sudan 2011, amended 2013

264 Ibid

265 United Nations Development Fund “Steering a Path to Family Law in South Sudan”. Available at: <https://www.undp.org/south-sudan/steering-path-family-law-south-sudan> (accessed 17 April 2024)

266 Section 167(3) of the Constitution of the Republic of South Sudan 2011, amended 2013

267 Section 247, 259 and 273 of the Penal Code 2008. Available at <https://www.wipo.int/wipolex/en/text/250684> (accessed 17 April 2024)

268 Section 23 of the Child Act 2008. Available at <https://www.refworld.org/legal/legislation/natlegbod/2008/en/66904> (accessed 17 April 2024)

269 South Sudan, State Party Report to the Committee on the Rights of the Child, para 46

270 See <https://www.reuters.com/article/us-southsudan-women-court-idUSKCN1U42CK>

271 <https://www.reuters.com/article/us-southsudan-women-court-idUSKCN1U42CK>

KEY GAPS AND CONTESTATIONS

- (i) **Legal pluralism:** Due to the lack of statutory law and the Constitution's recognition of South Sudan's plural legal system, family law is governed by the custom of the large number of ethnic groups in South Sudan.²⁷² This leads to a number of problems:
- ▶ There is no minimum age for marriage under customary law.
 - ▶ Polygamy is legal for men.²⁷³
 - ▶ Divorce is generally easier for men to obtain.²⁷⁴
 - ▶ Women are often deprived of an equitable share in property upon divorce or deprived of inheritance upon the death of their husbands.²⁷⁵
 - ▶ While the Child Act grants equal rights of custody to parents,²⁷⁶ custom and tradition generally place children with their fathers, unless they are of tender age.²⁷⁷ The strong likelihood of losing property and custody of children, as well as the rule that divorce requires repayment of the bride price, prevent many women from leaving unhappy and even abusive marriages.²⁷⁸
- (ii) **Harmful traditional practices:** A number of harmful traditional practices persist in custom, including polygamy, forced marriages, child marriage, and wife inheritance.²⁷⁹

RECOMMENDATIONS

Legal reforms:

- ▶ A minimum marriage age of 18 without exception must be adopted.
- ▶ Legislation must be enacted to regulate marriage, divorce, matrimonial property rights, and inheritance. This legislation must be effectively implemented and must give effect to women's rights under the Constitution.

Policy and awareness raising:

South Sudan must adopt comprehensive policy and awareness campaigns to combat harmful traditional practices, including female genital mutilation, wife inheritance, child marriage, and forced marriage.

²⁷² OECD Development Centre "Social Institutions and Gender Index" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/data-sheets/2019/SS.pdf>

²⁷³ Id

²⁷⁴ Id

²⁷⁵ <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/South-sudan.pdf> (accessed 17 April 2024)

²⁷⁶ Sections 112-114 of the Child Act 2008

²⁷⁷ OECD Development Centre "Social Institutions and Gender Index" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/data-sheets/2019/SS.pdf>

²⁷⁸ Id

²⁷⁹ Id



AJAK'S* STORY

Case study collected with the support of Survivors Network in South Sudan

"My name is Ajak*. I reside in a village in Juba, South Sudan. I have three children: my firstborn is ten, my second-born is five, and my youngest is two. I am an entrepreneur, and to put food on our table, I sell charcoal, groundnut paste, and local delicacies like Mandazi (cake) by the roadside.

My life's journey has led me through hardships many may never comprehend. Fifteen years ago, I embarked on a marital journey filled with hope and dreams. Little did I know that misunderstanding, cultural norms, and the complexities of family dynamics would shape my destiny. I was compelled to divorce my husband due to his failure to tend to the family's basic needs, including food, school fees, and clothing, aggravated by his polygamous behaviour and his attempts to bring additional wives into our lives.

My duties also became overwhelming, including paying school fees and feeding our three children. When our families attempted to mediate and discuss our family affairs, the situation became complicated, with no clear resolution in sight. The cultural norms that once bound us now posed barriers, making it difficult to seek a divorce. I left my marital home with my children to stay with my mother. As efforts to divorce through traditional means were futile, I went to court and filed for divorce.

Unfortunately, the divorce process has taken a toll on me, both morally and socially. In our culture, children are expected to remain with their mothers after divorce until they are grown, and any unpaid dowry must be settled before finalising the agreement. However, the reality has been different.

My ex-husband sought to claim our children, but they are still in need of their mother's care. The attempt to forcefully take them from me to frustrate me led me to seek justice through family members and community leaders. However, these efforts were unsuccessful, so I filed the matter in court to seek justice. Unfortunately, the hearing has been delayed for over two years now. In South Sudan, a lack of influential political connections and money to pay off people and navigate the system often results in prolonged legal battles.

Family law in South Sudan is currently in transition as part of broader democratic reforms (between 2019 and 2024). There is no national legislation governing marriage, divorce, matrimonial property rights, and inheritance, so couples in South Sudan have the right to decide which marital property regime will be in effect during their marriage. This determination affects whether the property is owned individually or jointly. However, women's rights in areas such as choosing a spouse, obtaining a divorce, protecting themselves from domestic violence, securing custody of their children, and inheriting marital property remain restricted and dependent on traditional customs of justice.

The legal system is mostly corrupt. The prolonged delays and additional fees of 300,000 SSP (equivalent to USD. 2,303) in the name of legal fees demanded during the legal process have frustrated me. This has affected me emotionally and created an impossible financial burden, which impedes my ability to fulfil the court's requirements. The divorce process is still ongoing, but I wonder if I will ever get justice as I do not have the money to pay people to navigate the system.

I sought counselling from a Catholic Nun who provided a semblance of solace. I attended weekly meetings with women's groups that shared similar experiences and provided advice, which has become a source of strength.

I advise others facing similar challenges to be strong, stay connected to their community, and attend workshops on children's and women's rights to gain more experience. As for me, I am ready to amplify the voice of the voiceless to bring attention to the struggles of women and their children facing similar situations. In sharing my story, I hope we can pave the way for a better tomorrow where women access equal justice as their male counterparts. It has been particularly difficult for me (financially and emotionally since the case has taken so long). No woman should suffer like this."

I was compelled to divorce my husband due to his failure to tend to the family's basic needs

* Not her real name



COUNTRY PROFILE

The Constitution of the Republic of Sudan makes no mention of the right to family. It does, however, protect women's rights including the equal right to enjoy all civil, political, social, cultural, and economic rights.²⁸⁰ Further, the Constitution obliges the State to work to combat harmful customs and traditions that reduce the dignity and status of women.²⁸¹

Treaty	Date of ratification	Reservations/Declarations
CEDAW	Sudan is not a State party to CEDAW	-
African Charter	18 February 1986	None
Maputo Protocol	Not ratified Signed: 30 June 2008	-

MAIN TRENDS ON FAMILY LAW

Family law in Sudan is among the most conservative in North Africa and has been resistant to reform.²⁸² Family law in Sudan is largely governed by a particularly conservative version of Islamic law, codified in the Muslims (Personal Status) Act.²⁸³ Non-Muslims are governed by customary law or the religious law and customs of their community.²⁸⁴ These legal systems are deeply patriarchal. Progress in law reform has been hampered by the state of perpetual conflict in the country stretching long before its independence in 1956.²⁸⁵ Critics have claimed that the country is stuck in a cycle of never-ending law review, amounting to no tangible change.

The Criminal Act prohibits rape, though marital rape is not prohibited and women in Muslim marriages are expected to obey their husbands.²⁸⁶ The Penal Code prohibits female genital mutilation.²⁸⁷

KEY GAPS AND CONTESTATIONS

(i) Harmful cultural practices:

In spite of the Constitutional imperative to combat harmful customs and traditions that reduce the dignity and status of women,²⁸⁸ these practices persist. There are a great number of gaps in Sudanese family law, stemming from oppressive religious and cultural beliefs.

(ii) Forced marriage:

A woman does not enter into marriage of her own accord. Instead, a male, mature, and sane Muslim man must conclude marriage on her behalf, with her express or implicit consent.²⁸⁹ This provision leaves room for forced marriage, without true consent of the woman. The guardian system also deprives women of autonomy in their personal relationships.

(iii) Child marriage:

Child marriage is endemic and permitted under the Muslims (Personal Status) Act, provided that the girl has reached puberty and that her guardian obtains permission from a court after proving that the marriage will benefit the minor girl, that the husband is suitable and the husband pays the dowry usually paid to women of her status.²⁹⁰ The Marriage of Non-Muslims Act sets the age of marriage at 13 for non-Muslim girls, and 15 for non-Muslim boys.²⁹¹

²⁸⁰ Section 49(2) of the Constitution of the Republic of the Sudan 2019. Available at https://adsdatabase.ohchr.org/IssueLibrary/SUDAN_Constitution.pdf (accessed 17 April 2024)

²⁸¹ Section 49(3) of the Constitution of the Republic of the Sudan 2019

²⁸² S al-Nagar and L Tønnessen “#Justice for Noura” CMI Brief (2018) 3-4. Available at <https://www.cmi.no/publications/6581-family-law-reform-in-sudan-a-never-ending-story> (accessed 17 April 2024)

²⁸³ <https://sgbv-ihrda.uwazi.io/en/document/jzyl9rrxnbr> (accessed 17 April 2024)

²⁸⁴ OECD Development Centre “Social Institutions and Gender Index Sudan” (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/SD.pdf>

²⁸⁵ <https://www.cmi.no/publications/5303-family-law-reform-in-sudan>

²⁸⁶ Section 149 of the Criminal Act 1991, amended 2009. Available at <https://redress.org/wp-content/uploads/2021/09/Criminal-Act-1991-English.pdf> (accessed 17 April 2024)

²⁸⁷ Section 284(a) of the Penal Code 2003. Available at <https://www.refworld.org/legal/legislation/natlegbod/2003/en/63604>

²⁸⁸ Section 49(4) of the Constitution of the Republic of the Sudan 2019

²⁸⁹ Section 25(c) read with Section 33 of the Muslims Personal Status Act 1991. Available at <https://sgbv-ihrda.uwazi.io/en/document/jzyl9rrxnbr> (accessed 17 April 2024)

²⁹⁰ Section 40(3) of the Muslims (Personal Status) Act 1991

²⁹¹ <https://www.cmi.no/publications/file/6438-community-views-on-child-marriage-in-kassala.pdf> (accessed 17 April 2024)

(iv) Inheritance:

Women's rights to inheritance, to matrimonial property, divorce and custody are unequal. The Muslims (Personal Status) Act provides that women have unequal rights to inheritance.²⁹² A woman inherits half of the property of her brother/s. Christian women and men have equal rights in regard to inheritance.²⁹³

(v) Divorce:

Divorce laws in Sudan are discriminatory in that a woman cannot obtain a judgment of divorce in the same way as a man²⁹⁴ as provided in Articles 132 and 174 of The Muslims (Personal Status) Act. Catholics may divorce in instances of regular abuse and mistreatment, while Protestants and Coptic Christians may only divorce in cases of adultery.²⁹⁵

(vi) Custody:

The Muslims (Personal Status) Act grants mothers custody for girl children until age nine and boys until age seven. After which, the best interests of the child are determinative. If women remarry, fathers of the children will automatically get custody. In the Coptic Church daughters also stay with the mother until 9 and sons until 7, after which the father obtains custody.²⁹⁶

(vii) Polygamy:

Polygamy is permitted. The Muslims (Personal Status) Act 1991 provides that a man is allowed to marry up to four wives provided that he treats all his wives justly.²⁹⁷

RECOMMENDATIONS

Legal reform:

- ▶ Family law in Sudan is in need of comprehensive legal reform.
- ▶ Sudan must legislate for civil, religious and customary marriages. The application of customary and religious law must be made subject to constitutional provisions requiring equality in marriage, matrimonial property, divorce, custody and inheritance.
- ▶ 18 must be prescribed as the minimum age of marriage without exceptions.
- ▶ Marital rape must be criminalised.
- ▶ Guardianship and wife obedience must be abolished.

Ratification of international instruments: Sudan should ratify CEDAW and the Maputo Protocol, without any reservations.

Sensitisation: Widespread awareness and sensitisation campaigns must be rolled out to change mindsets.

²⁹² Sections 356, 357 and 359 of the Muslims (Personal Status) Act 1991

²⁹³ OECD Development Centre "Social Institutions and Gender Index Sudan" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/SD.pdf>

²⁹⁴ <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Sudan.pdf> (accessed 17 April 2024)

²⁹⁵ OECD Development Centre "Social Institutions and Gender Index Sudan" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/SD.pdf>

²⁹⁶ OECD Development Centre "Social Institutions and Gender Index Sudan" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/SD.pdf>

²⁹⁷ Section 51 of the Muslims (Personal Status) Act 1991



COUNTRY PROFILE

The Constitution of the United Republic of Tanzania establishes that every person is entitled to respect and protection of his family and matrimonial life.²⁹⁸ The Constitution also entrenches the right to equality and prohibits discrimination on, among others, the ground of sex.²⁹⁹

Treaty	Date of ratification	Reservations/Declarations
CEDAW	20 August 1985	None
African Charter	18 February 1984	None
Maputo Protocol	3 May 2011	None

MAIN TRENDS ON FAMILY LAW

Tanzania has historically enjoyed progressive family laws. The Law of Marriage Act, enacted in 1971, was the first piece of legislation in Commonwealth Africa to recognise a married woman's right to "acquire, hold and dispose of property". The Act also dictates that when determining division of matrimonial property upon divorce, a court must consider each spouse's contribution to the household.³⁰⁰ Unfortunately, courts have interpreted this provision to be limited to financial contribution, in spite of legal precedent recognising unpaid domestic labour and childcare as contributions to the household.³⁰¹ This interpretation leaves women who are financially weaker than their spouses and burdened by unpaid labour vulnerable to financial destitution upon divorce.

The Child Act grants women equal rights to custody upon divorce.³⁰² However, the Law of Marriage Act stipulates that the customs of the community must be considered when determining division of matrimonial property and custody of children.³⁰³ This has the potential to undermine women's right to equality, since custom may not recognise women's right to property and children are often considered a part of their father's clan, thus there is a preference for granting father's custody in custom.³⁰⁴ Courts must be sure to consider custom as one of many factors in the matrimonial property and custody determinations, rather than as the determinative factor.

Finally, while Tanzania has adopted policy measures to combat child marriage, child marriage remains permitted in law.³⁰⁵ The Law of Marriage Act prescribes that the minimum age of marriage for boys is 18 years and for girls 15 years.³⁰⁶ With the court's permission, both boys and girls can marry from the age 14, with girls also requiring parental consent.³⁰⁷ However, in 2016 the High Court held in *Rebeca Z. Gyumi vs Attorney General* that Sections 13 and 17 of the Law of Marriage Act were unconstitutional and directed the Government through the Attorney General to amend the law within one year from the date of the decision to set the minimum age of marriage to 18 years for both boys and girls.³⁰⁸ The Attorney General appealed unsuccessfully and the Court of Appeal in 2019 directed the Government to abide by the order of the High Court and amend the Law of Marriage Act.³⁰⁹ The law had not yet changed at the time of publishing this Report.

298 Section 16 of the Constitution of the United Republic of Tanzania 1977, amended 2005. Available at https://www.constituteproject.org/constitution/Tanzania_2005#:~:text=The%20organs%20vested%20with%20executive,the%20organs%20vested%20with%20legislative (accessed 17 April 2024)

299 Sections 12-13 of the Constitution of the United Republic of Tanzania 1977, amended 2005

300 Section 114 of the Law of Marriage Act 1971. Available at <http://parliament.go.tz/polis/uploads/bills/acts/1461835089-ActNo-5-1971.pdf> (accessed 17 April 2024)

301 *Mohamed vs Sefu* Court of Appeal 1983; K Van Aelst "Household decision-making and gender relations in Tanzania: Literature and theory review" (2014). Available at https://www.chr.up.ac.za/images/researchunits/wru/documents/_caselaw/bi_hawa_mohamed_v_ally_sefu_9_of_1983.pdf (accessed 17 April 2024)

302 Section 9 of the Law of the Child Act 2009. Available at <https://www.bunge.go.tz/polis/uploads/bills/acts/1452143878-ActNo-21-2009.pdf> (accessed 17 April 2024)

303 Section 125(2) of the Law of Marriage Act 1971.

304 OECD Development Centre "Social Institutions and Gender Index Tanzania" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/TZ.pdf>

305 Id

306 Section 13(1) of the Law of Marriage Act 1971

307 Section 13(2) of the Law of Marriage Act 1971

308 *Rebeca Z. Gyumi vs Attorney General* (Misc. Civil Cause 5 of 2016) [2016] TZHC 2023 (3 March 2016) Available at <https://tanzlii.org/akn/tz/judgment/tzhc/2016/2023/eng@2016-03-03> (accessed 17 April 2024)

309 *Attorney General vs Rebeca Z. Gyumi* (Civil Appeal 204 of 2017) [2019] TZCA 348 (23 October 2019) Available at <https://tanzlii.org/akn/tz/judgment/tzca/2019/348/eng@2019-10-23> (accessed 17 April 2024)

KEY GAPS AND CONTESTATIONS

(i) Inheritance:

Ensuring that women have equal rights to inheritance has proven challenging. Under both customary law and Islamic law, women do not enjoy equal inheritance rights. In 2016, the CEDAW Committee held in *E.S. and S.C. vs. Tanzania* that by condoning a patrilineal inheritance system and legal restraints on inheritance and property rights that discriminate against women, Tanzania had violated CEDAW.³¹⁰ The case concerned two widows who were prevented from inheriting and administering the estates of their deceased husbands and were evicted from their homes. The case is a landmark victory and a stark reminder of the challenges experienced by women when they are overlooked by the law of succession. Tanzania must ensure that legislation and mindsets reflect this decision, so that women are able to inherit equally.

(ii) Violence against women:

A further gap exists in the regulation of violence against women. While rape is criminalised,³¹¹ there is no specific legislative response to domestic violence.

(iii) Marital rape:

Marital rape is only criminalised upon separation since rape is defined as a male person having “sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions: (a) not being his wife or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse...”³¹² This greatly undermines women’s equality, dignity, and bodily autonomy. It is however worth noting that the High Court in *Mzumbe Masunga @ Maguryati and Another vs Republic* (Criminal Appeal 54 of 2022) [2023] TZHC 16379 (24 March 2023)³¹³ held that Section 130 (2) (e) of the Tanzania Penal Code, which states that “A male person commits the offence of rape if he has sexual intercourse with a girl or a woman... with or without her consent when she is under eighteen years of age unless the woman is his wife who is fifteen or more years of age and is not separated from the man.”, is redundant to the extent of recognition of a marriage with a girl of 15 years. The Court noted the lack of legal coherence in the provision, highlighting that it categorises an act as rape only when committed against an unmarried girl under 18 years old. However, if the girl is married at 15 years old, the same act is not considered rape according to the provision.

RECOMMENDATIONS

Legal reform:

- ▶ Increase the legal age of marriage to 18, without any exceptions.
- ▶ Reform unequal customary inheritance law.
- ▶ Enact legislation to combat domestic violence and abuse, including marital rape.

Judiciary:

- ▶ Courts must interpret the Law of Marriage Act to recognise women’s non-economic contributions to the household when dividing matrimonial property.
- ▶ Courts must ensure that considering custom does not unfairly prejudice women when determining inheritance and custody of children after divorce.

310 CEDAW/C/60/D/48/2013 Communication No. 48/2013. Available at https://www.escri-net.org/sites/default/files/caselaw/cedaw_tanzania_inheritance_laws_views.pdf

311 Section 5 of the Sexual Offences (Special Provisions) Act 1998. Available at <http://parliament.go.tz/polis/uploads/bills/acts/1457516075-ActNo-4-1998.pdf> (accessed 17 April 2024)

312 Ibid

313 <https://tanzlii.org/akn/tz/judgment/tzhc/2023/16379/eng@2023-03-24> (accessed 15 April 2024)

FATU'S* STORY

Tanzania



Case study collected with the support of
Network Against Female Genital Mutilation (NAFGEM)

In Fatu's case, There is no legal framework in Tanzania that adequately defines the scope of domestic violence or criminalises it. While Section 66 of the Law of Marriage Act prohibits domestic violence, it doesn't include any penalties or sanctions. The definition of rape in Tanzania's statutory laws also excludes marital rape. These contribute as impediments for survivors of domestic violence and marital rape in seeking redress.

"My name is Fatu*, and I am 55 years old with two children. I live in Moshi District in Kiborloni Ward of Tanzania. I am trapped in a harrowing tale of hardship and abuse. I am married to an older man in the security sector who, even before being expelled from work due to his drunkenness and neglect of responsibilities, subjected me to a life of violence and fear.

My husband's violent demands for money, food, and what he claims are **"conjugal rights"** have made my life a constant struggle. He forces me to have sex any time he wants; otherwise, he threatens to punch me severely.

His assaults, both in public and behind closed doors, are relentless. This has driven me to avoid spending nights in our shared space, where he keeps menacing tools under his bed, including a machete, hammer, and screwdriver. I fear those tools may one day be turned against me, exacerbating the pain he's already inflicted on me, as evidenced by a scar on my hand – a brutal reminder of his attempt to take my life when he beat me and cut me with a knife.

My 22-year-old daughter lives 600 kilometres away in Dar-es-Salaam and has severed all ties, leaving me in extreme poverty to care for my two grandchildren. My pleas for help have fallen on deaf ears. Neighbours and relatives have abandoned me and have warned me not to involve the police because if I do, my husband will be jailed. They have gone further, threatening to evict me from our family and the community. NAFGEM has been a pillar of support for me and provided me with some counselling and legal advice. The organisation has also connected me with some local economic welfare groups. These have been a great support system for me.

What I'm going through affects my mental and emotional health, but I do not have any other alternative. Despite the toll on my mental well-being, divorce is not an option for me. I have nowhere to go - I am an orphan with no siblings to turn to. I fear that if I relocate, I will be in more danger. I don't feel safe. It has been a 20-year vicious cycle. I am caught in a cycle of desperation, weakness, sleepless nights, and constant anxiety.

My husband's violent demands for money, food, and what he claims are "conjugal rights" have made my life a constant struggle.

* Not her real name



COUNTRY PROFILE

The Gambia is a predominantly Muslim State.³¹⁴ As such, over 90% of family law matters are adjudicated in the Cadi or Islamic courts by application of Islamic law.³¹⁵ Thus, while the Constitution of The Gambia provides that women are entitled to full and equal dignity of the person, equal treatment, equal opportunities, and protection from discrimination,³¹⁶ this is subject to the caveat that the prohibition of unfair discrimination against women does not apply to any law regarding adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law, nor to the application of customary law over persons subject to that law.³¹⁷

In 2017, The Gambia ushered in democracy with the end of Yahya Jammeh's 22 years in power.³¹⁸ A constitutional review and reform process was launched, culminating in a 2020 draft Constitution, which omitted the troubling caveat to women's rights. Unfortunately, the constitution reform process has stalled and the 2020 Constitution has not been passed into law.³¹⁹ As a result, family law in The Gambia remains subject to the regressive provisions of customary and Islamic law.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	16 April 1993	None
African Charter	8 June 1983	None
Maputo Protocol	25 March 2005	None. ³²⁰

MAIN TRENDS ON FAMILY LAW

In general, there is a trend towards progress in The Gambia's family law, though implementation of progressive legislation is hindered by The Gambia's pluralistic legal system.

In 2010 The Gambia adopted the Women's Act³²¹ to domesticate CEDAW and the Maputo Protocol. The Act is the result of a comprehensive review of relevant legislation and consolidates all laws relating to women's rights in The Gambia. The Act seeks to implement the legal provisions of the National Policy for the Advancement of Gambian Women and Girls and provides for equal rights for women in marriage, divorce, custody, inheritance, and maintenance issues. In 2015, following the recommendations of the CEDAW Committee, the Women's Act³²² was amended to criminalise female genital mutilation.³²³ The Act is a major legislative victory, though the vast majority of women who marry in terms of Islamic and customary law do not have full access to its benefits.³²⁴

Another area of legislative progress has been regarding violence against women. The Sexual Offences Act has amended substantive laws and procedures related to the prosecution of rape and other sexual offences, including providing a broader definition of rape and abolishing the cautionary rule which required corroboration when prosecuting sexual offences.³²⁵ In the same year, The Gambia enacted the Domestic Violence Act to protect victims of domestic violence and abuse.³²⁶ The Domestic Violence Act adopts a broad definition of violence, including within its ambit physical, sexual, psychological, emotional,

314 Section 7 of the Constitution of The Gambia 1997 provides that customary law so far as it concerns members of the communities to which it applies and the Shari'a as regards matters of marriage, divorce and inheritance among members of the communities to which it applies are sources of law.

315 UN Women and Commonwealth Secretariat "Towards Reversing Discrimination in Law: Mapping and Analysis of the Laws of The Gambia from a Gender Perspective" (2020) at 12. Available at https://africa.unwomen.org/sites/default/files/Field%20Office%20Africa/Attachments/Publications/2020/Gambia%20report%20_layout_FINAL_DIGITAL_2907.pdf

316 See Sections 28 and 33 of the Constitution of the Republic of The Gambia 1996, amended 2004

317 See Sections 33(5)(c) and (d) of the Constitution of the Republic of The Gambia 1996, amended 2004

318 See Institute for Security Studies "The Gambia's president faces a tricky second term" (2022). Available at: <https://issafrica.org/iss-today/the-gambias-president-faces-a-tricky-second-term>

319 Fadera, L. (n.d.). Gambia's draft constitution rejected by lawmakers. ConstitutionNet. <https://constitutionnet.org/news/gambias-draft-constitution-rejected-lawmakers#:~:text=Gambia's%20lawmakers%20have%20rejected%20a,votes%20at%20the%20national%20assembly>

320 Initially, The Gambia made a blanket reservation on Articles 5 (elimination of harmful practices), 6 (marriage), 7 (separation, divorce and annulment of marriage) and 14 (health and reproductive rights) of the Maputo Protocol. In 2006, due to intense advocacy and The Gambia hosting the African Union (AU Summit), the reservation was removed

321 Women's Act 2010. Available at <https://www.ilo.org/dyn/natlex2/natlex2/files/download/90619/GMB90619.pdf> (accessed 17 April 2024)

322 Women's (Amendment Act) 2015 Available at <https://static1.squarespace.com/static/5a7c2ca18a02c7a46149331c/t/5a0f4ede2c4830bd808329a/1520497906008/Women%27s+Act+Amendment+Act+2015.pdf> (accessed 17 April 2024)

323 The Women's Amendment Act, 2024 introduced in the National Assembly of the Gambia seeks to repeal the prohibition of FGM in The Gambia. The Bill was still under debate in the National Assembly at the time of publication of this Report

324 OECD Development Centre "Social Institutions and Gender Index" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/data-sheets/2019/GM.pdf>

325 Sexual Offences Act 2013. Available at <https://static1.squarespace.com/static/5a7c2ca18a02c7a46149331c/t/5d1d654749d9a70001826156/1562207562046/Sexual+Offences+Act+2013.pdf> (accessed 17 April 2024)

326 Domestic Violence Act 2013. Available at <https://www.ilo.org/dyn/natlex2/natlex2/files/download/90619/GMB90619.pdf> (accessed 17 April 2024)

and economic abuse. In addition, the Act allows victims of domestic violence to choose to settle cases through alternative dispute resolution.³²⁷

Finally, the Children's Amendment Bill passed in 2016 amended the Children's Act³²⁸ to prohibit child marriage and impose a penalty of up to 20 years imprisonment on those who violate the prohibition. While this is a positive move, there is concern that child marriage continues in customary and religious settings, and that there is societal backlash against the prohibition.³²⁹

KEY GAPS AND CONTESTATIONS

(i) Legal pluralism:

Unfortunately, while statutory progress has been made, customary and Islamic law present significant obstacles. For instance, while the Women's Act provides that men and women have equal rights to an equitable sharing of the joint marital property upon divorce, in reality, under customary law the husband is deemed to own the matrimonial home and in the distribution of property, the woman's contribution to the acquisition

(ii) of marital property is not given due consideration.³³⁰ Similarly, while the Women's Act provides that men and women have the same rights to inherit equitable shares of familial estates, including in the case of surviving spouses, the Christian Marriage Act³³¹ makes succession of property dependent on the will of the husband, and under Islamic law, women inherit a lower share of assets than men.³³²

(iii) Harmful practices:

The Woman's Act does not do enough to prohibit harmful cultural and traditional practices. While it commendably prohibits female genital mutilation, it is silent on other harmful practices such as levirate marriage and unequal inheritance.

(iv) Marital rape:

Finally, while the Sexual Offences Act is generally progressive, it explicitly permits marital rape, providing that "rape shall not apply to married couples."³³³ This is a violation of married women's rights to equality, dignity, and bodily autonomy.

RECOMMENDATIONS

Legal reform:

- ▶ Section 33(5)(c) of the Constitution should be repealed so that women are granted absolute protection from discrimination. Customary and Islamic law should be applicable only to the extent that they do not discriminate against women.
- ▶ Women's rights to equality in matters regarding matrimonial property, inheritance and custody must be enforced, even in customary and religious contexts.
- ▶ The Women's Act must be amended to prohibit other harmful traditional practices, in addition to female genital mutilation. The attempts that are being made by Parliament to repeal the legal provisions within the Women's Act which prohibit and criminalise FGM should be stopped by the other organs of government.
- ▶ The Sexual Offences Act must be amended to prohibit marital rape.

Policy and sensitisation:

Policy and awareness interventions must be launched to combat patriarchal cultural and religious attitudes.

327 UN Women and Commonwealth Secretariat "Towards Reversing Discrimination in Law: Mapping and Analysis of the Laws of The Gambia from a Gender Perspective" (2020) at 30. Available at https://africa.unwomen.org/sites/default/files/Field%20Office%20Africa/Attachments/Publications/2020/Gambia%20report%20_Layou_FINAL_DIGITAL_2907.pdf (accessed 17 April 2024)

328 Children's (Amendment) Act 2016. Available at <https://security-legislation.gm/wp-content/uploads/2022/10/Childrens-Amendment-Act-2016.pdf> (accessed 17 April 2024)

329 OECD Development Centre "Social Institutions and Gender Index" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/data-sheets/2019/GM.pdf>

330 UN Women and Commonwealth Secretariat "Towards Reversing Discrimination in Law: Mapping and Analysis of the Laws of The Gambia from a Gender Perspective" (2020) at 27

331 <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/gambia-republic-of-the/> (accessed 17 April 2024)

332 OECD Development Centre "Social Institutions and Gender Index" (2019). Available at: <https://www.genderindex.org/wp-content/uploads/files/data-sheets/2019/GM.pdf>

333 Section 3(3) of the Sexual Offences Act 2013

BINTA'S* STORY

The Gambia



Case study collected with the support of
African Centre for Democracy and Human Rights Studies (ACDHRS)

The Women's (Amendment) Act, 2004, provides that men and women have equal rights to an equitable sharing of the joint marital property upon divorce. In reality, under customary law, the husband is deemed to own the matrimonial home, and in the distribution of property, the woman's contribution to the acquisition of marital property is not given due consideration. Similarly, while the Women's Act provides that men and women have the same rights to inherit equitable shares of familial estates, including surviving spouses, the Christian Marriage Act makes succession of property dependent on the husband's will. Under Islamic law, women inherit a lower share of assets than men.

"My name is Binta*, a widow from Western Gambia. I have eight children who, despite facing numerous challenges, have become the centre of my strength. The turning point in my life occurred when my husband passed away several years ago, leaving our children relatively young. Unfortunately, instead of support and compassion, his relatives seized everything he had left for me and my children – properties and other belongings.

While I hadn't directly contributed to purchasing our matrimonial land, I had invested in constructing our matrimonial home on this land and purchased furniture – a fact well-known by my husband's relatives. The unfair and biased distribution of our assets by my husband's relatives left me and my children with virtually nothing. They tried to sell my matrimonial home, where I was staying with my children. However, after months of family in-fighting, my brothers helped me to reclaim my house, where I still reside with my children. However, I was left with nothing to make a living off as the cattle I reared for business purposes had been taken away.

The repercussions of this unjust inheritance distribution have been profound, affecting my emotional well-being and financial stability. Struggling to make ends meet, I ventured into various small businesses to put food on the table for my family. I tried to go to the courts, but the fees I had to pay initially to initiate the inheritance proceedings created a significant financial hurdle for me. Some of my children had to abandon their education due to my inability to afford school fees and other related expenses. As a result, I stopped pursuing this option. It was just too expensive.

The unfair and biased distribution of our assets by my husband's relatives left me and my children with virtually nothing.

The entire situation could have been mitigated had the inheritance been distributed equitably. Unfortunately, coupled with my limited education, I was unaware of the procedures involved or the laws that apply in my case. Moreover, my financial constraints made navigating the complex legal processes more challenging.

It would be good to see more women in society educated on the laws so they may know how to fight the traditional systems that often favour relatives who steal one's property to benefit themselves. Further, the legal fees involved and the long court processes make poor widows in rural areas like us feel alienated."

* Not her real name



COUNTRY PROFILE

The 2022 Constitution of Tunisia³³⁴ recognises the equality of rights and duties between male and female citizens before the law without any discrimination.³³⁵ Tunisia is an Islamic State as per the introduction of the Constitution. Article 5 further provides that “Tunisia is part of the Islamic nation, and the state alone must, under a democratic system, work to achieve the objectives of Islam in preserving life, honor, money, religion and freedom”.

After independence, the country adopted the Code of Personal Status in 1956 to regulate family law and this was a ‘radical departure from the sharia’. The Code of Personal Status only applies to Muslim Tunisians. Christian family law is regulated by their French law while Jewish persons have their own family law.

The 2022 Constitution has however been criticised on many fronts, specially concerning regressive human rights democratic provisions.³³⁶

Treaty	Date of ratification	Reservations/Declarations
CEDAW	20 September 1985	“The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution.” ³³⁷
African Charter	16 March 1983	None
Maputo Protocol	23 August 2018	None

MAIN TRENDS IN FAMILY LAW

Since the 1950s, there have been several strides in relation to women’s rights within family law in Tunisia. For instance, amendments to the 1956 Code of Personal Status relating to the abolishment of polygamy, making divorce more accessible for women and ‘eliminating the role of matrimonial guardians over women’, amongst others were advances in women’s rights within the family.³³⁸ These amendments made Tunisia the first country in the Arab world to take steps towards gender equality. In 2017, after a 44 year ban, the ban on inter-religious marriages between Tunisian Muslim females and non-Muslim males was lifted.³³⁹

There have been four waves of reforms in family law in Tunisia, the first one being during the French protectorate, the second one with the changes to the Code of Personal Status, the third one starting in the 1990s to more changes to the Code and the fourth one starting in 2010.³⁴⁰ They all have contributed to family law as it stands currently.

Book 1 on Marriage, of the 1956 Code of Personal Status lays down the requirements for a marriage to be valid. Aa 1-11 of Book 1 provides that both parties must consent to the marriage, and it took away authority of the guardian or parent to consent to a wedding to make sure that there is no forced marriage.

Concerning divorce, only a court can pronounce the same according to Article 30 of Book II of the Code of Personal Status. Moreover, according to Articles 29 to 33, both the husband and the wife can request for a divorce on the grounds listed in the Code of Personal Status. These grounds are provided by Article 31 as divorce upon mutual consent, divorce requested for fault, at the request of the husband or wife. Upon divorce, both spouses have an equal share in the matrimonial property.³⁴¹

According to Article 18 Book 1 on Marriage of the Code of Personal Status, marrying more than one woman is a crime punishable by one year’s imprisonment and a fine.

³³⁴ <https://www.wipo.int/wipolex/en/text/587018> (accessed 17 April 2024)

³³⁵ Article 23 of the Constitution

³³⁶ Aljazeera ‘Tunisia’s draft constitution: What’s new and why now’ (1 July 2022) <https://www.aljazeera.com/news/2022/7/1/proposed-new-tunisian-constitution-cements-presidents-powers-explainer> (accessed 19 July 2022)

³³⁷ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec (accessed 16 April 2024)

³³⁸ As above

³³⁹ Booley (n above) 18

³⁴⁰ Booley (n above) 1

³⁴¹ Reuters ‘Get land from your husbands’: Tunisia divided over equal inheritance of women’ (8 March 2019) <https://www.reuters.com/article/us-tunisia-women-landrights-feature-idUSKCN1QP13F> (accessed 19 July 2022)

With regard to addressing violence against women, Tunisia made historic strides by passing its first national law in 2017, to combat violence against women. This law was passed unanimously.³⁴² Article 51 of the Constitution also provides that the State must take measures to eliminate violence against women.

KEY GAPS AND CONTESTATIONS

(i) Child marriage:

In May 2007, the government amended the Code of Personal Status and increased the legal age of marriage to 18 years for both girls and boys.³⁴³ However, according to Book 1 Article 5 on Marriage there are still exceptions to the age of 18 with the consent of both parents or guardians, with special authorisation from a judge in extremely serious cases.³⁴⁴ One such example is when a minor persists in getting married.³⁴⁵

(ii) Discriminatory laws:

Article 23 of Book 1 of the Code of Personal Status provides that a wife must fulfil her duties in line with 'usages and customs'. This provision can be disadvantageous to women since Tunisia is still a patriarchal society which expects women to care for their husbands. The Article also puts women at risk of marital rape since a woman's traditional role includes her pleasing her husband sexually.

According to Articles 57 and 154 of the Code of Personal Status, both parents have custody. However, the father remains their legal guardian even if the judge determines custody on a case-by-case basis. The father is also the head of the household under Article 23.

The inheritance law in Tunisia is discriminatory against women given that Section 103 of the Code of Personal Status still allows for males to inherit twice as females in the instance the deceased has a son. Articles 101 and 102 also provide that female surviving spouses are entitled to half of male surviving spouses.

RECOMMENDATIONS

Legal reforms:

- ▶ Amend the Code of Personal Status to:
 - 1) Remove any exceptions from the age of 18 for marriage;
 - 2) Review Article 23 of Book 1 concerning duties of a wife;
 - 3) Include both spouses as heads of the household;
 - 4) Recognise both parents as legal guardians;
 - 5) Ensure that both men and women inherit on an equal basis.

³⁴² <https://learningpartnership.org/resource/violence-against-women-law-tunisia-document-french> (accessed 17 April 2024)

³⁴³ GirlsNotBride 'Tunisia' <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/tunisia/> (accessed 19 July 2022)

³⁴⁴ <https://www.jstor.org/stable/4322925> (accessed 17 April 2024)

³⁴⁵ https://assets.publishing.service.gov.uk/media/5cc1a18ced915d05618812a5/Tunisian_Family_Law_-_Print_Version_Final_Document.pdf (accessed 17 April 2024)



5. CONCLUSION

The findings of this Report illustrate that the quest for gender equality in family laws in Africa is a mixed bag characterised by successes, setbacks, and stagnation. Success is visible in positive trends such as the introduction of the age of marriage at 18 without any exceptions in several countries; progressive jurisprudence that expresses an understanding of women's rights; laws recognizing women's rights within a marriage that has not even been registered; decriminalisation of same-sex relationships; abolition of marital power; recognition of therapeutic abortion; prohibition of FGM, and laws on violence against women, including the prohibition of domestic violence and criminalisation of marital rape.

Where progress has happened, setbacks continue through negative trends such as lack of recognition of same-sex marriage even in contexts where same-sex relationships are decriminalised; retention of the husband as head of the family practices; exceptions to 18 as the minimum age of marriage; lack of criminalisation of marital rape; recognition of polygamy without protections for women in polygamous marriages; retrogressive jurisprudence on the distribution of matrimonial property, and disproportionate restrictions on the rights to inheritance and rights of widows, and unequal divorce regimes. The setbacks have been compounded by backlash from the anti-rights movement through efforts to reverse positive gains on laws to end FGM and child marriage among others.

In some countries, progressive family codes have been pending enactment in Parliament for decades.

Stagnation has worsened the situation in contexts where governments have committed to law reform but have not taken any meaningful steps to concretise the commitment into policy or legislation. In some countries, progressive family codes have been pending enactment in Parliament for decades. Worse still, in most countries where national judiciaries and African Union judicial bodies have explicitly called for law reform in their decisions, the decisions have not been implemented. There is an urgent need to expedite stagnant reforms by harnessing political will to ensure that the vision of equality in family laws and practice does not remain to be a mere aspiration.

Additionally, pluralistic legal systems where statutory laws live alongside customary and religious laws are a stubborn colonial legacy and a huge stumbling block to family law reform in Africa. An intersectional feminist approach to decolonisation of family laws in Africa is thus imperative. Member States of the African Union should standardise their family codes by balancing the fundamental right to non-discrimination with the right to culture as per Article 17 of the Maputo Protocol on the right to positive cultural context and interpretive soft law instruments from the CEDAW Committee, the Committee on the Rights of the Child (CRC), the African Commission on Human and Peoples' Rights (ACHPR), and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

An intersectional feminist approach to decolonisation of family laws in Africa is imperative.

Moreover, while it is important to recognise religious laws, many of the provisions are discriminatory against women. Hence, such provisions need to be aligned with regional and international standards on the protection of women. For instance, family law reform in Islamic contexts needs to guarantee the protection of women as per international human rights standards, rather than as per Islamic Sharia law when it comes to inheritance, divorce, and polygamy.

In conclusion, for gender equality in family law in Africa to become a reality, there must be universal ratification and implementation of key human rights treaties, specifically, the Maputo Protocol and the African Charter on the Rights and Welfare of the Child. Reservations on the CEDAW and the Maputo Protocol must also be lifted unconditionally.

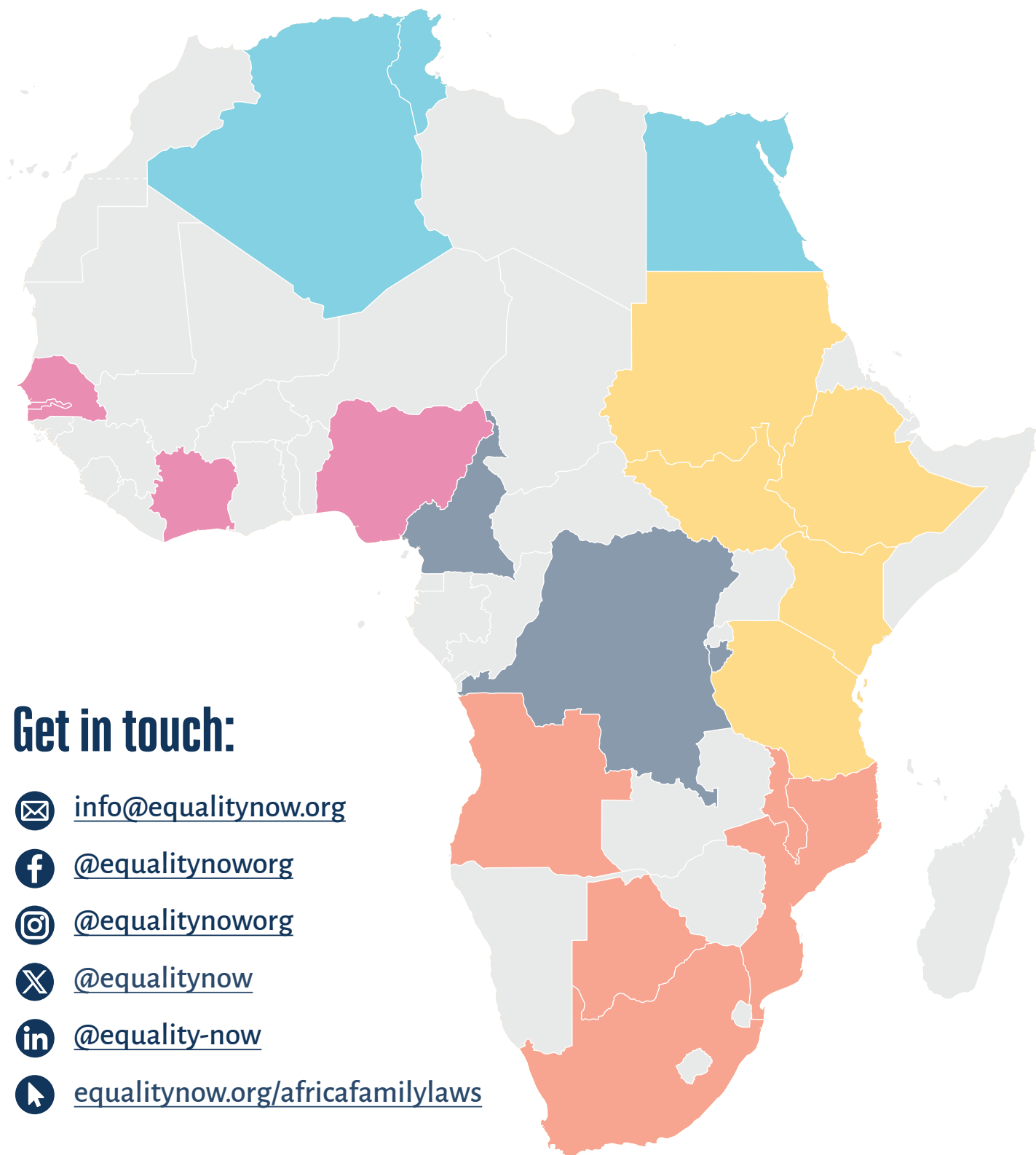
The ten Member States that have not yet ratified the Maputo Protocol (Burundi, Central African Republic, Chad, Egypt, Eritrea, Morocco, Madagascar, Niger, Somalia, and Sudan) need to fulfil their commitment to upholding women's rights in their respective countries by ratifying and taking all necessary steps to domesticate and implement the Maputo Protocol.

The nine Member States who have placed reservations on the Maputo Protocol (Algeria, Cameroon, Ethiopia, Kenya, Mauritius, Namibia, Sahrawi Arab Democratic Republic, South Africa, and Uganda) must remove their reservations to the Maputo Protocol and enable their populations to enjoy its full benefits.

Family law equality must be at the heart of the Africa we want.

An integrated, prosperous, and peaceful Africa cannot be actualised if discriminatory family laws remain in the statutory codes of Member States.

for gender equality in family law in Africa to become a reality, there must be universal ratification and implementation of key human rights treaties



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