

Article 21

Right to inheritance

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1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

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1 Introduction

This chapter provides a comprehensive guide to article 21 of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in terms of its meaning and implications in improving women's rights in Africa. It traces the legal, political, and economic foundations of the article, normative standards developed, and institutional efforts made by regional mechanisms under the African human rights system and African states.

Article 21 is double-pronged, combining two sub-sections. The first sub-section is specific to widows, guaranteeing them the right to an equitable share in the inheritance of the property of their deceased husbands. The second sub-section assures the equal right of women and men to inherit from their parents.

The approach of this provision is to tackle gender inequality in inheritance by focusing on both men and women, with a particular focus on widows. It should be noted, however, that the inequality in inheritance rights mostly affects women and girls due to deeply entrenched patriarchal characteristics of socio-economic, cultural and religious practices. In fact, the inheritance regime lies at the heart of women's subordination. In several respects, women are considered or treated as legal minors or have unequal status or entitlement to inheritance shares, which impacts their ability to acquire and enjoy productive resources.¹

1 Human Rights Watch 'You will get nothing. Violations of property and inheritance rights of widows in Zimbabwe' (24 January 2017) <https://www.hrw.org/report/2017/01/24/you-will-get-nothing/violations-property-and-inheritance-rights-widows-zimbabwe> (accessed 15 May 2023).

Inheritance is conceptualised broadly to mean intergenerational transfers of property that occur at different moments in life cycles upon death to those entitled to succeed it.² It is a major means for the transfer- or exclusion from the transfer- of adults' accumulated physical capital. In many African societies, inheritance is one of the most common means by which physical property is transferred from one generation to another, and it has emerged as a key area in the struggle for realising women's land, housing and property rights.³

In many African customs, men traditionally owned all family property, which was passed on through the male line from father to male linear descendants. This left women out of the equation of property ownership at family level.⁴ Most times, this discrimination was based on the belief that a woman does not need to inherit property as she is being cared for either by her own or her marital family.⁵ Furthermore, married women were formerly seen as legal minors who could not enter into contracts without the consent of their husbands. Although this practice has long since been abandoned, it followed patriarchal assumptions whereby the male is seen as the natural protector and congregator of family property, while leaving property in the hands of women was seen as individualising it.⁶ Under customary law, communal ownership and use rights were usually vested in lineages or clans, and while rights to use the land would be conferred upon both males and females, through custom, the males exercised control over the land.⁷ These indigenous systems of accountability of land rights however were greatly distorted by colonial interventions which reallocated and formalised ownership of land mostly to the benefit of men, leaving women in a more precarious position than before.

The discussion on inheritance – especially as it relates to land – is important because land has for a long time been recognised as a primary source of wealth, social status, and power, providing the basis for shelter, food, and economic activities.⁸ Inequalities in property rights are most evident in regard to land because the major mode of land acquisition in most sub-Saharan African countries is inheritance. Access to resources such as water and to services such as sanitation and electricity, as well as the ability to make long-term investments, are often conditioned upon access to rights in land.⁹ In many sub-Saharan African countries, the idea of women inheriting land is seen as a threat to the continuity of clan land, since marriage in many communities is exogenous.¹⁰

Women generally do not have independent property rights. especially in regard to customary laws which often infer that women are to access assets through their fathers, husbands or adult sons. As a result, women who are orphaned, unmarried, separated, divorced or widowed can be significantly disadvantaged, as are the children who grow up in households headed by divorced, separated, single (never married) or widowed women. Women in polygamous unions may be even more vulnerable. Even women who have property access through relationships are disadvantaged by not having independent

2 E Cooper 'Inheritance and the intergenerational transmission of poverty in sub-saharan Africa: policy considerations, Chronic Poverty Research Centre' (2010) *University of Oxford, Working Paper* 159, 2.

3 Cooper (n 2) 2.

4 V Bennett et al 'Inheritance law in Uganda: the plight of widows and children' (2006) 7 *Georgetown Journal of Gender and the Law* 451.

5 AM Richardson 'Women's inheritance rights in Africa: the need to integrate cultural understanding and legal reform' (2004) 11 *American University Washington College of Law Human Rights Brief* 3.

6 Human Rights Watch (n 1) 7.

7 CS Rabenhorst & A Bean *Gender and property rights: a critical issue in urban economic development* (2011) <https://www.urban.org/sites/default/files/publication/27491/412387-Gender-and-Property-Rights.PDF> (accessed 15 May 2023).

8 J Muhindo *Compulsory land acquisition in Uganda. An analysis of the Proposed Amendment of Article 26 of the Constitution*, ACODE Briefing Paper 47 (2017) 8.

9 Cooper (n 2) 6.

10 J Asiimwe 'Making women's land rights a reality in Uganda: advocacy for coownership by spouses' (2014) 4 *Yale Human Rights and Development Journal* 171.

property rights.¹¹ Thus, without independent and direct property rights, or fair rules on inheritance to be precise, many women are in a precarious position, able to gain access to resources only through their linkage to a male person.

Furthermore, the position of inheritance of property for women worsens in case of spousal death. To be a widow is to be an outcast.¹² Too often, when a woman loses her husband, she is also cast out of her family, forced out of her home, stripped of all her property, and separated from her own children.¹³

In fact, in a bid to consolidate and 'protect' family property, widow inheritance was a common practice in many parts of the continent. Here, widowed women were often 'inherited' as wives by male relatives of their deceased spouse, and the ability of a widow to keep the property that she shared with her deceased husband was dependent on remaining within his family through levirate marriage.¹⁴ This worsens women's generally already disadvantaged position in almost all spheres – socially, economically and politically. For instance, women generally have lower levels of education and employment, which ideally are alternative routes to economic empowerment and secure property rights. Therefore, considering the predominance of inheritance as a mode of acquisition of property for women, it should be protected from restraints and restrictions emanating from the socio-cultural set up of African society. Article 21 of the Maputo Protocol attempts to do just that.

While it is well understood that some customary and religious laws can be discriminatory, statutory laws can also be problematic for women and girls. Most countries in Africa have a pluralistic legal order where customary law operates in interaction with statutory and religious laws.

However, when provisions of these legal frameworks conflict, indigenous customary law often retains an advantage over the other legal systems, on account of being long embedded in social and cultural norms. Some countries' constitutions further embed this supremacy of customary law by exempting inheritance and other family law matters from the Constitution's non-discrimination clause. For example, section 15(4)(c) and (d) of Botswana's Bill of Rights accommodates 'negative customary practices' when it exempts devolution of property upon death from its non-discrimination clause. Additionally, the country's Administration of Estates Act states that every person belonging to an ethnic group, which essentially applies to every native citizen of Botswana, will have their property devolved according to the customs and practices of their particular ethnic group. According to the patrilineal system of marriage that most Batswana follow, a married woman belongs to her husband's ethnic group. Most of the property owned or acquired by the couple in the course of the marriage belongs to the husband and will pass to the eldest son when his father dies. A woman retains, in theory, the right to certain property, such as her ploughing fields, which are intended to pass to her daughter upon her death. Application of such laws may lead to the perpetuation of inequality between men and women when these customs promote practices which are antithetical to the ideals of the Maputo Protocol.¹⁵

Although the provisions of statutory law are supposed to prevail in the event of a conflict with customary law, the reality is that statutory law will be poorly implemented and possibly completely ignored.¹⁶ This unfortunately works to disfavour women's inheritance rights because it disallows fair

11 Cooper (n 2).

12 Bennett (n 4) 457.

13 Uganda Law Reform Commission 'A Study Report on the Reform of the Law of Domestic Relations.' (2000) Publication 2, 243-306.

14 FA Akiiki & O Crankshaw 'The impact of customary laws on inheritance: a case study of widows in urban Uganda' (2011) 3 *Journal of Law and Conflict Resolution* 7, 10-11.

15 Cooper (n 2) 11.

16 Cooper (n 2) 19.

and equal protection of women's property rights by extending the gender hierarchy in societal norms which preclude women from inheriting property.¹⁷

Another problem with statutory law is regarding intestate succession. In many of the commonwealth countries whose legal systems are based on early English common law and which form the majority of African states, wives could only receive a stipulated portion of their deceased husband's estate.¹⁸ It restricted ownership of land and the matrimonial home to the customary heir and in instances where there was more than one wife, all the wives shared in the scheduled portion allotted to the spouse.¹⁹

Application of statutory inheritance law faces further challenges of prohibitive procedural requirements for registration and formalisation of marriages. These technicalities are often used to exclude women married under customary marriages or even those in cohabitation. Without an official record of marriage, a widow who needs to make a claim to property that was held in the marriage has to first jump the preliminary hurdle of proving that she was indeed married to her deceased husband.²⁰ This is not always easy because the widow is cast upon the mercy of witnesses, often including in-laws who have the greatest incentive to deny the existence of the marriage, yet best positioned to provide confirmation of it. It should also be noted that there is a high level of ignorance of the right to marital property to begin with. Additionally, inheritance is often viewed as a private matter, which explains the hesitation national entities often display in 'interfering' with the issue.²¹

Customary norms manifest throughout the structures and institutions of society, including formal law and the court system. Their influence is not contained in the informal sphere.

Religious laws add further complexities to inheritance rights. Islamic (Sharia) law entitles women to inherit property, but the share of inheritance is invariably smaller than that of males. In general, a male under the Quran takes double the share of a female in a similar degree of relationship to the deceased. The sons take two times the share of daughters. Where daughters are the only surviving heirs, they can only inherit up to two-thirds of the estate; never the entire estate. Sons are not similarly restricted; they take the entire estate. Furthermore, where a man dies leaving a wife and children, the widow receives one-eighth of the net estate; where there are no children, the widow receives one-quarter of the estate.²²

As a consequence, women inherit less, especially where polygamy exists since the co-wives have to split the portion designated for 'wife' among themselves.²³ In polygamous marriages, all the widows

17 M Matheson & A Heinze 'Reevaluating African women's inheritance rights in indigenous customary law and statutory national law' (2019) 5 *Brigham Young University BYU Scholars Archive* 2-4.

18 International Justice Mission 'Property grabbing from Ugandan widows and the justice system' (2012) https://pulte.nd.edu/assets/172925/property_grabbing_for_ugandan_widows_and_the_justice_system.pdf%22%3Eproperty_grabbing_for_ugandan_widows_and_the_justice_system.pdf (accessed 15 May 2023).

19 Succession Act of Uganda 1972.

20 Human Rights Watch (n 1).

21 UNHABITAT, Progress Report on removing discrimination against women in respect of property & inheritance rights, <https://staging.unhabitat.org/content.asp?cid=3983&catid=491> (accessed 15 May 2023).

22 MA Jadeed *The inheritance rights of Muslim women in Kenya: reality or rhetoric* http://erepository.uonbi.ac.ke/bitstream/handle/11295/154363/Moza_The%20Inheritance%20Rights%20of%20Muslim%20Women%20in%20Kenya%20-%20%20Reality%20or%20Rhetoric.pdf?sequence=4, p 13 (accessed 15 May 2023). For more, see also; UN-Women & Office of the UN High Commissioner for Human Rights (OHCHR) (2013) *Realizing women's rights to land and other productive resources* (New York & Geneva: UN-Women & UN-OHCHR) <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Realizing-womens-rights-to-land-and-other-productive-resources-2nd-edition-en.pdf> (accessed 15 May 2023).

23 Under Sharia law, women (wives) can only inherit one-eighth of the net estate of their deceased husband when there were children and one-fourth if there were none. On the other hand, men inherit a fourth of their wife's estate where there are children and a half where there are none. See Jadeed (n 22).

share $\frac{1}{8}$ of the estate if there are children, or one quarter of the estate, if there are no children. Even worse, women hesitate to claim even these entitlements stipulated under Islamic law, out of fear of causing family strife or for lack of awareness.²⁴

Regrettably, limitations of access to property rights through, *inter alia*, restricted inheritance implicates the enjoyment of many human rights of women such as the right to live free from discrimination, the elimination of harmful traditional practices where women in a disadvantaged and poor position cannot negotiate out of precarious social conditions, the right to housing, right to health and the right to an adequate standard of living including the ability of women to provide for their day-to-day needs and those of their families, and to weather some of life's most difficult challenges.

With this in mind, the adoption of a comprehensive protocol on women's rights is an unequivocal acknowledgment that women's rights, including inheritance rights matter.²⁵

This chapter is organised into seven sections. Following this introduction, the second section addresses the drafting history of article 21. The third section relates article 21 to other relevant provisions in the Maputo Protocol and in other human rights treaties. Section 4 discusses the concepts that are core to the content of article 21. The fifth section analyses the nature and scope of the obligation placed on states. The sixth section reviews state practice in implementation of article 21, making reference to relevant Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or Commission) and other treaty bodies. The concluding section gives an assessment of the progress made in realising inheritance rights and makes appropriate recommendations.

2 Drafting history

Article 21 of the Maputo Protocol is unique in its articulation of widows' right to inheritance as well as gender equality in inheritance rights for both men and women. As aforementioned, it focuses on two aspects of inequality in inheritance, one being that suffered by widows, and the other, the negative experiences of inequality for both men and women. Additionally, it not only touches on inheritance of property per se, but it extends further rights to widows when it includes guarantee of a widow's right to remarry and, in that regard, to marry the person of her choice. Never before in an international instrument has such express attention been given to widows as is given in the Maputo Protocol's articles 20 and 21.²⁶

The wording and weight of article 21 as reflected in the Maputo Protocol did not just happen and neither was there automatic consensus among the drafters. It went through several adjustments, which reflects the importance that was attached to inheritance during the development of the Protocol. This section will trace the journey of this provision as it evolved through various drafts of the Protocol.

The version of the Maputo Protocol that was discussed in Nouakchott in Mauritania in 1997 did not provide for a specific and stand-alone provision on inheritance.²⁷ Article 2 of the same carried a general equality provision requiring equal treatment for men and women in all circumstances. It therefore commenced with a broad basis for gender equality. The draft provision also addressed the issue of property division following marriage annulment (Clause 7). It went further to protect the right of the surviving party to live in the matrimonial home upon the passing of their spouse. In this sense therefore, the provision as reflected in 1997 was more general, providing for rights for both women and

24 Jadeed (n 22).

25 International Justice Mission (n 18).

26 For discussion of art 20 on widows' rights, see C Mokoena 'Article 20' in this volume.

27 Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

men with regard to property except in brief passing where it stated that a widow shall have the right to inherit her husband's property. This early version of the Protocol gave greater emphasis to transfer of property at annulment of marriage than to inheritance.

The next draft of the Maputo Protocol was discussed in Kigali in 1999.²⁸ Just like the earlier draft, the 1999 version provided for rights to property for parties upon annulment of marriage in Clause 8. Clause 9 also reflected the same position as the 1997 draft where it allowed both widows and widowers to have the right to inherit each other's property, and for widows to continue living in the matrimonial home. Generally, both the 1997 and 1999 drafts of the Maputo Protocol still clamped together the aspect of annulment of marriage as well as inheritance. Inheritance in itself was yet to be recognised as a stand-alone element of property devolution and in fact the position got worse before it got better.

The draft Organisation of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls,²⁹ later merged with the Draft Protocol, contained only 13 articles, none of which addressed inheritance. Even the definition of harmful practices under article 1 was limited to 'attitudes, behaviours or practices that affect life, health and bodily integrity of women'. This definition was limiting in that it omitted indirect effects that can be caused by harmful practices such as unequal inheritance between genders.

It was therefore a relief when the final version of the Protocol specifically focused on inheritance as a stand-alone right without merging it with annulment of marriage. It further integrated elements of equality for both men and women with emphasis on widows. The Meeting of Experts held in Addis Ababa, Ethiopia in November 2001 to discuss the draft Protocol³⁰ added protection of widows' rights to the matrimonial home even upon remarriage.

It is clear from the above therefore that article 21 evolved from simple clauses that amalgamated marital property and inheritance. In the end, the final provision is a strong stand-alone guarantee of rights to property received through inheritance for both men and women. Furthermore, it specifically assures widows of secure and continuous access to and control of the matrimonial home even upon remarriage.

3 Linkages with other treaty provisions

While the significance of having article 21 cannot be denied with regard to protecting inheritance rights especially for women, the provision stands to benefit from other complementary rights. The article should be read together with provisions on non-discrimination, the right to dignity as well as equality in marriage. The United Nations Committee on the Elimination of Discrimination against Women, the United Nations Committee on Economic, Social and Cultural Rights and the United Nations Human Rights Committee have explicitly recognised equality in marriage over the management of property, including land.³¹

28 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

29 Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

30 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

31 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 21 on Equality in Marriage and Family Relations, 1994 A/49/38(SUPP)/4733/E.

Similarly, the right to an adequate standard of living is linked to article 21. The UN Special Rapporteur on the Right to Food articulated this linkage as

the right to food requires that states refrain from taking measures that may deprive individuals of access to productive resources on which they depend when they produce food ... and that they seek to strengthen people's access to and utilisation of resources and means to ensure their livelihoods, including food security...³²

He also observed that 'there remain laws and social customs such as those ensuring that the land of a deceased husband belongs to his sons, not to his widow, despite the flagrant violation of women's rights to which this leads' and 'as a result, women still represent a significant minority of the total number of titleholders ...'³³

Particular mention goes to article 20 of the Maputo Protocol which provides for the rights of widows. It is common practice customarily for widows to receive a smaller share of their husband's property at his death than would widowers and sons. In some instances, widows are granted limited and controlled rights and receive only income from the deceased's property.³⁴ Often rights of widows do not reflect the principle of equality in marriage, especially in regard to ownership of property acquired during marriage. The existence of article 20 therefore complements article 21 in a special way.

Thus, a holistic reading of the Protocol together with other relevant human rights instruments is just as important in guaranteeing the full enjoyment of the right to inheritance for both women and men, and particularly for women in marital circumstances.

4 Concepts and definitions

4.1 Equality and non-discrimination in inheritance: pronouncements at the African regional level

The starting point for women's equal right to inherit can be inferred from rights to equality and non-discrimination. At the regional level, the right to property is guaranteed under article 14 of the African Charter on Human and Peoples' Rights (African Charter). The treaty further guarantees that the enjoyment of this right shall be without distinction of any kind including sex.³⁵ The African Charter makes no specific mention of inheritance. It however requires states to ensure the elimination of every discrimination against women.³⁶

The Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the African Charter make mention of the right to property with a focus on protection from forced eviction, protection from historical land injustices and the prevention of unfair exploitation of natural resources.³⁷ However, the focus in this instrument is on land as a key asset for most people on the African continent. The Guidelines underline the obligation on states to ensure equitable and non-discriminatory access to land and housing especially by women. They further mandate states to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and

32 UN-Women & OHCHR (n 22) 21.

33 UN-Women & OHCHR (n 22) 27.

34 UN-Women & OHCHR (n 22) 21.

35 African Charter art 2.

36 Article 18 African Charter.

37 Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y (accessed 15 May 2023) para 55.

other members of vulnerable and disadvantaged groups from enjoying their right to property.³⁸ One limitation of these Guidelines in regard to inheritance is the fact that the protection mandate imparted upon states is confined to matters such as protection from forced eviction, historical land injustices and unfair exploitation of natural resources. While these addresses recognised historical challenges, it suffers two shortcomings. First, it fails to address land injustices that arise from relations in the private sphere of family. Second, the exclusive focus on land eclipses concerns around other forms of property. The context of inheritance brings up both of these dimensions. The Guidelines therefore fall short of addressing the issue of inheritance in general, and as a specific violation of women's property rights.

Over the years, however, there have been some more specific pronouncements on inheritance, specifically on widow's rights. African Commission Resolution 262³⁹ urges states to, *inter alia*, ensure widows' right to inheritance, including the right to inherit the movable and immovable property of their husbands, as well as their right, irrespective of matrimonial regime, to continue to live in the matrimonial house. This instrument is significant as a basis for promoting gender equality and protection of widows from unfair inheritance practices. It should be noted however that the resolution, just like the aforementioned Guidelines, adopts a specific approach focused on land and housing, rather than a broader mandate to protect women's access to and control over all forms of property.

So far, no General Comment has been issued on the matter of inheritance. The closest that the African Commission has come to enacting an instrument under the Maputo Protocol on the right to property is General Comment 6. Adopted in March 2020, General Comment 6 focuses on the right to property during separation, divorce or annulment of marriage as laid out under article 7(d) of the Maputo Protocol.⁴⁰ This does not take care of inheritance triggered only upon a spouse's death and not annulment of marriage. To the commission's credit though, General Comment 6 does address other property besides land and housing. The General Comment, however, provides no specific pronouncement on division of property received as inheritance, and does not therefore address the concerns of article 21.

38 As above para 55(h).

39 African Commission Resolution on Women's right to land and productive resources, ACHPR/Res. 262 (LIV) 2013 (African Commission Resolution 262).

40 General Comment 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 (art 7(d)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020.

4.2 Equality and non-discrimination in inheritance: pronouncements at the international level

General Comment 28 of the Human Rights Committee highlights the significance of conferring equal property and inheritance rights upon men and women. In the context of giving effect to article 23 of the International Covenant on Civil and Political Rights (equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution), it specifies that '[w]omen should... have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses'.⁴¹

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the most comprehensive instrument at international level with regard to women's rights. It provides an extensive definition of discrimination.⁴² It further recognises that many abuses of women's rights emanate from society and culture and compels governments to take appropriate measures to correct these abuses. CEDAW requires governments:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁴³

CEDAW contains general clauses that accord women equal rights with men before the law⁴⁴ as well as specific clauses on equal rights in marriage.⁴⁵ Article 2 obliges states to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women'. Article 16(h) specifically prescribes the same rights for spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.⁴⁶ However, CEDAW does not contain a specific provision on inheritance.

The UN Committee on Elimination of Discrimination against Women (CEDAW Committee) has attempted to plug this gap by elaborating on discrimination in the area of property rights so as to include a concern about inheritance:

There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.⁴⁷

The Committee also stated that in countries undergoing agrarian reform or land redistribution 'the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed'.⁴⁸

41 Human Rights Committee, General Comment 28, Equality of rights between men and women (art 3) (29 March 2000).

42 CEDAW art 2.

43 CEDAW art 5.

44 CEDAW art 15(1).

45 CEDAW art 16.

46 CEDAW art 16(h). See UN-Women & Office of the UN High Commissioner (n 22) 20.

47 As above. See also CEDAW Committee General Recommendation 29, paras 49, 52-53.

48 UN-Women & Office of the UN High Commissioner (n 22) 21.

The CEDAW Committee further cites unequal inheritance rights as a contributing factor to women's lack of economic and political advancement, vulnerability to domestic abuse and HIV/AIDS.⁴⁹ Additionally in General Recommendation 21 (1994) on equality in marriage and family relations, the CEDAW Committee underscored that 'the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.'⁵⁰

Despite the strong inference to property rights guaranteed in CEDAW, it should be noted that there is a difference in terminology with the Maputo Protocol. Whereas CEDAW in General Recommendation 21 refers to 'equal' rights to property, the Maputo Protocol refers to 'equitable' rights to the same. The language of equality essentially means equal amounts to or equal opportunity to access property. The CEDAW Committee has suggested that the term 'equitable' could result in less favourable treatment, and has ruled that it is incompatible with the Convention's standard of equality.⁵¹ Despite the variance in terminology between the two treaties, it is clear that both are concerned about women's restricted property rights, as well as relatively limited access to education, employment and other opportunities, which ideally constitute alternative routes to economic empowerment and secure property rights. The mandate to guarantee women greater access, whether that is tagged 'equal' or 'equitable' at least signals a strengthening of state obligation towards this social group. Considering the predominance of inheritance as a mode of acquisition of property for women, the language in both CEDAW and the Maputo Protocol guarantees a strong position for property rights through inheritance. The inclusion of the adjectives in the texts of both instruments demand that a lot more should be done to protect women from restraints and restrictions emanating from the socio-cultural set up of African society beyond merely improved access.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has also weighed in on this issue of property rights. In its General Comment 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights,⁵² the CESCR Committee stated that 'women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so'.⁵³ The UN Human Rights Committee has also stated that 'the capacity of women to own property ... may not be restricted on the basis of marital status or any other discriminatory ground' and that states parties must ensure that the 'matrimonial regime contains equal rights and obligations for both spouses with regard to ... the ownership or administration of property, whether common property or property in the sole ownership of either spouse'.⁵⁴

The right to adequate housing is one with close nexus to inheritance and property rights and in fact, the UN Special Rapporteur on the Right to Adequate Housing has made great strides focusing on

49 See CEDAW Committee General Recommendation 28 on the core obligations of states parties under art 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (16 December 2010) CEDAW/C/GC/28 (2010) para 22.

50 General Recommendation 21 on equality in marriage and family relations, adopted at the 13th session (1994) A/49/38SUPP/4733/E(1), para 26. The CEDAW committee has not had the opportunity to rule on any individual complaint dealing with inheritance to property. The complaint of Cristina Muñoz-Vargas y Sainz de Vicuña relating to inheritance of a nobility title in Spain was ruled inadmissible because Spain had not yet ratified CEDAW at the time the alleged violation took place. See the CEDAW Committee, Communication 7/2005, 39th session (23 July-10 August 2007).

51 CEDAW Committee General Recommendation 28 (n 49) para 22.

52 CESCR Committee General Comment 16 the equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3 of the Covenant) 11 August 2005 E/C.12/2005/4.

53 CESCR Committee General Comment 16 (n 52) para 28.

54 UN Human Rights Committee (HRC), CCPR General Comment 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10.

this issue especially as it relates to women's right to equality under international human rights law.⁵⁵ The loss of security of tenure that is experienced by most women following the death of a spouse is an example of gender-based inequality and discrimination. The Guidelines for the implementation of the right to adequate housing (2020) developed by the Special Rapporteur on the right to adequate housing, urge states in Guideline 9 to recognise the independent right of women to security of tenure, irrespective of their family or relationship status. This would ensure protection of women in circumstances of widowhood. Additionally, the Special Rapporteur interrelates issues of land, property and inheritance to other human rights, such as the rights to water and to health, in order to provide a more comprehensive and indivisible analysis of women's right to adequate housing.⁵⁶ Providing a wide application of the right to adequate housing ensures that other interrelated rights such as property and inheritance enjoy legal enforcement through a diverse range of legal and policy frameworks, and provide avenues for redress where violations occur.

From the above discussion, it is clear that regional and international laws do provide for property rights but largely follow a broad approach with limited reference to inheritance. Only the Maputo Protocol is very specific in providing a stand-alone provision on the right to inheritance. However, credit should also be given to some instruments other than the Maputo Protocol, which have attempted to highlight widows' plight. These include the UN General Assembly Resolution 65/189 which designates 23 June as a day for reflection on widows and their circumstances.⁵⁷ Additionally, the 2002 UN Madrid International Plan of Action on Ageing⁵⁸ notes widows' exposure to the risk of poverty and widowhood rites. The chapter commenting on article 20 addresses these broader challenges in greater detail.

5 Nature and scope of state obligations

The Maputo Protocol outlines obligations that guide states parties in fulfilling their mandate under the instrument. Article 2 is key as an introductory provision. It sets the standard in prohibiting all forms of discrimination against women. It calls upon states parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. It sets out the nature and scope of state obligations to include integration of the principle of equality between women and men in national constitutions and other legislation and ensure their effective application. Of particular relevance in the context of inheritance is the call on states to take measures such as public education to modify social and cultural patterns of conduct of men and women so as to eliminate harmful practices which are based on assumptions as to the inferiority or superiority of either of the sexes or on role stereotyping.⁵⁹

Additionally, the Protocol calls on states to provide for appropriate remedies to any woman whose rights or freedoms have been violated.⁶⁰ This goes hand in hand with the duty to report periodically on progress made in implementing the Protocol at national level,⁶¹ as well as the need to allocate adequate budgets.⁶²

55 UN Special Rapporteur on the Right to Adequate Housing, Report on Women and the right to adequate housing (2012) A/HRC/19/53.

56 UN Special Rapporteur on the Right to Adequate Housing, Women and the right to adequate housing, Final report (2006), E/CN.4/2006/118.

57 Resolution adopted by the General Assembly on 21 December 2010 on the report of the Third Committee (A/65/449): International Widows' Day A/RES/65/189.

58 <https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf> (accessed 15 May 2023).

59 Maputo Protocol art 2(2).

60 Maputo Protocol art 25.

61 Maputo Protocol art 6(1).

62 Maputo Protocol art 26(2).

As a starting point, it is remarkable to note that no reservations have been entered on article 21.⁶³ This is a clear sign that the right is undisputed – at least in principle – by all state parties.

6 State practice/implementation

With regard to the aforementioned obligations, state practice indicates an increasing number of countries that have recognised women's equal rights to property in their constitutions and national laws, thus complying with human rights standards and obligations under the protocol. Constitutional provisions that prohibit discrimination, including in customary law and practice, constitute best practice in implementing gender equality in property rights and specifically inheritance. Many African countries' constitutions make good examples. For instance, Mozambique addressed gender discrimination in property ownership and inheritance laws by amending its Constitution as well as its land and family laws.⁶⁴ Uganda's Constitution prohibits in very concrete terms any 'laws, cultures, customs and traditions' which harm women and undermine their status.⁶⁵ On this premise, gender-discriminatory provisions of customary law remain explicitly illegal under Ugandan constitutional law. The Constitution also protects every person's right to individually or collectively own property.⁶⁶ However, that has not stopped the continued existence of gender discriminatory practices against women through customary law. Additionally, Malawi's Constitution is unique in that it makes specific mention of women's property rights.⁶⁷ Furthermore, more recent constitutions, such as that adopted in Kenya in 2010 and in Zimbabwe in 2013, include a gender-sensitive dimension that improves women's rights. Section 17 of Zimbabwe's Constitution not only promotes full gender balance in Zimbabwean society but further calls on the state and all institutions and agencies of government at every level to take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.⁶⁸

Similarly, Kenya's Constitution protects every individual's right to property.⁶⁹ Specifically, article 40(2)(b) prohibits parliament from enacting laws that limit the enjoyment of this right through any grounds of discrimination, including sex, marital status, belief and culture. This provision implies that women, like men, have a right to own property of any kind, and culture and traditions cannot be used to deprive them of this right.

Another aspect of implementation is the enactment of national laws that conform to the principles in the Maputo Protocol. In 2011 Malawi passed the Deceased Estates (Wills, Inheritance and

63 42 out of the 55 African countries have ratified the Maputo Protocol leaving 13 countries yet to join the treaty. See, <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 15 May 2023).

64 Article 36 of Mozambique's Constitution amended in 2004 provides for the principle of gender equality. It guarantees that both men and women shall be equal before the law in all spheres of political, economic, social and cultural life. See also, Cooper (n 2) 11.

65 Constitution of Uganda, 1995 art 33.

66 As above arts 26 & 27.

67 RS Sikwese 'Women's economic rights: removing barriers to women's access to justice in Malawi' in Goal 16 of the Sustainable Development Goals: Perspectives from judges and lawyers in Southern Africa on promoting rule of law and equal access to justice (2016) 22 <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Sikwese.pdf> (accessed 16 May 2023). Section 24 of the Constitution of Malawi, 1994, provides that: '(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status ... (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as: (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs; and (c) deprivation of property, including property obtained by inheritance'.

68 Constitution of Zimbabwe 2013, sec 17(1)(c).

69 Constitution of Kenya, art 40(1).

Protection) Act. This Act repealed the Wills and Inheritance Act, which posed many challenges for widows. The Act is deemed a milestone in addressing the predicament of women and children in as far as the administration of deceased estates is concerned.

Uganda has also taken similar strides by repealing its old Succession Act of 1972, an Act that was rooted in patrilineal practices under customary and Islamic law. Although the Act recognised women's right to inherit from their husbands, inequalities in inheritance rights were not addressed and still restricted women's rights to land and matrimonial property as well as limited percentages to the deceased's estate. The Act legitimised devolution of the residential holding to the oldest male descendant and further limited a widow's right to occupy her home by requiring that she remain chaste for the rest of her life. The law also permitted an overlap between customary practices and Sharia law. The repealing of this law was prompted by a successful judgment given by the Constitutional Court in the case of *Law and Advocacy for Women in Uganda v Attorney General*⁷⁰ which nullified several sections of it. The Succession (Amendment) Act 2022 remedies these gender inequalities by aligning intestate inheritance law to the Constitution. The 2022 Act was enacted purposely to recognise and accord equal rights to men and women under the law, among other reforms. It re-defines the distribution of estates of intestates (persons who die without a will) and provides for the duration of probate and letters of administration. Among the changes made through the amendment is the use of gender-neutral language. It replaces words such as 'a married woman' with spouse; uses 'persons' instead of 'man', and inserts 'or her' after 'his'. It refers to both parents and not just 'father', and it takes account of both sons and daughters. Additionally, the Amendment also substituted the words 'customary heir', which only recognised the males, to 'customary heir or heiress' to include even women.⁷¹ The amendment also revised the percentage shares for the distribution of property of an intestate by increasing the percentage share of the spouse from 15 per cent to 20 per cent where an intestate is survived by a spouse, lineal descendant, a dependent relative and customary heir.⁷² The Act however fails to recognize any property interest for persons that did not conclude what is termed as a legally formalised marriage despite the number of years of cohabitation.

In Sierra Leone, equality in matters of inheritance is now provided for through the Devolution of Estates Act of 2007, but this does not apply to property held under customary law.⁷³ Ghana's Intestate Succession Law of 1985 also provides for the spouse and children of a person who died intestate (that is, without a will) to inherit most of the property of their deceased spouse or parent.⁷⁴

In Rwanda, both the Constitution and accompanying legislation safeguard women's rights to inherit land. A 1999 revision of the civil code stipulates an equal inheritance right for all children, but also guarantees that married women can inherit from their husbands.⁷⁵ In actual sense therefore, women not only have inheritance rights in their birth family as daughters but have in addition an equal share in marital property.

Provisions allowing discrimination through customary and personal law matters (such as inheritance) continue to persist in some countries in Africa upon which precedents restricting inheritance

70 Constitutional Petition 13/2006 & 05/2006 (Uganda).

71 Section I(a) Succession (Amendment) Act 2022 (Uganda).

72 Constitution of Uganda, 1995 sec 27(a).

73 UN Women & OHCHR 2013 (n 22).

74 As above.

75 K Vanhees 'Property rights for women in Rwanda: access to land for women living in de facto unions' Masters Dissertation, University of Ghent, 2014.

rights have been issued by courts.⁷⁶ The Zimbabwean case of *Magaya v Magaya*⁷⁷ is an example. The brief facts of this case are that Magaya, an unmarried daughter was appointed by court as heir to his estate, but this was contested by her younger half-brother. The Supreme Court ruled that Ms. Magaya could not inherit a municipal house, because customary law did not permit women to own property on land. In other words, the court ruled that customary law took precedence over the non-discrimination provision of the Constitution. The Zimbabwe Constitution at that time exempted discrimination arising from the application of customary law in such matters of personal law. Such a court decision shows the disastrous consequences that can follow from discriminatory and contradictory provisions in a plural legal system. It should be noted however that this decision was passed before the adoption of the Maputo Protocol. Additionally, the Zimbabwe Constitution of 2013 put an end to this exemption and the case is no longer good law in Zimbabwe. However, the effect of this judgment is important to illustrate the negative effect of such provisions on inheritance rights if retained in law.

On the other hand, where constitutions carry progressive provisions of equality, it is easier to enforce rights such as inheritance in courts. A case in point is the Tanzanian case of *Ndossi v Ndossi*.⁷⁸ Here, a widow retained her right to her deceased husband's estate after she challenged her brother-in-law, who had been appointed administrator. The court rooted its decision in the Tanzanian Constitution as well as the anti-discrimination principles in CEDAW. A similar decision was reached in *Ephrahim v Holario Pastory*.⁷⁹ The South African case of *Nonkululeko Letta Bhe v Magistrate Khayelitsha*⁸⁰ is another landmark decision. While making reference to articles 2(1)(a), 21 and 25 of the Maputo Protocol, among other international and regional conventions, the Constitutional Court ruled unconstitutional the Black Administration Act which regulated customary intestacy and allowed the discriminatory practice of male primogeniture.

In the words of Deputy Chief Justice Langa:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.⁸¹

He then went on to say:

In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom... In conclusion, the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny.⁸²

Other progressive decisions affirming gender equality and the right to inheritance for widows are evidenced in the decisions of *Re the Estate of Andrew Manunzyu Musyoka*,⁸³ where the court held that Kamba customary law of Kenya was discriminatory in so far as it sought to deny the applicant her

76 V Knobelsdorf 'Zimbabwe's Magaya decision revisited: women's rights and land succession in the international context' (2006) 15 *Columbia Journal of Gender and Law* 749.

77 1999 (1) ZLR 100 (S).

78 Civil Appeal 13 of 2001 (Unreported), High Court of Tanzania.

79 High Court of Tanzania at Mwanza (PC) Civil Appeal 70 of 1989; [1990] LRC (Const) 757.

80 *Nonkululeko Letta Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 48.

81 Para 91.

82 Paras 95 & 97.

83 Succession Cause 303 of 1998.

inheritance rights on grounds of sex. The practice barred married daughters from inheriting from their fathers' estates, except in instances where the daughter in question was divorced and had taken the step of returning the bride price to her husband's family. The court held that the customary law in question was repugnant to justice and good morals.⁸⁴ It relied on section 40 of the Law of Succession Act which confirms that all children whether male or female are beneficiaries and should have a share in the deceased's estate, as well as the non-discrimination clause of the constitution.⁸⁵ The court went on to say that Kenya, as signatory to a number of international conventions and regional agreements was under an obligation to observe the doctrines of anti-discrimination contained therein. The decision came earlier than the Maputo Protocol and thus did not make any specific reference to it. It is however noteworthy that it relied on CEDAW and the African Charter on Human and Peoples' Rights in ensuring elimination of discrimination of women in inheritance rights.

In 2012, the Botswana High Court ruled that the Constitution took precedence over Ngwaketse customary law in *Mmusi v Ramantele*.⁸⁶ Here, Ngwaketse customary law favoured inheritance by the next closest male in the absence of a direct linear male heir. The Botswana High Court, relying on national and international instruments prohibiting discrimination on grounds of gender, ruled in favour of a female heir. It based its decision on the understanding that customary law should not be repugnant to the written law, morality, humanity, or natural justice. According to the Customary Law Act, customary law in relation to any particular tribe or tribal community, is law in so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.⁸⁷

This ruling fundamentally changed the way women's inheritance rights function today in Botswana.⁸⁸ The court also cited articles 2 and 3 in the African Charter which prohibit discrimination on the basis of sex and further maintains that '(a) Every individual shall be equal before the law [and] (b) Every individual be entitled to equal protection of the law.'⁸⁹

Other notable decisions include the Ugandan case of *Herbert Kolya v Erikiya Mawemuko Kolya*⁹⁰ which prohibited the practice of husbands bequeathing the matrimonial home to their legal heir without taking care of the interests of the widow. In *Adong Simon v Opolot David*,⁹¹ the Uganda Court of Appeal decided that a widow has a right to dispose of land she inherited from her deceased husband in light of the equality provisions in Uganda's Constitution.⁹² The case of *Best Kemigisha v Mable Komuntale*⁹³ not only affirmed the right of a widow to inherit the property of her deceased husband, but in this case,

84 It should be noted that this case was decided before Kenya's Constitution of 2010 where the standard under which customary law was judged was the repugnancy test, rather than the constitutionality test.

85 The relevant section then was sec 82(3) of the 1963 Constitution (as amended in 1997). Section 82(3) defined discrimination as; 'affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe. Place of origin or residence or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons another such description.' Since the 2010 Constitution, the relevant clause is art 27 on equality, and art 2 which makes it explicit that the application of customary law is subject to the constitution.

86 (2012) 2 BLR 590 HC (Bots).

87 Section 2, Customary Law Act Cap 16.

88 It is both remarkable and perplexing that the court made no reference to the personal law exemption clause contained in art 15(4)(c) of the Constitution.

89 T Masengu 'Customary law inheritance: lessons learnt from *Ramantele v Mmusi and Others*' (2015) University of Cape Town Working Paper 6.

90 High Court Civil Suit 150/2016 (Uganda).

91 Soroti Civil Appeal 46 of 2013 (Uganda).

92 Article 31(1) of Uganda's Constitution entitles men and women to equal rights in marriage, during marriage and at its dissolution.

93 HCCS 5/1998 (Uganda).

extending to the properties of a kingdom. The queen contested the Toro custom which precluded her from administering the property of the kingdom upon the demise of her husband, the king. The court held that this restriction was repugnant to the principles of natural justice and good conscience and therefore null.⁹⁴

Other cases to note include the Zimbabwean case of *Chiminya v Estate (Late Dennis Mhirimo Chiminya)*⁹⁵ which protected the rights of a widow married under an unregistered customary law union for 42 years. The court held that an unregistered customary law union is recognised for inheritance and proprietary right purposes. Similarly, in *Ukeje v Ukeje*,⁹⁶ the Supreme Court of Nigeria unanimously protected the right to inheritance of a female child from her late father's estate despite the fact that she was born outside marriage. The Supreme Court of Ghana has guaranteed equal rights to both male and female children. In *Fianko v Aggrey*, it stated that 'the children of a deceased person both male and female have a right to inherit their deceased mother's property; this is regardless of whether the woman came from a matrilineal or patrilineal family'.⁹⁷

Additionally, in *King NO v De Jager*,⁹⁸ the South African Constitutional Court ruled that a clause in a private will limiting the inheritance of property to only male descendants is unconstitutional or otherwise void as against public policy. The import of this case lies in the horizontal application of the non-discrimination clause of the Constitution to restrict a person's right to exercise private property rights, when such exercise of property rights contradicts the Constitution's values. It is generally worth noting that most of the progressive cases discussing inheritance rights in Africa rely on CEDAW much more than the Maputo Protocol. There is therefore a gap and an opportunity to create further awareness within the legal fraternity about the Protocol and its potential for developing the jurisprudence of equality across the continent.

The African Court on Human and Peoples' Rights has also weighed in on the issue of inheritance rights. Its 2018 ruling in *APDF*⁹⁹ marked the first time that the African Court found violations of the Maputo Protocol on rights of women, and specifically inheritance rights. The parties challenged the 2011 Family Code of Mali for violating the right to equitable inheritance enshrined in article 21(2) of the Maputo Protocol. The applicants submitted as follows:

In adopting the impugned law, the Malien state violated Article 21 of the Maputo Protocol which provides that a widow shall have the right to an equitable share in the inheritance of the property of her husband ... Women and men shall have the right to inherit, in equitable shares, their parents' properties.¹⁰⁰

The applicants further referenced the Committee on the Elimination of Discrimination against Women which declared that practices which do not give women the same share of inheritance as men constitute a violation of CEDAW.¹⁰¹ In this instance, Mali's Islamic law applied in matters of inheritance, giving women only a half of the portion of what their male counterparts receive. The

94 Similar rulings can be found in *Elizabeth Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *South African Human Rights Commission v President of the Republic of South Africa* (2005 (1) SA 580 (CC); *Shibi v Sithole* 2005 (1) SA 580 (CC); *Ndabahweje Pauline v Babirye Rosemary* (Civil Appeal 95 of 2001 (Uganda); and *Juliet Kalema v William Kalema* CA 95/2003.

95 HC 4201 of 2014 [2015] ZWHHC 272 (11 March 2015).

96 (2014) 11 NWLR (PT.1418) 384,

97 (2007-2008) SC. GLR 1135, 1145.

98 2021 (5) BCLR 449.

99 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380 (APDF).

100 APDF (n 99) para 98.

101 APDF (n 99) para 99.

court affirmed that, irrespective of current cultural and religious practices, Mali had committed to eliminating discrimination against women, and the Family Code sanctioned discriminatory practices that undermine the rights of women. The court noted that in matters of inheritance a predominant place is accorded to the rights of the woman and the child, given that the widow and the children born out of wedlock have the same rights as the others and that these guarantee equality of treatment for women and for children without any distinction.¹⁰² The Court therefore found that the Malien state had violated article 21(2) of the Maputo Protocol.¹⁰³ The Court subsequently ordered Mali to amend its Family Code so as to bring it into line with international human rights standards.¹⁰⁴ It also ordered it to inform and educate its population as to these rights and obligations.¹⁰⁵

Overall, there has been progress with regard to implementing article 21 of the Maputo Protocol across parts of the African continent. There are some key institutions and actors which have been at the heart of breathing life into the Maputo Protocol and implementing article 21. They include the courts, law and policy makers such as ministries of gender, parliaments and agencies in charge of law reform.

However, some challenges remain which need to be overcome mostly regarding reconciling the different inheritance positions within conflicting customary, religious and national laws. Additionally, states have to find ways to address prohibitive procedural requirements for registration and formalisation of marriages which are often used to exclude women from inheriting their spouses' property. Both the African Commission and CEDAW, in their engagement with state reports, have expressed concern over two extremes: state failure to implement a universal marriage registration system altogether, and rigid, punitive formal registration requirements that fail to take account of practical limitations such as inadequate decentralisation of services.¹⁰⁶

It is notable though, that the right to inheritance has not attracted much specific attention in the African Commission's engagement with states. There was little mention, if any, of inheritance equality in state reporting. This is partly because separate and systematic reporting under the Protocol is not yet a uniform state practice, with most states reporting under the African Charter. This in a way hinders the impact of the regional human rights instruments to enforce specific rights such as inheritance equality through the mechanism of state reporting, key being the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).

Article 62 of the African Charter mandates states parties to report on the legislative, policy, institutional and other measures which have been taken to implement the Maputo Protocol in the specific

102 *APDF* (n 99) para 110.

103 *APDF* (n 99) paras 115 & 135(v) & (vii).

104 *APDF* (n 99) para 135.

105 As above.

106 See, eg, Concluding Observations and Recommendations on the Combined 2nd and 3rd Periodic Reports of Botswana 2011-2015, African Commission on Human and Peoples' Rights, adopted at the 26th extraordinary session (16-30 July 2019) para 17; Concluding Observations and Recommendations on the Combined 1st to 9th Periodic Report of Eswatini on implementation of the African Charter on Human and Peoples' Rights 2001-2020, and the initial report to the Maputo Protocol, African Commission on Human and Peoples' Rights, adopted at the 69th ordinary session (15 November-2 December 2021) para 50. See also CEDAW Committee Concluding Observations on 4th Periodic Report of Côte d'Ivoire (30 July 2019), UN Doc CEDAW/C/CIV/CO/4 (2019) para 51; 6th Periodic Report of Gabon (11 March 2015), UN Doc CEDAW/C/GAB/CO/6 (2015) paras 44 & 45; Combined 4th and 5th Periodic Reports of The Gambia (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 49; 6th and 7th Periodic Reports of Ghana (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 40; 6th Periodic Report of Zimbabwe (10 March 2020) UN Doc CEDAW/C/ZWE/CO/6 (2020) para 50; 8th Periodic Report of Kenya (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 32; 8th Periodic Report of Mauritius (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 37; 8th Periodic Report of Senegal (1 March 2022), UN Doc CEDAW/C/SEN/CO/8 (2022) para 42(b).

countries. However, a quick scan by the author through state reports as well as concluding observations and recommendations indicates a light touch on this right. Focus on issues affecting women include marital rape and domestic violence,¹⁰⁷ HIV, sexual and reproductive health rights including elimination of maternal mortality.¹⁰⁸ The closest that the African Commission has come to including the right to inheritance is in its references to the duty to eliminate harmful traditional practices which affect the rights of vulnerable persons such as women.¹⁰⁹ Even Nigeria, a country which regularly submits its periodic reports, does not feature specific reporting on the right to inheritance.¹¹⁰ This position is no different under the African children's rights mechanism. The majority of state reporting and the Concluding Observations to state reports considered by the African Children's Committee interpret article 21 on harmful social and cultural practices largely to mean protection against female genital mutilation, child marriage and child marriage.¹¹¹ Equal right to inheritance between boys and girls in state reports and Concluding Observations features minimally.

Nevertheless, the African Commission has attempted to mitigate this issue by giving special focus to the general duty on states to eliminate discrimination against women and children as provided under article 18(3) of the African Charter. This provision calls on state parties to eliminate discrimination against women and children and further protect their rights as stipulated in international declarations and conventions.

7 Conclusion

Inadequate protection of inheritance rights remains a key obstacle to the enjoyment of property especially for women in African societies. This is mostly because of customary and religious norms that restrict women's right to hold and transact in property in their own right. While a majority of African constitutions outlaw gender discrimination, the practice under both formal and customary law explicitly contradicts these ideals. This is compounded by institutional barriers which limit women's access to courts and fair adjudication when violations of women's inheritance rights occur.

The adoption of a comprehensive protocol on women's rights – the Maputo Protocol – was a landmark gain for women's rights and in particular on aspects such as inheritance. It was an unequivocal acknowledgment that women's rights, including inheritance rights matter and in fact, never before in an international instrument has such express attention been given to widows.

107 See for instance Concluding Observations and Recommendations on the 6th to 8th Combined Report of Mauritius on implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 60th ordinary session (8-22 May 2017) para 78 & 80.

108 See African Commission Concluding Observations on the Combined 8th to 11th Periodic Report of Kenya 2008-2014, adopted at the 19th extraordinary session 16-25 February 2016) Banjul, The Gambia.

109 See for instance Concluding Observations and Recommendations on the 5th Periodic Report of Nigeria 2011-2014, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015); para 74 mentions the existence of harmful traditional practices which affect the rights of most vulnerable persons like women and children; para 75 also refers to traditional prejudices in a similar light. See also Concluding Observations and Recommendations on the 2nd Periodic Report of South Africa 2003-2014, African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016), where the Commission mentions traditional practices, para 33.

110 The African Commission acknowledges that Nigeria is one of the State parties to the African Charter which submits its Periodic Reports regularly in conformity with art 62 of the African Charter. See African Commission Concluding Observations Nigeria 2015 (n 109) para 12.

111 See Concluding Recommendations on the 1st Periodic Report of Cameroon on the status of implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 28th ordinary session (21 October-1 November 2016) para 25. See also Concluding Recommendations on the initial report of Benin on the status of implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 33rd ordinary session (18-28 March 2019) para 50.

Article 21 of the Maputo Protocol has inspired implementation of inheritance rights across the continent, through adoption of progressive national laws and constitutions. Many judicial decisions have been passed by courts that affirm the right of parties to equitable inheritance. Resultantly, it is clear that there is progress with regard to implementing article 21 of the Maputo Protocol and some of the key actors at the heart of this include courts, law and policy makers and agencies in charge of law reform. The African Commission and the African Court have also played a part in advancing the implementation of article 21 as evidenced by the jurisprudence emanating from national courts on interpretation of this and other sections of the Protocol. However, some challenges remain arising from a combination of customary, religious and statutory norms and practices that disfavour women in the area of inheritance.

Going forward, steps need to be taken to ensure full ratification of the Maputo Protocol for those countries that have not yet done so. States should also take initiative to examine and align their national laws with the provisions of the Maputo Protocol and specifically article 21. National constitutions should explicitly recognise human rights and gender equality in all domains, including security of tenure in land and housing, and prohibit discrimination in property and inheritance matters.¹¹² Additionally, domestic laws which are discriminatory towards women should be repealed or amended. In particular, national legislation should prohibit discrimination against women and girls in inheritance and explicitly allow females to inherit property and land equally with males.

Furthermore, these reforms should ensure harmonisation of plural legal systems to ensure that all justice mechanisms, including religious and customary mechanisms, respect, protect and fulfil equality in property rights for all individuals, especially women's rights to land and housing, and that the relevant authorities are held accountable when they fail to do so.¹¹³ Legislation should also state that national laws shall have supremacy over customary and religious laws and practices that discriminate against women and girls in inheritance matters.

Enforcement of laws should strengthen institutional structures, including customary and statutory institutions, to ensure effective implementation of laws, policies and programmes related to women's rights to land and other productive resources. States should undertake adequate allocation of resources and increase the human capacity, financial, legal, technical and other resources needed to ensure that enacted legislation serves its purpose. Part of institutional strengthening should target formal and informal avenues of justice that protect property rights. All persons, including women and girls should be able to access low-cost or free legal aid and other legal services in their own language. Courts and legal services should aim to be gender-responsive in terms of physical accessibility, travel distance and opening hours.¹¹⁴

All these efforts should go hand in hand with general sensitisation, awareness raising and legal literacy campaigns specifically on rights to property and inheritance. Religious and customary justice authorities should be equipped with information and training on gender issues and other relevant support to effectively protect women's rights and inheritance rights within the scope of their jurisdiction.

112 UN Women & OHCHR 2013 (n 22) 39.

113 UN Women & OHCHR 2013 (n 22) 46.

114 UN Women & OHCHR 2013 (n 22) 51.