Article 6

Marriage

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States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

(a) no marriage shall take place without the free and full consent of both parties;

(b) the minimum age of marriage for women shall be 18 years;

(c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;

(d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;

(e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;

(f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;

(g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

(h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;

(i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;

(j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

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1 Introduction

References to the family as the fundamental unit of society abound in international and regional human rights documents.[1] Family relations are the primary context for social interaction. The family is foundational in embedding in one's consciousness a template of rights and responsibilities. For this reason, marriage is a crucial site for nurturing respect for women's human rights and redressing gender injustice. The text of article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) reveals that its adoption was driven by a concern to redress a pattern of gender injustice. The emphasis on equal rights during and after marriage, consent to marry and minimum age speak to the persistence of child and forced marriage on the continent. Twenty years after the adoption of the Maputo Protocol, sub-Saharan Africa has the highest prevalence rates of child marriage.[2] For example, 35 per cent of women between the ages of 20 and 24 are married by the age of 18 and 11 per cent by the age of 15.[3] The Maputo Protocol's insistence on the registration of marriages is part of seeking a solution to these grim statistics, as well as easing access to justice for women in scenarios such as child support and contestation over marital property. The emphasis on equal parental rights, including with respect to the nationality of children and marital property rights, reflects a concern to overcome the legacy of the alchemy of customary norms and colonial laws that encoded automatic father preference and the subsuming of a wife's legal personality into that of her husband.[4]

At the adoption of the Maputo Protocol, the constitutions of some African states contained personal law exemption clauses, which made non-discrimination clauses inapplicable within the sphere of family as long as the relationships were governed by customary or religious law. Given the centrality of marriage and family to shaping gender relations, the effect of these clauses was to render gender equality virtually unattainable. Constitutional and legislative reforms since the 1990s through to the adoption of the Maputo Protocol in 2003 have improved the picture somewhat but have by no means eradicated the injustices.[5]

This chapter provides commentary on the normative content of article 6 and assesses the status of its implementation. The chapter is organised into seven sections. Following this introduction, the second section discusses the drafting history of article 6. Section 3 draws out linkages between article 6 and other provisions within and beyond the Maputo Protocol. Section 4 discusses the concepts at the heart of the article, while section 5 analyses the nature and scope of state obligation. Section 6 evaluates state practice in the implementation of article 6, drawing mainly from the Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or the commission). The final section reflects on the progress made so far in developing jurisprudence around article 6 and evaluates the prospects for full implementation, highlighting the indispensable role that civil society continues to play.

1 See, eg, the African Charter on Human and Peoples' Rights (the African Charter), art 18; the International Covenant on Civil and Political Rights (ICCPR), art 23; the International Covenant on Economic, Social and Cultural Rights (ICESCR), art 10; the Universal Declaration of Human Rights (UDHR), art 16.

2 At 76% Niger has the highest rate globally. The Central African Republic registers 68%, Chad 67%, Mali 54%, and Mozambique 53%. See Girls Not Brides *Child marriage atlas: sub-Saharan Africa*, https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/sub-saharan-africa/ (Child Marriage Atlas).

3 See Child Marriage Atlas (n 2).

4 The alchemy of customary law and colonial legal doctrines is discussed under sec 4 below.

5 Personal exemption clauses are discussed in sec 5 below.

2 Drafting history

The first draft of the Maputo Protocol was discussed by a Meeting of Experts in 1997 (the Nouakchott Draft).[6] It provided for women's equal rights within marriage as article 6.[7] It provided for free and full consent as the basis for marriage, and the same minimum age for marriage for both men and women, corresponding to the age of majority at the very least. The third sub-clause stated that polygamy 'shall be prohibited'.[8] Formal and immediate registration before competent authorities would be made a precondition for legal recognition of any marriage. The draft also recognised the right of husband and wife, by mutual agreement, to choose their place of residence. The draft guaranteed a married woman the right to keep her maiden name and 'use it as she pleases, jointly or separately with her husband's surname, and to give her maiden name to her husband and children'.[9] Draft article 6 recognised that a married woman is free to retain or change her nationality, pass it on to her husband and children, or acquire a new nationality. Finally, the draft article provided for a married woman's right to acquire, administer and manage her own property and, in case of joint ownership with her husband, have the same rights with respect to such property.

The next draft was discussed in Kigali, Rwanda in 1999 (the Kigali Draft).[10] In this draft, marriage appears under article 7. The coverage of issues is virtually identical to the Nouakchott Draft and organised into ten numbered clauses in much the same order. The content of the draft article on marriage remained the same, with only a few changes in phrasing.

At the next discussion of the draft in 2001,[11] three issues proved contentious: polygamy, the minimum age for marriage, and nationality. The sub-clause on the passing on of nationality to husbands and children drew objections from Algeria, Egypt, Libya and Sudan.[12]

With respect to the clause on the minimum age for marriage, the Meeting of Experts resolved to retain the stipulation of 18 as the minimum age for marriage, despite concerns expressed by some delegations. The justification given was that it was necessary to align the Maputo Protocol to the African Charter on the Rights and Welfare of the Child (African Children's Charter), as well as the United Nations Convention on the Rights of the Child (CRC), to which most African Union (AU) member states were signatories.[13] This achievement is no doubt to the credit of civil society groups across the continent, who had for a long time mobilised for the stipulation of 18 as the minimum age for marriage in collaboration with the Inter-African Committee on Traditional Practices affecting the Health of Women and Children.[14]

6 Expert Meeting on the Preparation of a 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).

7 Nouakchott Draft.

8 Nouakchott Draft, art 6, second bullet point.

9 Nouakchott Draft, art 6, sixth bullet point.

10 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).

11 See 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).

12 See Report of the Meeting of Experts (n 11) paras 55 & 56.

13 See Report of the Meeting of Experts (n 11) para 49.

14 See, for instance, Girls Not Brides (girlsnotbrides.org), Plan International's 18+ campaign (https://plan-international.org/srhr/child-marriage-early-forced/ (accessed 6 May 2023)), and the Inter-African Committee on Traditional Practices affecting the Health of Women and Children https://iac-ciaf.net/about-iac/#:~:text=The%20Inter%2DAfrican%20Committee%20on,the%20African%20Region%20and%20worldwide (accessed 6 May 2023).

The issue of polygamy proved so contentious that the meeting could not come to a consensus. The draft that resulted from that first Meeting of Experts resorted to bracketing the three options that were on the table. The first option was to retain the outright prohibition of polygamy contained in the Nouakchott Draft. The second option called on states to 'adopt appropriate measures in order to recognize monogamy as the sole legal form of marriage' while also committing themselves to provide for the rights and welfare of women in existing polygamous unions. The third option took the position that polygamy was a matter of personal choice and mutual agreement among spouses, and all that a state could do was encourage monogamy as the preferred form of marriage.

What was finally adopted in 2003 as article 6(c) of the final text of the Maputo Protocol represents a compromise between the second and third options.[15]

3 Linkage to related treaty provisions

Article 6 must be read together with related provisions within the Maputo Protocol and in other human rights treaties. Within the Maputo Protocol, most closely related is article 7, which deals with divorce, separation or annulment, requiring equality in all aspects of the consequences of the termination of marriage. Framing all the rights in the Maputo Protocol are the provisions for the elimination of discrimination in law and practice (articles 2, 8(f)). Article 4, in so far as it addresses violence against women in both the public and the private sphere, has relevance for marriage. Article 5 aims at eliminating harmful practices, among them child and forced marriage. Article 14 on health and reproductive rights is relevant to marriage. Also relevant are the provisions requiring equality with respect to inheritance and treatment of widows (articles 20 and 21), as they relate to the consequences that flow from dissolution of marriage by death.

In other international treaties, the issue of equal rights for women in marriage had been addressed previously in article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW's article 9 on nationality also refers to marriage. Prior to CEDAW, UN resolutions and declarations touched on the subject: Resolution 843 on 'The Status of Women in Private Law: Customs, Ancient Laws, and Practices Affecting the Human Dignity of Women' (1954), the Convention on the Consent to Marriage, Minimum Age of Marriage, and Registration of Marriage (1962), and article 16 of the Universal Declaration of Human Rights which provided for equality of men and women to and within marriage. Article 23(3) and (4) of the International Covenant on Civil and Political Rights (ICCPR) also highlights the equal right of men and women in marriage as a fundamental right.

At the African regional level, the main preceding document is the African Charter on Human and Peoples' Rights (African Charter), whose sole provision on gender equality (article 18(3)) is cast in broad terms and does not make specific reference to marriage.

15 See also accounts in F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16(1) *Washington & Lee Journal of Civil Rights and Social Justice* 22; R Murray 'Women's rights and the Organization of African Unity and African Union: the Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: modern feminist approaches* (2005) 267; F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50(1) *Journal of African Law* 77.

4 Key concepts and definitions

Article 6 contains key concepts and terms whose elaboration is crucial to understanding the content of the provision. Each subheading in the following discussion refers to these key concepts.

4.1 Minimum age and consent for marriage

4.1.1. Interpretation of minimum age and consent for marriage in African regional forums

The Maputo Protocol addresses the issue of 'free and full consent' under article 6(a). Free and full consent is negated overtly by practices such as arranged marriage (betrothal), forced marriage or forced remarriage, and covertly in situations where women subject themselves to unions in search of financial security.[16]

Article 6(b) addresses itself to the issue of minimum age for marriage, stipulating 18 as the age of marriage. This subsection tackles consent in tandem with minimum age, since child marriage has raised the greatest concern and received the greatest attention in relation to the issue of consent.

Interpretation of consent and minimum age for marriage has been dealt with comprehensively in a 2017 Joint General Comment on Ending Child Marriage issued by the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).[17] The joint General Comment defines child marriage as any union in which one or both parties is – or was – below the age of 18 at the time of entry into the union. In a bid to seal any loopholes at national level, the joint General Comment unequivocally states that 18 is the minimum age, regardless of any national law that may stipulate a lower age of majority. In addition, by defining marriage to mean 'formal and informal unions between men and women recognised under any system of law, custom, society or religion', the joint General Comment ensures that the choice of system of marriage is not deployed to circumvent the human rights treaties.[18]

The joint General Comment takes the position that child marriage violates foundational principles, namely the best interests of the child, child survival, development, protection and participation, and the principle of non-discrimination. The latter undergirds both women's rights and children's rights.[19]

Regarding consent, the joint General Comment underlines that the consent must be given by the parties themselves; even where the consent of a parent or guardian is required by law, it does not replace the consent of the parties entering into the marriage.[20] Free and full consent is defined as 'a non-coercive agreement to the marriage with a full understanding of the consequences of giving consent'.[21] Concerning older children, the joint General Comment takes the position that while their evolving

16 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21: Equality in marriage and family relations, 1994, A/49/38 para 16. Forced remarriage of widows is discussed in UC Mokoena 'Article 20' sec 3 & sec 6.1(c) in this volume.

17 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, adopted at the 29th session of the African Committee of Experts on the Rights and Welfare of the Child 2-9 May 2017 in Maseru (https://www.acerwc.africa/wp-content/uploads/2018/07/Website_Joint_GeneralComment_acerwc-AFRICANCOMMISSION_Ending_Child_Marriage_20_January_2018.pdf) (Joint General Comment on Child Marriage).

18 Joint General Comment on Child Marriage (n 17) para 6.

19 See arts 4 & 5 of the African Children's Charter.

20 See Joint General Comment on Child Marriage (n 17) para 22.

21 Joint General Comment on Child Marriage (n 17) para 6.

capacity for decision-making may arguably enable them to consent to sex, medical treatment and other acts, 'the language of the Maputo Protocol and the African Children's Charter clearly stipulates that children under the age of 18 are not capable of giving full and free consent to a marriage'.[22]

The African Court of Human and Peoples' Rights (African Court) had the opportunity to develop the jurisprudence on consent and minimum age for marriage in *APDF and IHRDA v Mali* (2018).[23] Mali's Family Code set the marriage age for boys at 18 and 16 for girls. The marriage age could be lowered further to 15 with parental consent. The government of Mali justified this position by asserting that for girls, 'in all objectivity' at age 15, 'the biological and psychological conditions for marriage are in place …'.[24] The Court ruled that Mali's Family Code offended the Maputo Protocol, as well as the African Children's Charter and CEDAW.

Regarding free and full consent to marry,[25] Mali's Family Code requires that consent must be given orally by parties physically present at the marriage ceremony. It imposes sanctions on civil registry officials for conducting marriages without ascertaining the consent of the parties. However, no such sanctions are imposed on religious officials conducting marriage ceremonies, yet the prevailing practice in Mali is that marriage ceremonies are largely conducted by family representatives in the absence of the parties. The African Court ruled that the code's provisions on consent violated article 6(a) of the Maputo Protocol as well as article 16(1)(b) of CEDAW.[26]

At the sub-regional level, the Southern Africa Development Cooperation (SADC) Parliamentary Forum has adopted a model law on ending child marriage (SADC Model Law).[27] The SADC Model Law's Preamble reproduces article 6 of the Maputo Protocol, along with article 21(2) of the African Children's Charter and CEDAW's article 16(2). It defines child marriage expansively as 'a statutory or customary union in which one party is a child or both parties are children', having defined a 'child' as anyone below the age of 18 years and 'marriage' as 'a union of persons contracted statutorily, religiously, verbally or customarily.'[28]

4.1.2 Pronouncements on minimum age and consent for marriage in other international forums

In 2019 the CEDAW Committee and the CRC Committee issued a revised joint declaration on harmful practices, which gives considerable attention to elaborating on the concepts of child and forced marriage.[29] The joint declaration defines child marriage as 'any marriage where at least one of the parties is under 18 years of age. Child marriage is considered to be a form of forced marriage, given that one or both of the parties have not expressed full, free and informed consent.'[30] The joint

22 See Joint General Comment on Child Marriage (n 17) para 6.

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

24 *APDF v Mali* (n 23) para 66.

25 *APDF v Mali* (n 23) paras 79-95.

26 The CEDAW Committee had the opportunity to engage Mali on the issues raised by the case. See Concluding Observations on the combined 6th and 7th Periodic Reports of Mali, Committee on the Elimination of all Forms of Discrimination against Women (25 July 2016) UN Doc CEDAW/C/MLI/CO/6-7 (2016) paras 43, 44.

27 The Southern Africa Development Cooperation (SADC) consists of 15 states in the southern Africa region. All except two (Botswana and Madagascar) are also parties to the Maputo Protocol, which makes the model law crucially significant.

28 See SADC Parliamentary Forum, *SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage* (2018), https://www.girlsnotbrides.org/documents/484/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf (accessed 8 May 2023).

29 Joint General Recommendation/Comment of the CEDAW and CRC Committees on Harmful Practices CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1(Joint CEDAW/CRC Declaration).

30 As above para 20.

declaration defines forced marriage as any marriage 'in which one or both parties have not personally expressed their full and free consent to the union.'[31]

According to this interpretation, non-compliance with the minimum age stipulation under article 6(b) of the Maputo Protocol would obviate article 6(a) on full and free consent for marriage since underage consent is not, by definition, consent. Prior to the joint declaration in 2019, the CRC Committee's position on a minimum age for marriage was not as precisely stated as the Maputo Protocol article 6(b)'s unequivocal stipulation of 18 years. The CRC Committee's position in 2003 simply stated that the minimum age for consent to sexual relations and to marriage must be the same for boys and girls and must come as close as possible to recognising 18 as the age of majority.[32] The Maputo Protocol can therefore be said to have blazed a trail on the issue of consent and the minimum age for marriage.

4.2 Monogamy versus polygamy

As the discussion of the drafting history under section 2 has shown, the issue of polygamy triggered contestation. This reflects the tension between the various views on family form in the African context. On the one side are those who view the nuclear family as a colonial imposition, and laud the extended family – including polygamous arrangements – as more reflective of African realities. On the other side are those who take the view that monogamy is more reflective of the ideal of equality between spouses.[33] This subsection discusses the manner in which human rights bodies regionally and internationally have interpreted the issue.

4.2.1 Pronouncements on monogamy versus polygamy in African regional forums

The text of the Maputo Protocol offers no definition of polygamy, nor does it situate it in relation to the concept of gender equality. None of the regional human rights forums have issued any interpretive statement touching on the issue of polygamy, which is a practice or custom that allows a man to have more than one wife at the same time.[34] However, the African Children's Committee's engagement with some states' reports suggests that the committee takes the position that growing up in a polygamous family may be detrimental to child development.[35]

31 Joint CEDAW/CRC Declaration (n 29) para 20.

32 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5), adopted during the 21st extraordinary session of the African Commission, held in Banjul The Gambia, from 22 October to 5 November 2013, para 9.

33 See S Cotton & A Diala 'Silences in marriage laws in Southern Africa: women's position in polygamous customary marriages' (2018) 32(1) *Speculum Juris* 18-32; A Armstrong, C Beyani et al 'Uncovering reality: excavating women's rights in African family law' (1993) 7 *International Journal of Law and the Family* 342-344; C Musembi 'Pulling apart? Treatment of pluralism in CEDAW and the Maputo Protocol' in A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional, and national law* (2013) 186-194.

34 Concise Oxford English Dictionary, 11th edition (revised), 2009.

35 See for instance, the African Children's Committee's engagement with Algeria and Gabon, in which the African Children's Committee takes note of the fact that in those states 'polygamy is not a prohibited act' and calls upon the state to ensure that 'the practice of polygamy does not affect the upbringing and development of children in a polygamous family.' See African Children's Committee, Concluding Observations on: Initial report of Algeria on the 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 26th ordinary session held virtually (16-19 November 2015) para 24; held virtually (16-19 November 2015) para 28.

4.2.2 Pronouncements on monogamy versus polygamy in other international forums

The CEDAW Committee issued General Recommendation 21 on equality in marriage and family relations.[36] In General Recommendation 21, the CEDAW Committee interpreted polygamy as being inimical to the concept of equality in marriage and called on state parties 'to discourage and prohibit' it, highlighting that it can have 'serious emotional and financial consequences' for women and their dependents.[37] Similarly, the UN Human Rights Committee, which oversees the implementation of the ICCPR, takes the view that polygamy constitutes 'inadmissible discrimination' against women.[38]

This same position was reiterated in 2013 in CEDAW's General Recommendation 29 (CEDAW Committee General Recommendation 29)[39] and also in a declaration issued jointly by the CEDAW Committee and the CRC Committee, in 2014 and revised in 2019.[40] Both reiterate the CEDAW Committee's 1994 position, the joint declaration terming polygamy as 'contrary to the dignity of women and girls' and an infringement on their human rights, including the right to equality and protection within the family.[41] Both statements call on states to 'discourage and prohibit' polygamy.[42] The CEDAW Committee's Concluding Observations on the periodic reports of African states reflect this position.[43]

36 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21: Equality in Marriage and Family Relations (adopted 13th session 1994) A/49/38 (CEDAW Committee General Recommendation 21).

37 As above para 14.

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

39 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 29 on art 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequences of marriage, family relations and their dissolution, 26 February 2013, CEDAW/C/GC/29 (General Recommendation 29) para 27.

40 Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child (2019) on harmful practices, CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (Joint CEDAW/CRC Declaration).

41 Joint CEDAW/CRC Declaration (n 40) para 25.

42 Joint CEDAW/CRC Declaration (n 40) para 28.

43 Musembi (n 33) 186-194. For more examples of recent CEDAW Concluding Observations castigating African states for not outlawing polygamy see CEDAW Committee Concluding Observations on: 7th Periodic Report of Burkina Faso (22 November 2017), UN Doc CEDAW/C/BFA/CO/7 (2017) para 50; Combined 4th and 5th Periodic Report of Cameroon (9 March 2014), UN Doc CEDAW/C/CMR/CO/4-5 (2014) para 39; Initial and 2nd to 5th Periodic Reports of the Central African Republic (24 July 2014) UN Doc CEDAW/C/CAF/CO/1-5 (2014) para 45; 9th Periodic Report of Cabo Verde (30 July 2019) UN Doc CEDAW/C/CPV/CO/9, para 47 (the CEDAW committee urged Cabo Verde to 'strengthen its efforts to prevent and end de facto polygamy'); Combined 1st to 4th Periodic Reports of Chad (4 November 2011) UN Doc CEDAW/C/TCD/CO/1-4 (2011) paras 42-43 (the CEDAW committee was dissatisfied with Chad's approach of giving parties the option of expressly renouncing polygamy at the time of entering into the marriage contract, urging prohibition instead); 4th Periodic Report of Côte d'Ivoire (30 July 2019), UN Doc CEDAW/C/CIV/CO/4 (2019) paras 51, 52 (the CEDAW committee recommends that the revised Criminal Code should explicitly prohibit polygamous, levirate and sororate marriages); Combined initial to 4th Periodic Reports of Comoros (8 November 2012) UN Doc CEDAW/C/COM/CO/1-4 (2012) paras 39,40; 7th Periodic Report of the Congo (14 November 2018) UN Doc CEDAW/C/COG/CO/7 (2018) paras 50,51; Combined Initial to 3rd Periodic Reports of Djibouti (2 August 2011), UN Doc CEDAW/C/DJI/CO/1-3 (2011) para 36; 6th Periodic Report of Gabon (11 March 2015), UN Doc CEDAW/C/GAB/CO/6 (2015) para 44; Combined 4th and 5th Periodic Reports of The Gambia (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 48; Combined initial to 6th Periodic Reports of Guinea-Bissau (14 August 2009), UN Doc CEDAW/C/GNB/CO/6 (2009) para 41; Combined 7th and 8th Periodic Reports of Guinea (14 November 2014) UN Doc CEDAW/C/GIN/CO/7-8 (2014) para 54; 8th Periodic Report of Kenya (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 50 (the CEDAW Committee stated that recognition of polygamy in the Marriage Act contravenes the Constitution); Combined 6th and 7th Periodic Reports of Madagascar (24 November 2015) UN Doc CEDAW/C/MDG/CO/6-7 (2015) para 46; Mali (2016) n 25, para 43; 8th Periodic Report of Mauritius (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 38; Combined 7th and 8th Periodic Reports of Nigeria (24 July 2017) UN Doc CEDAW/C/NGA/CO/7-8 (2017) para 45(d); Combined 3rd and 4th Periodic Reports of Niger (24 July 2017) UN Doc CEDAW/C/NER/CO/3-4 (2017) para 43; Combined 6th and 7th Periodic Reports of Togo (8 November 2012), UN Doc CEDAW/C/TGO/CO/6-7 (2012) para 40; 8th and 9th Periodic Reports

Article 6(c) of the Maputo Protocol takes the 'discourage' rather than the 'prohibit' path: rather than outright prohibition, it urges states to encode within their laws a preference for monogamy while guaranteeing legal protection for women in all unions, including polygamous unions.[44]

4.3 Compulsory and universal registration of marriage

The benefits of a nationwide registry of marriages have been widely acknowledged: it protects against multiple (secret) marriages, makes it easier to eradicate child marriage, provides proof of marriage for purposes such as division of marital property and inheritance, and proof of parental rights.

The contentious point has been whether non-registration should invalidate a marriage. The African Court missed out on the opportunity to interpret this clause of the Maputo Protocol because a request for an advisory opinion on the matter was ruled to be inadmissible for the petitioners' lack of standing.[45] The request for an advisory opinion had been prepared by four civil society organisations in Kenya, Nigeria, South Africa, and Zimbabwe. The organisations sought to have the African Court affirm that article 6(d) imposes on states the obligation to enact legislation on registration of all forms of marriages but to reject an interpretation that renders a marriage invalid for non-registration. Given the prevalence of unregistered marriages on the continent, an interpretation that results in invalidation of unregistered marriages would render many women vulnerable, which would defeat the overall objective of eliminating discrimination against women as expressed under article 2 of the Maputo Protocol.[46]

4.4 Equality in choice of matrimonial regime and residence

Matrimonial regime simply refers to the relevant legal system governing a marriage, which determines the validity of the marriage, the procedure for its termination, how property acquired before and during the marriage will be administered and owned, and matters of custody and nationality of children. Its greatest practical implications are to do with property administration and ownership.[47]

Residence in ordinary usage refers to no more than the geographical location in which one resides. In law, however, residence attaches legal consequences; for instance, it will determine which entity one pays taxes to, one's immigration status, as well as where one may file divorce proceedings. When employed in this sense, the term is usually rendered as 'domicile'. In the context of article 6(e), since the Maputo Protocol specifies 'place of residence', it seems that the provision intended no more than a geographical designation. It simply guarantees the equal right of spouses to decide where the family will establish its dwelling. The African Commission's General Comment 5 – interpreting article 12 of the African Charter, which deals with freedom of movement and residence- confirms this interpretation by defining residence as simply the 'place of dwelling', and avoiding any reference to domicile.[48]

of Uganda (1 March 2022), UN Doc CEDAW/C/UGA/CO/8-9 (2022) para 49; 6th Periodic Report of Zimbabwe (10 March 2020) UN Doc CEDAW/C/ZWE/CO/6 (2020) para 49 (the CEDAW Committee termed polygamy a 'harmful practice').

44 For detailed discussion of these divergent paths (between CEDAW and the Maputo Protocol); see Musembi (n 33) 196-197.

45 The request was dismissed because the four organizations' only had observer status with the African Commission on Human and Peoples' Rights but none of them was formally recognised before the African Union Commission as the Court's rules require. See https://www.chr.up.ac.za/units/about-liu/30-units/litigation-and-implementation/2778-litigation (accessed 8 May 2023).

46 For this reason, South Africa and Namibia have entered reservations to this article of the protocol. The approach taken by various states and by the commission itself on the matter of registration is discussed further under sec 6.3 below.

47 See UN-Women *Families in a changing world,* (Progress of the World's Women 2019-2020) 122-124.

48 African Commission General Comment 5 on the African Charter on Human and Peoples' Rights: The right to freedom of movement and residence (art 12(1)), adopted during the 64th ordinary session of the African Commission on Human and

There is not enough information to determine whether the choice of 'residence' over 'domicile' in the Maputo Protocol was deliberate, but it is likely that the controversy over the transmission of nationality prompted the drafters to steer clear of terms overtly laden with legal consequences.

African legal systems have been influenced by the colonial legacy of either the English common law, the French civil law tradition, or Roman-Dutch law, all of which subsumed the wife's legal personality into that of her husband.[49] The law, therefore, automatically recognised him as the sole decision maker in all matters, including the choice of what legal regime would govern the marriage and what the family's residence would be. This has implications for other rights, such as nationality and marital property, as will be discussed below.

At the conceptual level, the issue of choice of matrimonial regime and residence has not drawn much by way of interpretive statements, and so it will be revisited in the section on implementation below.

4.5 Right to maiden name

While the text of article 6(f) relates specifically to a married woman's freedom to retain and use her maiden name, the corresponding provision in CEDAW is worded in terms of the same right between husband and wife to choose the family name. As with the provision on equal choice of matrimonial regime and residence, this provision of the Maputo Protocol was necessitated by the specific legacy of colonial legal doctrines on a married woman's loss of legal personality, including the automatic dropping of her maiden name in favour of her husband's.

The wording of article 6(f) does not expressly grant a married woman the right to confer her maiden name on the children. Only a broad interpretation of 'to use it as she pleases' could support such an extension of the right. A narrow reading suggests that the text only refers to the form: whether she chooses to use her maiden name separately or jointly with her husband's name. CEDAW's wording, therefore, gives this right weightier consequence.

There has been no interpretive statement on the scope of this right.[50]

4.6 Equal rights as to nationality

Nationality is a concept used in public international law to denote an individual's connection to a specific state, which places an obligation of protection on that state. Within the meaning of both the Maputo Protocol and CEDAW, the term is used synonymously with citizenship, a concept that denotes entitlement to full membership in a polity with its attendant rights and obligations.[51]

The Maputo Protocol sets out two dimensions of equal rights as to nationality. The first concerns a woman's right to choose to retain her nationality or to acquire the nationality of her husband (article 6(g)). This clause is of crucial importance in the African context, where most states' laws have historically been informed by the concept of dependent nationality, which is rooted in English common

Peoples' Rights (24 April-14 May 2019) para 11.

49 See B Kombo 'Napoleonic legacies, postcolonial state legitimation, and the perpetual myth of non-intervention: Family Code reform and gender equality in Mali' (2020) XX(X) *Social and Legal Studies* 1-22, 7-11.

50 The discussion on implementation below will highlight the instances when the African Commission has raised issues concerning this right in the specific practices of certain states.

51 M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2012) 'Article 9' 234.

law and civil law doctrines that fuse the wife's legal personality with that of her husband.[52] Marriage, therefore, entails the automatic loss of a married woman's nationality and acquisition of her husband's nationality; and a husband's change of nationality in the course of the marriage automatically leads to a change of nationality for the wife. These restrictive concepts found resonance with the attitudes and practices embedded in various African customary laws and continued to operate in post-colonial settings, so it was crucial for the Maputo Protocol to lift this restriction on women's nationality rights.

The second dimension concerns equal rights of male and female parents with respect to the nationality of their children. However, article 6(h)) carries a proviso, which essentially claws back the rights granted by the Maputo Protocol: 'except where this is contrary to a provision in national legislation or is contrary to national security interests.' Effectively, this dimension of equal rights with respect to children's nationality is made subordinate to national law and to 'national security interests'. The 2001 draft discussed at the Meeting of Experts did not contain this proviso. Instead, it simply gave a mother the right to transfer her nationality to her children by mutual consent of the spouses. Algeria, Egypt, Libya and Sudan objected to this.[53] A draft proposed in January 2003 by a representation of NGOs convened by the Organisation of African Unity's (OAU) regional office sought to align the content of the article with CEDAW's article 9 by providing as follows: 'a woman shall have the right to keep her nationality, obtain another one or take up the nationality of her husband and the ability without legal restriction to transfer her nationality to her husband and her children.'[54] This tighter formulation was clearly rejected since the proviso showed up in the draft subsequently presented for discussion by the ministerial meeting held in March 2003 and remained in the final version.

This proviso sets the bar rather low. By contrast, article 9 of CEDAW grants a wide latitude of nationality rights to women, including an unqualified right to transmit their nationality to their children on the basis of equality with men.

As shall become evident in the discussion on implementation below, the African Commission does, despite the proviso, question states whose laws restrict women's ability to transmit nationality to their children.

4.7 Equal parental rights and responsibilities

Article 6(i) is worded as an obligation rather than as a right, placed on men and women to jointly contribute to the safeguarding of the interests of their family, with specific attention being given to the protection and education of children.

While the Maputo Protocol refers to 'a woman and a man' rather than to a wife and a husband, it is clear that the context is one of marriage since the clause refers to their joint contribution to 'safeguarding the interests of the family, protecting and educating their children' (article 6(i)). The clause does not make explicit provision for equal parental rights and responsibilities in the context of parenting outside of marriage, despite this being a prevalent feature of parenting in the contemporary African context. In this respect, the wording of the corresponding clause in CEDAW gives greater scope to the right: 'The same rights and responsibilities as parents, irrespective of their marital status …'.[55] This envisions a more even-handed apportionment of rights and responsibilities even in the case

52 Freeman et al (n 51) 235-236.

53 See 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, November 2001, Addis Ababa, Ethiopia, paras 55, 56. On file with the author.

54 See Organisation of African Unity, '6th January Markup from the Meeting Convened on 4-5 January 2003 in Addis Ababa, by the Africa Regional Office and the Law Project of Equality Now', p 8. On file with the author.

55 CEDAW, art 16(1)(d).

of unwed fathers. This is important because problems in the enforcement of child support obligations arise mostly against unwed fathers or former husbands.

There are still states whose family laws work with the presumption that the father is the default legal guardian and custodial parent.[56] This presumption is based on the same convergence of African customary laws and colonial legal doctrines that gave rise to the dependant nationality discussed above. In states that have undertaken reforms, the application of the principle of the paramountcy of the best interests of the child has had to contend with prevailing customary and religious rules and practices that operate on the basis of a father preference.[57] It has been noted that the conferring of legal rights and authority on the father has not always been matched by the conferring of responsibilities.[58] This is especially true in the African context, where enforcement of child support obligations is generally weak. The Maputo Protocol's framing of the clause in terms of parental obligations (rather than rights) is therefore understandable.

The issue of equal parental responsibility tends to arise in the context of custody and maintenance disputes at the point of dissolution of marriage, which is addressed under article 7 of the Maputo Protocol. However, inequality in parental rights and responsibilities may also manifest itself in other areas of law, such as employment law. The granting of shared parental leave or paternity leave is a relatively new phenomenon in African states, and roughly half of them were yet to legislate for it as of 2015.[59] The International Labour Organization has not developed a standard, and so state practice globally is varied.[60] Elaborating on the content of article 6(i) of the Maputo Protocol positions the African human rights regional system in a good place to begin to set some concrete standards in areas such as paternity leave.

4.8 Equal marital property rights

Article 6(j) of the Maputo Protocol is about married women's property rights, but it restricts itself to women's property rights during the subsistence of the marriage. It is, therefore, not concerned with the division of marital property upon dissolution of a marriage, which is dealt with by article 7(d). As part of ensuring that women and men enjoy equal rights and are regarded as equal partners in marriage, states are required to encode in legislation a woman's right to acquire and manage property in her own right during marriage.

This clause was necessitated by the reality of formal and informal restrictions on women's legal capacity to enter into transactions. These restrictions can be traced back to the English common law doctrine of coverture and the civil law doctrine of *parens patriae,* both of which subsumed a married woman's legal personality into that of her husband, depriving her of contractual and proprietary capacity. When these were combined with restrictive interpretations of customary laws, the result was to cast married women in the role of perpetual dependants lacking authority to exercise control over

56 These states include Burkina Faso, Cameroon, Central African Republic, Democratic Republic of Congo, Gabon, Senegal, Togo and Tunisia. See discussion under sec 6.7.

57 In Kenya, for instance, it was only in 1970 that a court ruled that the principle of the best interests of the child meant the displacement of customary laws that automatically grant custody to one parent over the other: *Wambwa-v-Okumu* [1970] EA 578.

58 Freeman et al (n 51) art16, 427.

59 As of 2015, 55% of African states had undertaken legislative reform to recognise paternity leave, some paid and some unpaid. Among these states are Kenya, Mauritius, South Africa, Tanzania, and Uganda. See MenCare *State of the world's fathers report* (2015) 107-110.

60 See K Feldman & B Gran 'Is what's best for dads best for families? Paternity leave policies and equity across forty-four nations' (2016) 43(1) *Journal of Sociology and Social Welfare* 101 (but the only African country included in the study is South Africa).

family resources.[61] This combined legacy is the basis for laws granting husbands marital power, which makes a husband the sole economic agent of the family and administrator of all the marital property, with absolute authority to transact without any reference to the wife.[62]

An important corollary to a wife's contractual and proprietary capacity is recognition of her right to have a say over her spouse's dealings with marital property so as to safeguard her interests. A spouse's written consent must be a mandatory requirement if the equal right to manage marital property is not to be rendered nugatory. The African Commission's General Comment 6 adopted in 2020 concerning marital property rights under article 7(d) of the Maputo Protocol also underlines this dimension of the right.[63]

The CEDAW Committee makes a link between women's capacity to acquire and manage property on the one hand and laws that limit their capacity to initiate proceedings or diminish the weight of women's testimony as witnesses. This has an adverse effect on women's ability to defend their claims, including claims to property. This, in turn, is interlinked with the right of choice of residence under article 6(e) because the ability to choose residence has implications for women's legal standing to pursue their claims in court. These interlinkages underline the need for harmonisation in the design of laws and policies to give effect to the provisions of the Maputo Protocol.

The African Commission's General Comment underlines that the changed socio-economic context in Africa makes the safeguarding of women's right to acquire and administer property all the more important: women now have increased capacity and opportunity to earn income and contribute to the family's resources, in addition to their contribution in the form of unpaid care and reproductive work.[64] Despite this changed socio-economic context, social expectations may leave women without much of a say over the proceeds of their economic activity, including their own wages.[65] Indeed, some states still have laws that give a husband power to forbid his wife from engaging in paid work.[66]

Thus, clarity in how the law will delineate the boundaries between the separate property of the parties to the marriage and the community property of the union and give effect to the express or implied wishes of the parties while recognising the spouses' equal capacity to acquire and manage both types of property is crucial.

In states where the law recognises and enforces prenuptial agreements in which parties set out in advance how property matters are to be determined in their marriage, the state must put in place measures to ensure that unequal bargaining power does not translate into unconscionable outcomes for wives. Ideally, information on the economic consequences of marriage and its dissolution ought to be provided to parties at the point of getting into marriage, at the very least.[67]

61 Armstrong et al (n 33) 342-344. See also Kombo (n 49) 7-11.

62 Recent repeal of marital power laws in some African countries is discussed in sec 6 on implementation. CEDAW expressed concern over the designation of the husband as sole economic agent in CEDAW Committee General Recommendation 29 (n 39) para 36.

63 African Commission 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 extra ordinary session of the African Commission held in Banjul, The Gambia 19 February-4 March 2020, para 55.

64 African Commission General Comment 6 (n 63) para 23.

65 CEDAW General Recommendation 29 (n 39) para 37.

66 See CEDAW Concluding Observations Gabon (n 42) para 44(b).

67 CEDAW General Recommendation 29 (n 39) paras 32, 34 & 35.

How the law gives effect to married women's contractual and proprietary capacity has significance beyond women's financial independence and ability to meet their family obligations, as the CEDAW Committee observed.[68] It has implications for overall decision-making power within the family and the perception of women's status in society broadly.[69]

5 Nature and scope of state obligations

Article 6 calls upon state parties to ensure that women and men enjoy equal rights and that they are regarded as equal partners in marriage. At a minimum, therefore, every state's constitutional framework must grant equal rights and freedom from non-discrimination to women and men alike, in line with article 2 of the Maputo Protocol. Some recent constitutions do go further to provide for the right to marry or the right to a family on the basis of equality between men and women.[70] It is the exception rather than the norm for constitutions to address the other specific issues covered by article 6. Côte d'Ivoire is one such exception, guaranteeing the exercise of parental authority equally by father and mother under its Constitution.[71]

Article 6 then requires states to enact 'appropriate national legislative measures' to provide for all the issues spelt out in the article. States parties must therefore enact, amend, or repeal laws as may be necessary to bring their legislative framework into compliance with the Maputo Protocol. In the case of the minimum age of marriage, for instance, fulfilment of the state's obligation would require that the law explicitly stipulates 18 as the minimum age. This would be followed through with criminal sanctions for breach of that stipulation, as well as remedies for the victims of child marriage, as is demonstrated in the SADC Model Law on Ending Child Marriage.[72]

In areas where the legislature has been silent, new laws would need to be enacted. Examples of such legislative silences include marital property and polygamy, discussed in detail under the respective sub-sections below on implementation.

Beyond legislation, a state must demonstrate investment in institutional infrastructure for implementation. In the case of implementing a minimum age for marriage, a birth registration system is indispensable, as is a system of registration of marriages, preferably decentralised and accessible.[73] It also calls for a system of data gathering to enable monitoring and evaluation of progress[74] and the inevitable allocation of budgetary, human and other relevant resources.[75]

68 CEDAW General Recommendation 21 (n 36) para 26.

69 Armstrong et al (n 33) 343; Food and Agriculture Organization (FAO) *'The state of food and agriculture: women in agriculture. Closing the gender gap for development 2010-2011'* (2011) 23 http://www.fao.org/3/i2050e/i2050e.pdf (accessed 8 May 2023). See also studies making a link between control of assets and women's decisional autonomy in the context of domestic violence, eg Asia Pacific Forum on Women, Law and Development (APWLD) and others*, Proceedings of the Asia Regional Consultation on 'The interlinkages between violence against women and women's right to adequate housing'* (New Delhi, India, 2003) https://www.hic-net.org/fr/interlinkages-between-violence-against-women-and-womens-right-to-adequate-housing/ (accessed 11 May 2023); CD Deere & CR Doss, 'The gender asset gap: what do we know and why does it matter?' (2006) 12(1-2) *Feminist Economics* 36-39.

70 Several recently enacted constitutions contain provisions on the equal right of men and women to marry or found a family: Angola (2010, art 35(2); Burkina Faso (2015, art 23); Burundi (2018, art 29); Democratic Republic of Congo (2011, art 40); Eritrea (1997, art 22(2); Gambia (2020, art 54); Kenya (2010, art 45(2)); Malawi 2017, art 22(3); Uganda (2017, art 31(1); Zimbabwe (2013, sec 78(1)).

71 Côte d'Ivoire Constitution, 2016 (art 31).

72 See also Joint General Comment on Child Marriage, paras 29-30 & 59-60.

73 See Joint General Comment on Child Marriage, paras 26 & 28.

74 See Joint General Comment on Child Marriage, para 51.

75 See Joint General Comment on Child Marriage, paras 45-47.

In addition, both rights holders and duty bearers must be made aware of the rights in question and the remedies available for their breach. This is particularly important for the implementation of rights with respect to matters that are considered 'sticky' and likely to encounter relatively stiffer social resistance. The Joint General Comment on Child Marriage even recommends that states disseminate relevant court judgments.[76] In the *APDF* case, in addition to requiring Mali to amend its Family Code to align with article 6(b) of the Maputo Protocol, the court also required the government to undertake a thorough sensitisation campaign to counter the negative mobilisation against the proposed reforms to the code, and report back to the court within two years on the matter.[77]

It is not enough that a state simply legislates; the legislation must be 'national'. The language of the chapeau to article 6 suggests that the Maputo Protocol aspires to have the legislation apply nationally, leaving no pockets of non-compliance. Such pockets of non-compliance might result from polite nods in the direction of social and religious norms in the name of cultural and religious pluralism. The joint General Comment emphasises this point with respect to child marriage: 'Legislative measures that prohibit child marriage must take precedence over customary, religious, traditional or sub-national laws and States Parties with plural legal systems must take care to ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.'[78] This means that states whose constitutions contain personal law exemption clauses fall foul of the Maputo Protocol.[79]

As the African Court underlined in *APDF*, the state should not, under any circumstances, abdicate its obligation to legislate. Mali pleaded *force majeure*, arguing that socio-cultural realities prevailing in Mali thwarted earlier reform efforts (2009) towards aligning its Family Code with its international human rights obligations. The state made the pragmatic argument that it would be self-defeating to enact a law which would meet with guaranteed non-compliance.[80] The African Court rejected Mali's arguments, underlining that the obligation to comply with the Maputo Protocol's requirement to legislate 18 years as the minimum age rests solely on the state.[81]

6 Implementation

Relying primarily on a review of states' reports and the African Commission's Concluding Observations on those reports submitted since 2005[82] this section discusses the status of implementation of article

76 See Joint General Comment on Child Marriage, para 63.

77 The court's decision was rendered in 2018. As of 2022, the government had not submitted any report to the court. Civil society groups are engaged in efforts to hold the government to account, and to dialogue so as to chart a way forward, in view of the difficult political environment prevailing in the country. Personal communication with Edmund Foley, Head of Programs, Institute for Human Rights and Development in Africa, email dated 30 May 2022.

78 See Joint General Comment on Child Marriage, para 19.

79 See Joint General Comment on Child Marriage, para 24. Treaty bodies have cited African states whose constitutions still contain personal law exemption clauses (i.e. exempting customary and religious norms from application of the non-discrimination clause). See, eg, CEDAW Committee Concluding Observations on: Combined initial to 3rd Periodic Report of Botswana (26 March 2010), UN Doc CEDAW/C/BOT/CO/3 (2010) para 11-12; Combined initial to 4th Periodic Reports of Lesotho (8 November 2011), UN Doc CEDAW/C/LSO/CO/1-4 (2011) para 12-13; African Commission Concluding Observations on: 1st to 9th Periodic Reports of Eswatini 2001-2020, adopted at the 70th ordinary session (23 February-9 March 2022); Combined 6th to 8th Periodic Report of Mauritius 2009-2015 adopted at the 60th ordinary session (8-22 May 2017) para 62.

80 *APDF* (n 23) paras 59-78.

81 The court did not engage with the Malian government's claim of *force majeure* or on the broader issue of derogation, about which the African regional human rights instruments are silent. Some commentators argue that the African Court thereby missed an opportunity to contribute to the jurisprudence. See B Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) *African Human Rights Yearbook* 389.

82 For the status of each country's submission of reports to the African Commission see https://www.achpr.org/statereportsandconcludingobservations. The Commission engages states on matters covered under the Maputo Protocol as it reviews reports submitted under the African Charter on Human and Peoples' Rights (African Commission), even

6 through legislation, policies, and other measures. This review is supplemented by CEDAW and the African Children's Committee Concluding Observations as well as national reported cases where available, discussing the eight components of the content of article 6 discussed in section 4 above.

6.1 Implementation of minimum age and consent for marriage

The African Commission's Concluding Observations contain, in equal measure, commendation for states that have stipulated 18 as the minimum age and condemnation for those that have not taken adequate steps towards this goal.[83]

Among the African states that have reviewed their constitutions since the mid-1990s, it is not uncommon to find a provision relating to the right to found a family, which is conferred on adult men and women equally. Kenya's 2010 constitution in article 45(2) confers the right to marry on 'every adult', while the Children Act defines a child as a person under the age of 18 years. Zimbabwe's constitution of 2013 similarly sets the age of 18 as the age at which one acquires the right to found a family (section 78(1)). Uganda makes a similar provision under article 31(1). Malawi amended its constitution to stipulate 18 as the marriage age in 2017.[84]

In the best-case scenario, these constitutional revisions are then followed by the harmonisation of the various relevant laws to bring them into alignment with the constitution. The experience has been mixed. There is still progress to be made, but significant gains can be made when national courts commit to affirming the Maputo Protocol's stipulation of 18 as the minimum age for marriage, as three landmark cases from Tanzania, Kenya, and Zimbabwe illustrate.

when no report is submitted specifically on the protocol. This way, even states that have not ratified the protocol have their records on women's human rights opened up to scrutiny by virtue of their obligations under art 18 of the African Charter.

83 For the states that have been commended see African Commission Concluding Observations on: Algeria: Fifth and 6th Periodic Reports of Algeria, adopted at the 57th ordinary session (4-18 November 2015); Benin: Second Periodic Report of Benin, adopted at the 45th ordinary session (13-27 May 2009); Democratic Republic of Congo: 11th to 13th Periodic Reports of the Democratic Republic of Congo, adopted at the 61st ordinary session (1-15 September 2017); Djibouti: Initial and Combined Periodic Reports of Djibouti 1993-2013, adopted at the 56th ordinary session (21 April-7 May 2015); Kenya: 12th and 13th Periodic Reports of Kenya, adopted at the 71st ordinary session (21 April-13 May 2022); Malawi: Initial and combined reports of Malawi 1995-2013, adopted at the 57th ordinary session (4-18 November 2015); Mauritania: Combined 15th to 17th Periodic Report of the Islamic Republic of Mauritania 2018-2021, adopted at the 73rd ordinary session (21 October-10 November 2022); Namibia: 7th Periodic Report of Namibia 2015-2019, adopted at the 72nd ordinary session (19 July-2 August 2022); Nigeria (commended for the 22 federal states that had adopted the Child's Rights Act): 5th Periodic Report of Nigeria, adopted at the 56th ordinary session (21 April-7 May 2015); Rwanda: Combined 11th to 13th Periodic Reports of Rwanda 2009-2016, adopted at the 61st ordinary session (1-15 November 2017); and Sierra Leone: Initial and combined reports of Sierra Leone 1983-2013, adopted at the 57th ordinary session (4-18 November 2015). For states that have been urged to comply see African Commission Concluding Observations on: Angola: 6th Periodic Report of Angola 2011-2016, adopted at the 62th ordinary session (25 April-9 May 2018); Botswana (even though Botswana has neither signed nor ratified the protocol): Combined 2nd and 3rd Periodic Reports of Botswana, adopted at the 63rd ordinary session (24 October-13 November 2018); Ethiopia: Combined 5th and 6th Reports of Ethiopia 2009-2013, adopted at the 56th ordinary session (21 April-7 May 2015); Lesotho: Initial and Combined 2nd to 8th Periodic Reports 2001-2017, adopted at the 68th ordinary session (14 April-4 May 2021); Liberia: Initial and combined reports of Liberia 1982-2012 adopted at the 17th extraordinary session (19-28 February 2015); Namibia: 6th Periodic Report of Namibia 2011-2014, adopted at the 58th ordinary session (6-20 April 2016); Niger: 15th Periodic Report of Niger 2017-2019, adopted at the 66th ordinary session (4-18 November 2015); Senegal: Combined reports of Senegal 2004-2013 adopted at the 18th extraordinary session (28 July-7 August 2015); South Africa: 2nd Periodic Report of South Africa 2003-2014 adopted at the 58th ordinary session (6-20 April 2016) (the African Commission cited South Africa for failing to harmonise various laws on minimum age). Mauritius has entered a reservation in respect of art 4(d), subordinating the Protocol's provision on minimum age to national legislation.

84 The amendment resulted from a 2016 amicable settlement of a complaint before the African Children's Committee concerning Malawi's constitution that defined a child as a person below the age of 16 years. Sections 22(6) and 23(6), Malawi Constitution (1994, with amendments to 2017). See 'Malawi, IHRDA reach amicable settlement in child rights case before the Committee of Experts', www.ihrda.org. See also BD Mezmur 'No second chance for first impressions: the first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62-84.

In the Tanzanian case of *Attorney-General v Rebecca Gyumi*, the Attorney-General (AG) appealed against a high court decision that had declared unconstitutional sections of the Law of Marriage Act that permitted marriage of a girl below the age of 18 with parental consent and also set a lower legal age of marriage for girls (at 15, compared to 18 for boys). The AG's objection was on the ground that boys and girls could be treated differently in this case since girls mature earlier than boys, and therefore the provisions did not offend equality, as the two categories are not similarly situated. Rejecting the AG's argument, the Court interpreted article 6 of the Maputo Protocol as imposing a specific obligation on Tanzania to adopt 18 as the minimum age of marriage for both men and women.[85] The Court rejected the argument that marriage is in the best interests of the girls in cases of pregnancy, a position that resonates with the joint General Comment.[86]

Zimbabwe's Constitution of 2013 provides in section 78(1) that persons aged at least 18 years have the 'right to found a family'. The marriage statute, which predated the constitution, permitted girls to marry at the age of 16. The *Mudzuru* case[87] was filed on behalf of affected girls, challenging the constitutionality of the marriage law. The court ruled that the constitutional provision had to be interpreted in the context of Zimbabwe's existing obligations under relevant international treaties.[88] The Maputo Protocol is not cited in the judgment, but CEDAW and the CEDAW Committee's General Recommendations, as well as the African Children's Charter, are cited extensively to yield an interpretation that is in line with the Maputo Protocol's explicit stipulation of 18 years as the minimum age for marriage.[89]

As a result of the *Mudzuru* case, a new marriage law was enacted in March 2022, setting the marriage age in Zimbabwe at 18 years, regardless of the system under which a marriage is conducted.[90]

In Kenya, a High Court decision similarly dismissed an attempt by the Council of Imams and Preachers to block the criminal prosecution of persons charged with arranging the marriage of a girl under 18, citing Islamic law.[91] The Court did not specifically cite the Maputo Protocol but cited the CRC and affirmed 18 years as the universal standard, thus upholding the principle established under the Maputo Protocol.[92]

However, the experience across the board is that customary and religious personal law systems recognise underage marriages. In their reports, states almost uniformly decry the persistence of deeply rooted customary practices which permit the marriage of persons (especially girls) under the age of 18, despite minimum age legislation.[93]

85 *Attorney-General v Rebecca Gyumi* Civil Appeal 204 (2017) 17, 30-31. Despite this ruling, three years on, Tanzania had not yet aligned its Law of the Child Act and Law of Marriage Act. See I Warioba 'Child marriage in Tanzania: a human rights perspective' (2019) 23 *Journal of Law, Social Justice and Global Development*, available at http://www2.warwick.ac.uk/research/priorities/internationaldevelopment/lgd/ (accessed 23 June 2023).

86 See Joint General Comment on Child Marriage, para 10.

87 *Loveness Mudzuru & Ruvimbo Tsopodzi v Minister for Justice, Legal and Parliamentary Affairs & 2 others*, Constitutional Court of Zimbabwe, Judgment CCZ 12/2015.

88 *Mudzuru* (n 87) 26.

89 *Mudzuru* (n 87) 42.

90 See 'Zimbabwe: Marriages Bill Passed', https://allafrica.com/stories/202203090145.html.

91 *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General* (2015) eKLR.

92 *Council of Imams* (n 91) p 8-9.

93 See eg, African Commission Concluding Observations on: Combined 3rd and 4th Periodic Reports of Burkina Faso 2011-2013, adopted at the 57th ordinary session (4-18 November 2015); Cumulative Periodic Report of Chad 1998-2015, adopted at the 72nd ordinary session (19 July-2 August 2022); Periodic Reports of the Democratic Republic of Congo (n 83); 2nd Periodic Report of The Gambia 1994-2018, adopted at the 64th ordinary session (24 April-19 May 2019) Cairo, Egypt; Periodic Reports of Kenya (n 83); Periodic Reports of Lesotho (n 83); Periodic Report of the Islamic Republic of Mauritania (n 83); 3rd Periodic Report of Togo 2003-2010, adopted at the 50th ordinary session (24 October-5

A study of 11 West African countries conducted in 2021 found that there was still a high prevalence of child marriage (41.6 per cent) and that progress toward ending child marriage was extremely slow. On average, the prevalence of child marriage in the region had decreased by a meagre 0.01 per cent annually, with some countries recording an increase (Nigeria, Niger and Côte d'Ivoire).[94]

The Joint General Comment on Child Marriage observes that the issue of bride price or bride wealth plays a role in contributing to the incidence of child and forced marriages.[95] Yet the Maputo Protocol is silent on this issue, and national laws are similarly silent.[96] If Zimbabwe's experience is anything to go by, reform efforts in this area are likely to encounter opposition.[97] The CEDAW Committee has flagged bride price as a driver of child and forced marriage.[98]

Another factor identified as a drawback to effective enforcement of minimum age is the failure to implement universal birth registration, particularly in rural areas. This makes it impossible to definitively identify cases of child marriage and take the necessary action. For this reason, the SADC Model Law guides states to make it a right of every child to have their birth registered, as is also stipulated in the African Children's Charter.[99]

It is encouraging that some states have taken a comprehensive approach beyond legislation to address the socio-economic conditions that drive child marriage.[100] The SADC Model Law points in this direction.[101]

November 2011); Combined 11th to 15th Periodic Reports of Zimbabwe 2007-2019, adopted at the 69th ordinary session (15 November-5 December 2021).

94 A Fatusi, S Adedini & J Mobolaji 'Trends and correlates of girl-child marriage in 11 West African countries: evidence from recent demographic and health surveys' (2021) 4 *AAS Open Research* 35.

95 See Joint General Comment on Child Marriage, para 49.

96 Warioba, *Child Marriage in Tanzania* (n 85). See also RI Danpullo 'The Maputo Protocol and the eradication of the cultural woes of African women: a critical analysis' (2017) 20(1) *RiA Recht in Afrika/Droit en Afrique*, 93-111. Danpullo (95-98) also notes a silence in the Protocol on the institution of 'woman-to-woman' 'marriage', an arrangement through which an older woman of means engages a younger (often poor) woman or girl to have children on her behalf. While this arrangement does not fit into the legal definition of 'marriage', its exploitation of poor girls and women is real and remains unaddressed. The arrangement is also distinct from same-sex marriage, which the Maputo Protocol does not address itself to.

97 An earlier (Senate) version of the Marriages Bill in Zimbabwe contained a provision to the effect that payment or non-payment of *lobola* (bridewealth) would not affect the validity of a marriage. Under pressure from traditional leaders, the National Assembly removed that clause in order for the Bill to be enacted. See 'Zimbabwe: Marriages Bill Passed', https://allafrica.com/stories/202203090145.html.

98 See CEDAW General Recommendation 21 (n 36). See also CEDAW Committee Concluding Observations on: 7th Periodic Report of Congo (14 November 2018) UN Doc CEDAW/C/COG/CO/7 (2018) paras 50, 51; Combined initial to 3rd Periodic Reports of Djibouti (2 August 2011) UN Doc CEDAW/C/DJI/CO/1-3 (2011) para 36; 8th Periodic Report of the Democratic Republic of Congo (30 July 2019) UN Doc CEDAW/C/COD/CO/8 (2019) paras 52, 53; 6th Periodic Report of Equatorial Guinea (9 November 2012) UN Doc CEDAW/C/GNQ/CO/6 (2012) para 43; 6th Periodic Report of Eritrea (10 March 2020) UN Doc CEDAW/C/ERI/CO/6 (2020) para 52; 6th Periodic Report of Tanzania (11 May 2009) UN Doc CEDAW/C/TZA/CO/6 (2009) para 146; Combined 4th to 7th Periodic Report of Uganda (5 November 2010) UN Doc CEDAW/C/UGA/CO/7 (2010) para 47; Mali (2016) n 25, para 43; CEDAW Committee List of issues and questions prior to the submission of the 7th Periodic Report of Tunisia (19 August 2019) UN Doc CEDAW/C/TUN/QPR/7 (2019) para 23.

99 SADC Model Law, sec 14.

100 See, eg, Tanzania's National Survey on the Drivers and Consequences of Child Marriage in Tanzania (2017) available at https://www.forwarduk.org.uk/wp-content/uploads/2019/06/Forward-230-Page-Report-2017-Updated-Branding-WEB.pdf).

101 See SADC Model Law, secs 15, 26.

6.2 Implementation of provisions on monogamy versus polygamy

Some states have gone beyond the language of the Maputo Protocol to outlaw polygamy altogether or recognised it only in limited instances. Rwanda's and Seychelles' laws only recognise civil monogamous marriages.[102] The Democratic Republic of Congo (DRC) only recognises polygamous marriages conducted before 1951.[103] Some states have taken steps to legislate monogamy as the preferred form of marriage, in line with the Maputo Protocol. Examples include states whose laws permit conversion from polygamous to monogamous marriage but not the reverse, such as Kenya and Uganda.

Some states have also complied with the Maputo Protocol by taking steps to extend legal protection to women in polygamous unions. Examples of protective steps include matrimonial property laws that set out the criteria to be used in determining marital property rights in polygamous unions.[104] Another protective measure is the requirement that the first or all wives in a subsisting marriage must consent to a husband's subsequent marriage.[105]

Some African states have maintained laws that simply place polygamous unions outside of the formal regulation of marriage.[106] This essentially exonerates the state from regulating polygamous unions in line with its human rights obligations under the Maputo Protocol, thus denying women in those relationships the legal protection that the Maputo Protocol calls for.

6.3 Implementation of compulsory and universal registration of marriages

Progress in establishing systems for compulsory and universal marriage registration has been slow. The main reason is that although a majority of the population relies on customary and religious marriages, they tend not to be covered by the official marriage registry.[107] A few states are singled out for their efforts in establishing a marriage registration system that extends to marriages conducted before traditional and religious authorities, even though uptake remains low.[108]

Namibia and South Africa have entered reservations to article 6(d) on account of the absence from their laws of a legal requirement and mechanism for the registration of customary marriages.

102 African Commission Concluding Observations on: Rwanda (n 83); 3d Periodic Report of Seychelles 2006-2019, adopted at the 69th ordinary session (15 November-5 December 2021).

103 African Commission Concluding Observations Democratic Republic of Congo (n 83).

104 See for instance Kenya's Matrimonial Property Act 2013, sec 8.

105 Examples of states whose laws require consent of the first or existing wives include: Algeria and Mauritania. See African Commission Concluding Observations, Algeria (n 83); and Mauritania (n 83). South Africa, following the Constitutional Court's decision in *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama & Minister for Home Affairs* 2013 (4) SA 415 (CC). In Morocco, at the point of entering into a marriage contract, a woman is given the option of indicating that she will not accept a polygamous marriage. However, if a wife objects to her husband's decision to take an additional wife, the law provides for automatic commencement of divorce proceedings on grounds of discord, so objection comes at a high price. See CEDAW Committee Concluding Observations on the combined 5th and 6th Periodic Report of Morocco (4 July 2022) UN Doc CEDAW/C/MAR/CO/5-6 (2022) para 39.

106 See, eg, Lesotho, whose law on registration of marriages forbids the District Administrator from registering a marriage 'if either party thereto is at the time legally married to some other person.' See Cotton & Diala (n 33) 26. Another example is Seychelles whose report submitted to the African Commission in 2021 simply stated that bigamy is criminalised but gave no information on how legal protection is extended to women in polygamous relationships as the Protocol requires. See African Commission Concluding Observations Seychelles (2021) n 101.

107 See African Commission Concluding Observations on: Botswana (n 83); Eswatini (n 79). See also CEDAW committee Concluding Observations on: Côte d'Ivoire (n 43) para 51; Gabon (n 43) paras 44 & 45; The Gambia (n 43) para 49; 6th and 7th Periodic Reports of Ghana (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 40; Zimbabwe (2020) (n 42) para 50.

108 For states that are commended for efforts made toward registering customary and religious marriages see CEDAW Committee Concluding Observations on: Guinea (n 43) para 54; Madagascar (n 43) para 46; Mauritius (n 43) para 37; 8th Periodic Report of Senegal (1 March 2022), UN Doc CEDAW/C/SEN/CO/8 (2022) para 42.

Namibia's reservation is worded as temporary, pending legislative and institutional changes, but South Africa's is worded indefinitely.[109]

A minority of states have put in place laws and mechanisms for the universal registration of marriages. Rwanda has made registration of marriages compulsory.[110] The DRC requires registration of all marriages, including customary marriages, within a month. The DRC's report indicates that marriage registries have been decentralised to encourage compliance but that *de facto* unions are still prevalent.[111] Zimbabwe's Marriages Act, enacted in 2022, requires registration of all marriages and allows retrospective registration of customary marriages and *de facto* unions that have been in existence for at least five years as long as the parties were legally eligible to marry at the time the union commenced. To make registration accessible, chiefs at the lowest administrative level are designated as marriage registrars. Malawi, too, delegates to traditional authorities the power to register marriages.[112]

While the treaty bodies would like to see marriages registered, they are nonetheless concerned about the use of a punitive approach to enforce registration. They have therefore raised concern over the use of penalties, strict timelines in the absence of decentralised, accessible services, invalidation of unregistered marriages, and making marriage registration a precondition for access to essential services such as obtaining a passport.[113]

6.4 Implementation of equality in choice of matrimonial regime and residence

While some states have undertaken reforms in the post-independence period to remove restrictions on women's legal capacity,[114] restrictions still persist, mostly in the civil codes of Francophone countries.[115] What is more, in some instances, recent revisions of civil codes have left existing restrictions intact or only modified them slightly. For instance, CEDAW took issue with the fact that article 294 of Burkina Faso's revised Personal and Family Code gives deference to the husband's choice of domicile.[116] Taking a similar approach, Benin's Persons and Family Code (2004) defaults to the husband's choice of matrimonial domicile if the parties fail to agree and gives the wife the option of initiating legal proceedings to allow a separate domicile if she can demonstrate that the husband's choice poses a real danger to her and the children.[117] Regarding the matrimonial regime, the choice of matrimonial regime

109 See African Union, 'Reservations and declarations entered by member states on the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', March 2022 (communication from the African Union Commission).

110 See Republic of Rwanda, Combined 11th to 13th Periodic Reports 2009-2016 on the African Charter on Human and Peoples' Rights, p 79.

111 See Democratic Republic of Congo, Combined 11th to 13th Periodic Reports 2005-2015 on the African Charter on Human and Peoples' Rights, para 198.

112 See Marriage, Divorce and Family Relations Act (Malawi), sec 38. Uganda has had a system for registering customary marriages since 1973 (Customary Marriage (Registration) Act.

113 For states whose punitive approach has raised concerns see CEDAW committee Concluding Observations on: Kenya (n 43) para 32; Mauritius (n 43) para 37; Senegal (n 108) para 42(b).

114 Examples of reforms to remove restrictions on women's legal capacity include Zimbabwe's enactment of the Legal Age of Majority Act in 1982, Tanzania's Age of Majority Act, 1960, Botswana's Abolition of Marital Power Act 2004, and Namibia's abolition of marital power. See African Commission Concluding Observations on: Botswana (n 83); Namibia (n 83).

115 See African Commission Concluding Observations Senegal (2015) n 82, p 8. See also CEDAW committee Concluding Observations on: 4th Periodic Report of Benin (28 October 2013) UN Doc CEDAW/C/BEN/CO/4 (2013) para 38; Burkina Faso (n 43) para 50; Combined 5th and 6th Periodic Reports of Burundi (25 November 2016) UN Doc CEDAW/C/BDI/CO/5-6 (2016) para 50-51; Cameroon (n 43) para 38; Congo (n 98) para 50; Djibouti (n 43) para 12; Democratic Republic of Congo (n 98) para 52; Gabon (n 43) para 44; Guinea (n 43) para 54; Mali (n 26) para 43; Senegal (n 108) para 42. For implications of this restriction of women's legal capacity in Francophone Africa see Kombo (n 49).

116 CEDAW Committee Concluding Observations Burkina Faso (n 43) para 50.

117 CEDAW Committee Concluding Observations Benin (n 115) para 38.

has consequences chiefly for the division of property upon dissolution of the marriage. The emerging best practice in states that have undertaken reform seems to be that the various options are presented to the parties at the time of contracting the marriage so that they may opt into a preferred regime. The DRC and Rwanda have taken this approach. Intending parties to a marriage need to elect between a separate property regime, community property with respect to property acquired during the marriage only, or a joint estate over all property. Should parties fail to elect, the second option is the default option and is the choice that gets recorded in the marriage register.[118]

Regrettably, by both states' own admission, these reformed laws do not apply to customary and religious marriages.

6.5 Implementation of the right to maiden name

This right has not been a big issue before the treaty bodies. Mauritania's 2020 report to CEDAW flags the granting of this right in reporting on advances made under its Civil Status Act.

CEDAW took issue with Benin's Persons and Family Code 2004 which automatically confers upon a married woman the name of her husband. Upon dissolution of the marriage, she can only continue to use his name with his consent or with a judge's authorisation.[119] A woman is, therefore, never seized of the right to decide on her surname.

In monitoring the implementation of this right, the important thing to pay attention to is ensuring that a woman's choice to retain or drop her maiden name is not used against her. It is not uncommon in disputes at the dissolution of a marriage for a woman's retention of her maiden name to be held up as evidence that she was never really married, or that she was not loyal or does not regard herself as fully belonging to her husband's lineage or clan. The flip side is also a plausible scenario: in a succession dispute, a daughter's use of her husband's name bolsters the argument for her exclusion from her parents' estate distribution.

6.6 Implementation of equal rights as to nationality

Overall, African states have made remarkable progress in departing from restrictive colonial-era nationality and citizenship laws that employ the concept of dependent nationality.[120] However, the picture is mixed. There are still states whose laws restrict a woman's right to acquire and transmit nationality on the same terms as a man.[121] Then there are states that have recently changed their laws

118 Democratic Republic of Congo, Combined 11th to 13th Periodic Reports 2005-2015 on the African Charter on Human and Peoples' Rights, para 185. See also Republic of Rwanda, Combined 11th to 13th Periodic Reports on the African Charter on Human and Peoples' Rights, 80.

119 Articles 12 & 261(3) of Benin Persons and Family Code. See CEDAW Committee Concluding Observations Benin (n 115) para 38.

120 See, eg, African Commission Concluding Observations on: Algeria (n 83); 1st Periodic Report of Botswana 1996-2007, adopted at the 47th ordinary session (12-26 May 2010); Democratic Republic of Congo (n 83); Combined 2nd to 8th Periodic Report of the Kingdom of Lesotho 2001-2017, adopted at the 64th ordinary session (24 April-19 May 2019) – but only with respect to transmission to children, not husband. Senegal was commended by the African Committee of Experts in 2019. See African Committee of Experts Concluding Observations on the Periodic Report of Senegal, adopted at the 33rd ordinary session (18-28 March 2019) para 22.

121 See African Commission Concluding Observations on: Eswatini (n 79) and Lesotho (n 120). See also African Committee of Experts Concluding Observations on the initial report of Eswatini, adopted at the 33rd ordinary session, (18-28 March 2019) para 25. See also CEDAW Committee Concluding Observations on: 5th Periodic Report of Benin, (16 May 2022) UN Doc CEDAW/C/BEN/CO/5 (2022) paras 74-78; Burundi (n 115) para 12; Cameroon (n 43) para 24(a); Central African Republic (n 43) para 33; Congo (n 98) paras 38-39; Guinea (n 43) para 40; Lesotho (n 79) para 26; Combined initial to 6th Periodic Report of Liberia (7 August 2009) UN Doc CEDAW/C/LBR/CO/6 (2009) para 30; Madagascar (n 43) para 26; Combined 7th and 8th Periodic Report of Nigeria (24 July 2017) UN Doc (2017) para 31; Combined initial

to grant women equal rights as to nationality, but the actual realisation of those rights encounters challenges on account of ambiguities and delay in the harmonisation of laws. For instance, although Togo's Code of Persons and Family (2012) allows women to retain nationality following divorce, the Code of Nationality continued in operation with gender-based restrictions.[122] In other states, implementation of the newly enacted or amended nationality laws is beset by administrative hurdles or compromised by weaknesses and a punitive approach in related services such as birth registration. Treaty bodies have urged the removal of administrative hurdles such as tight deadlines and steep penalties for late birth registration, and requirements for both parents to appear at birth registration (which prejudice single mothers). They have also recommended decentralised services to better serve marginalised communities, such as in rural areas and among migrants. [123]

Despite the recent reforms in nationality laws, the assumption that the father is the legal guardian to the exclusion of the mother still continues to inform administrative procedures, such as the processing of passport applications for children.[124]

6.7 Implementation of equal parental rights and responsibilities

Both the African Commission and the African Children's Committee have flagged state practices that fall short of recognition of equality in parental rights and responsibilities. For instance, while Algeria was commended for amending its Family Code to remove restrictions on a mother's custody rights, the law still regarded the father as the legal guardian. The mother only becomes a legal guardian following the death of the father. Furthermore, a divorced mother surrenders her rights to child custody upon remarriage, which a father is not required to do.[125]

Both regional treaty bodies, as well as the CEDAW Committee and the CRC Committee, have also expressed concern over family codes (mostly from a Francophone background) that designate the father as the legal head of the family, thus skewing parental rights against the mother.[126]

to 2nd Periodic Reports of Swaziland (Eswatini) (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2 (2014) para 28; Combined 7th and 8th Periodic Reports of Tanzania (9 March 2016) UN Doc CEDAW/C/TZA/CO/7-8 (2016) para 28; and Tunisia (n 98) para 14.

122 CEDAW Committee Concluding Observations Togo (n 43) para 28. Similarly, a 2010 amendment to Tunisia's Nationality Code allowed women to transmit nationality to their children, regardless of the father's identity. However, another provision in the same law provides that children born in Tunisia receive Tunisian nationality if the father or grandfather are born in Tunisia. See Tunisia (n 98) para 14. See also African Committee of Experts Concluding Observations on the initial report of Sierra Leone, adopted at the 30th ordinary session (6-16 December 2017) para18.

123 See, eg, African Committee of Experts Concluding Observations on: Algeria (n 35); Initial report of Angola, adopted at the 30th ordinary session (6-16 December 2017); Initial report of Benin, adopted at the 33rd ordinary session (18-28 March 2019); Initial report of Eritrea, adopted at the 28th ordinary session (21 October-1 November 2016); 1st Periodic Report of Ethiopia, adopted at the 38th ordinary session (15-26 November 2021); Initial report of Ghana, adopted at the 28th ordinary session (21 October-1 November 2016); 1st Periodic Report of Kenya adopted at the 1st extraordinary session (6-11 October 2014); 2nd and 3rd Periodic Report of Rwanda, adopted at the 25th ordinary session (20-24 April 2015); Senegal (n 120); Sierra Leone (n 122); 1st Periodic Report of South Africa, adopted at the 32nd ordinary session (12-22 November 2018); Initial report of Sudan, adopted at the 20th ordinary session (12-16 November 2012); Initial report of Zimbabwe, adopted at the 25th ordinary session (20-24 April 2015).

124 In Kenya, for instance, the application form for a passport for a person under 16 years of age states: 'The mother or any other person claiming, during the lifetime of the father, to be the legal guardian must produce the Court Order committing the child to her or that person's custody.' See Form 19, https://www.kenyaembassyaddis.org/wp-content/uploads/forms/passport-application-form-19.pdf.

125 See African Commission Concluding Observations Algeria (2015); and African Committee of Experts Concluding Observations Algeria (2015). Egypt has similar provisions, terminating a mother's custody rights with respect to children over 15 years of age. See CEDAW committee Concluding Observations on the combined 8th to 10th Periodic Reports of Egypt (26 November 2021) UN Doc CEDAW/C/EGY/CO/8-10 (2021) para 49.

126 See eg African Committee of Experts Concluding Observations on the initial report of Congo, adopted at the 26th ordinary session (16-19 November 2015); CRC Committee Concluding Observations on the Combined 3rd and 4th Periodic Report of Burkina Faso (9 February 2010), UN Doc CRC/C/BFA/CO/3-4 (2010) para 44; CEDAW committee

Some states do report recent legislative enactments recognising the supremacy of the principle of the best interests of the child, thus ruling out the automatic preference of either parent.[127] However, it is often the case that these positive enactments do not govern customary marriages and *de facto* unions, yet these tend to be the most common forms of marriage on the continent. As with all the issues discussed, formal enactments are, therefore, a necessary but not sufficient indicator of compliance with a state's obligations under article 6.

As this chapter earlier highlighted, inequality in parental rights and responsibilities does manifest in other areas of law, such as employment. It is difficult to track the progress of states in implementing policies such as shared parental leave or paternity leave, which are designed to encourage fathers' participation in raising their children, thus spreading out care work and availing options for mothers who wish to have more economic engagement outside the home, or simply enabling greater family stability. The commission will hopefully engage the states more along these lines, especially if it takes an approach that brings out synergy among related provisions of the Maputo Protocol, for instance, with regard to this matter, the synergy between article 6(i) and article 13(l) (on recognition of equal parental responsibility in the context of employment).

Finally, in spite of language restricting the Maputo Protocol's scope in article 6(i) to co-parenting in a marital context, the commission can extend its dialogue with states to cover unmarried parents and ensure that both parents bear responsibility for safeguarding the welfare of their children. Some states' constitutions and legislation reflect the principle of shared parental responsibility irrespective of marital status. Kenya's Constitution, for instance, provides that a child's right to parental care and protection 'includes responsibility of the mother and father to provide for their child, whether they are married to each other or not'.[128] The African Commission needs to reinforce the CRC Committee's call on states to adopt such legislation.[129]

6.8 Implementation of equal marital property rights

The post-colonial laws of a number of Southern African states influenced by Roman-Dutch law, namely Botswana, Lesotho, South Africa, Swaziland and Zimbabwe retained the automatic operation of marital power unless couples opted out of it through a prenuptial agreement.[130] Some states, such as South Africa and Zimbabwe, abolished marital power by statute long before the Maputo Protocol, while others in the Southern and West Africa region still retain or only recently abolished marital power or otherwise restrict a married woman's legal capacity to administer and transact in property.[131] The African Commission has commended the states that have taken positive legislative measures.[132]

Concluding Observations on: Cameroon (n 43) para 39; Central African Republic (n 43) para 45(d); Djibouti (n 98) para 36; Democratic Republic of Congo (n 98) para 52; Gabon (n 43) para 44(b); Guinea (n 43) para 54; Mali (n 26) para 43; Senegal (n 108) para 42(e); Togo (n 43) para 40; Tunisia (n 98) para 23.

127 Examples of legislation that encodes the principle of the best interests of the child include: Algeria's amended Family Code (2005); Kenya's Marriage Act 2014 and Children Act 2022; Malawi's Marriage, Divorce and Family Relations Act (2015), Mauritania's Personal Status Code (2001), Namibia's Married Persons Equality Act (1996), Zimbabwe's Marriages Act (2022), which extends equal spousal rights to all marriages, including customary ones.

128 Constitution of Kenya (2010), art 53(1)(e).

129 See Concluding Observations on the 2nd Periodic Report of Zimbabwe, CRC Committee (7 March 2016), UN Doc CRC/C/ZWE/CO/2 (2016) para 49.

130 Armstrong et al (n 33) 343-344.

131 Armstrong et al (n 33) 344; Cameroon (n 43) para 38; Chad (n 43) para 42; Gabon (n 43) para 44.

132 Botswana was commended for amending the Deeds Registry Act to allow women married in community of property to transact in their own right and hold separate property. See African Commission Concluding Observations Botswana (2010) n 119, para 17; Kenya was commended for enacting its Matrimonial Property Act of 2013. 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). Malawi was commended for its enactment of the Marriage, Divorce and Family Relations Act. African Commission Concluding Observations Malawi (n 83). The commission also commended

Others maintain fault-based divorce laws with negative property consequences for women found to be at fault and therefore risk losing all or part of the property they acquired or contributed to in the course of the marriage.[133]

In some states, overt restrictions still remain either in the laws or in the practice of institutions such as banks. In Madagascar, for instance, the CEDAW Committee raised concern over the requirement of a male family member's endorsement of financial transactions, which limits women's access to credit and the acquisition and transfer of property.[134]

Some states have undertaken legal reforms to remove restrictions on married women's contractual and proprietary capacity, but the benefit of such laws is out of reach for women married under customary law. The CEDAW Committee made this observation with respect to Botswana's Abolition of Marital Power Act 2004 and an amendment to the Deeds Registry Act, as well as Lesotho's Legal Capacity of Married Persons Act 2006. These statutes do not apply to customary and religious marriages on account of personal law exemption clauses in these countries' constitutions.[135] A similar concern was expressed over Rwanda's and Mauritius' laws which only recognise civil monogamous marriages, therefore leaving the property rights of women in *de facto* unions or polygamous marriages unprotected.[136]

A woman's right to have a say over her spouse's transactions over marital property is, on the whole, not adequately safeguarded. In Kenya, for instance, a 2016 revision of the Land Registration Act of 2012 dispensed with a general mandatory requirement of spousal consent to all transactions involving land that falls within the category of marital property. What remains is a narrower option for a spouse under the Matrimonial Property Act to enter a caveat and thereby put on hold transactions by the other spouse that threaten marital property. The broader framing would have put the onus on the transacting parties to ensure that consent, where it is needed, has been obtained.[137] This flags a broader concern regarding harmonisation of laws.

It is also ideal that the law should provide for a spouse's right to seek a judicial declaration of the extent of his/her interests in property (not the division of property) during the subsistence of the marriage, where there is a need for clarity. Other safeguards that the law ought to provide for include a spouse's right not to be evicted from the matrimonial home by or at the instance of the other spouse except by court order, right to consent to any mortgage or lease of matrimonial property, and right

Lesotho for passing the Legal Capacity of Married Persons Act 2006. African Commission Concluding Observations Lesotho (n 83).

133 See eg African Commission Concluding Observations Eswatini (n 121) para 42.

134 CEDAW raised this concern with Madagascar in 2008 and reiterated it when seven years later there was no change. See CEDAW Committee Concluding Observations on: 5th Periodic Report of Madagascar (7 November 2008), UN Doc CEDAW/C/MDG/CO/5 (2008) para 32 (2008); Combined 6th and 7th Periodic Report of Madagascar (24 November 2015), UN Doc CEDAW/C/MDG/CO/6-7 (2015) para 42. Similar concern was raised with respect to Benin and Mauritania. See CEDAW Committee Concluding Observations on: 4th Periodic Report of Benin (28 October 2013), UN Doc CEDAW/C/BEN/CO/4 (2013) para 34; Combined 2nd and 3rd Periodic Report of Mauritania (24 July 2014) UN Doc CEDAW/C/MRT/CO/2-3 (2014) para 42. Mauritania's subsequent state report (2020) admits that 56% of its women cannot transact in property without a male guarantor; no reason is given for this limitation. (See Mauritania, 4th Periodic Report, submitted 14 August 2020, UN Doc CEDAW/C/MRT/4, p 39).

135 CEDAW Committee Concluding Observations Botswana (n 79) para 41. At its next reporting cycle in 2019, Botswana still had the exemption clause in its constitution. See CEDAW Committee Concluding Observations on the 4th Periodic Report of Botswana (14 March 2019) UN Doc CEDAW/C/BWA/CO/4, (2019) paras 47, 48.

136 CEDAW committee Concluding Observations on the combined 7th to 9th Periodic Report of Rwanda (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 50; Mauritius (n 43) para 38.

137 CEDAW/C/KEN/CO/8 (2017) para 51(b).

to register a caveat or secure an injunction to stop a spouse from transacting in marital property in a manner that jeopardises a spouse's interests.[138]

7 Conclusion

There is evidence that no doubt the Maputo Protocol's approach to marriage has had some impact on laws, policies and practices on the continent. This is most discernible with respect to the issue of the minimum age for marriage. Progress is less discernible with respect to issues such as marital property and the regulation of polygamy, which are less amenable to the stipulation of minimum standards.

It is quite worrying that the one phrase that comes through as a universal helpless refrain in the reports of States Parties is that 'deep rooted customs' or 'deep rooted prejudices' or 'practices in the hinterland' present a barrier to attempts at marriage law reform. The impression conveyed is that there is an enduring incompatibility with the Maputo Protocol's objectives. The African Commission's response to this is invariably one of urging the states to invest more in sensitisation, yet lack of awareness is not the issue. What the reforms are up against is essentially an absence of social legitimacy for the notion of equal legal and moral worth between spouses. Thus, change will inevitably rely more on external nudging than on internal momentum. The external nudge would guide customary norms in the direction of full human dignity and equality, as the South African Constitutional Court did in the *Mayelane* case (2013).[139] Presented with evidence of varied practice on whether custom mandated the first wife's consent to the marriage of subsequent wives, the court took the view that her constitutional right to equality and dignity demanded that customary law be definitely developed in that direction. While the case did not cite the Maputo Protocol at all, the undergirding principle – equality of rights between men and women in marriage – is present.

This approach, which treats customary norms as dynamic and responsive rather than static, provides a way out of the apparent helplessness with regard to reforms in the area of marriage. Without this approach, states will feel exonerated in taking steps that can only be generously described as hesitant in complying with article 6 of the Maputo Protocol.

Finally, there is much to be said for the role that civil society engagement has played, both at the regional level and in national contexts.[140] It has been indispensable in the developments that have taken place. It is thanks to civil society that the litigation initiatives discussed in this chapter were undertaken at all.

138 Kenyan law provides for all these safeguards under the Matrimonial Property Act of 2013. See secs 12 & 17.

139 *Mayelane* (n 105).

140 The protocol has been popularised through the work of SOAWR (Solidarity for African Women's Rights), a coalition of 63 civil society groups working in 32 African countries. The coalition keeps up pressure on governments that have not ratified the protocol, and advocates for more effective implementation among the state parties. See soawr.org/protocol-watch/ The coalition also produces material to equip civil society engagement relevant to the protocol. See for instance, KK Mwikya et al *Litigating the Maputo Protocol: a compendium of strategies and approaches for defending the rights of women and girls in Africa* (Equality Now 2020), available at https://soawr-test.org/wp-content/uploads/Compendium_of_Papers_on_the_Maputo_Protocol_Equality_Now_2020_Final.pdf The SADC Model Law on ending child marriage also resulted from a collaborative civil society initiative which brought together several organizations to form the 18+ Campaign steered by Plan International. See https://plan-international.org/srhr/child-marriage-early-forced/.