

Article 7

Separation, divorce and annulment of marriage

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

- (a) separation, divorce or annulment of a marriage shall be effected by judicial order;
- (b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- (c) in case of separation, divorce or annulment of

marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;

- (d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

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1 Introduction

That a woman should leave a marriage empty-handed and homeless, meets with much sympathy, some disapproval, but little surprise. It is a taken-for-granted facet of marriage, particularly marriage under various African customary laws, religious laws and the increasingly prevalent, fluidly defined cohabitation relationships.¹ Dissolution of relationships may also come with enforced separation from her children. In most cases, the divorce will have been effected without much ado, devoid of any defined adjudication process, let alone a formal judicial one.² Uncertainty, therefore, is the defining feature of women's entitlements when the relationship breaks down.³

1 The high prevalence of cohabitation unions is not unique to Africa; it reflects a global trend. See UN Women, *Families in a changing world* (Progress of the World's Women 2019-2020) (2019) 54.

2 A Armstrong et al, 'Uncovering reality: excavating women's rights in African family law' (1993) 7 *International Journal of Law and the Family* 350-357; A An-Na'im 'Shari'a and Islamic family law: transition and transformation' in A An-Na'im (ed) *Islamic family law in a changing world: a global resource book* (2002) 1-22; UN Women (n 1) 97.

3 See, for instance, Human Rights Watch and Federation of Women Lawyers (FIDA-Kenya) "'Once you get out, you lose everything": Women and Matrimonial Property Rights in Kenya' (2020) https://www.hrw.org/sites/default/files/media_2020/06/kenya0620_web.pdf (accessed 20 April 2023).

Worldwide trends indicate an increase in separation and divorce rates, with more divorced men likely to remarry than women.⁴ The adverse economic consequences of divorce fall disproportionately on women relative to men, even in high-income countries.⁵ Survey data from 91 low- and middle-income countries show that the rate of extreme poverty among those who are divorced or separated is twice as high for women compared to men.⁶ In countries with weak state-funded social protection mechanisms, which is the case in most of Africa, the adverse economic consequence of the dissolution of marriage goes unmitigated. That women are more likely than men to have invested their time in unpaid care work in the course of the marriage makes it likely that they will be disadvantaged by marital property regimes that base entitlement on proof of contribution to asset acquisition.

This complex interaction of fast-changing and vastly varied socio-economic realities, with a history of unfavourable laws and customs, maps the scope of the ambitious mission that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) seeks to accomplish through article 7. Article 7 seeks to chart a more secure course for women's rights in the life-defining moment of the dissolution of marriage. It seeks to do this by requiring that dissolution of marriage should be by means of a lawfully recognised process that is available to women and men on an equal basis and that parental rights and responsibilities, as well as sharing of assets accumulated during marriage, are subjected to fair adjudication.

This chapter provides a commentary on the normative content of article 7, elaborates on the nature and scope of state obligations, 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 7. The third section highlights linkages between article 7 and other provisions within the Protocol and in other treaties. Section 4 discusses the key concepts that define the subject matter of article 7. Section 5 analyses the nature and scope of state obligation. Section 6 evaluates state practice in the implementation of article 7, relying mainly on the Concluding Observations of the African Commission on Human and Peoples' Rights (African Commission or Commission), the United Nations Committee on Elimination of All Forms of Discrimination against Women (CEDAW Committee), the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), and the United Nations Committee on the Rights of the Child (CRC Committee). Section 7 is the conclusion, which reflects on the state of emerging jurisprudence around article 7 and evaluates the prospects for the article's full implementation.

2 Drafting history

In the first draft of the protocol, discussed at Nouakchott in 1997, article 7 addressed both dissolution of marriage by divorce or annulment, and dissolution by death, widowhood taking up most of the article's attention.⁷ With regard to divorce, the draft article addressed two issues: first, it provided that divorce or annulment should be effected only by judicial order. Second, it granted the same rights to men and women to initiate proceedings for divorce or annulment of marriage and the same rights with respect to 'children and property of the marriage' following divorce or annulment.

4 UN Women (n 1) 55.

5 UN Women (n 1) 127.

6 8% for women, compared to 3.9% for men. UN Women (n 1) 127.

7 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).

The Kigali Draft separated divorce from widowhood, designating article 8 to address the '[s]eparation and termination of marriage'.⁸ The article was made up of four clauses, addressing in substance the same issues as in the Nouakchott Draft. Like the Nouakchott Draft, the third and fourth clauses of the Kigali Draft's article 8 lumped together 'children and property of the marriage.' The merger of the Kigali Draft and the OAU Convention on Harmful Practices⁹ resulted in the Final Draft.¹⁰

Several changes were made when the Final Draft was discussed at the first meeting of experts held in Addis Ababa in 2001.¹¹ The article's heading was amended to read 'separation, divorce, and annulment of marriage', which heading remained in the final text of the protocol as it now stands. The clause stipulating that separation, divorce or annulment of marriage be effected only by judicial order drew objection from Egypt, Libya and Sudan, who sought deletion of the word 'divorce'.¹² In effect, what the objectors sought was accommodation of the male prerogative of divorce by oral pronouncement (*talaq*) under Islamic law of marriage.¹³ The only compromise made appears to be the dropping of the word 'only', which arguably left room for extra-judicial separation, divorce and annulment of marriage. The clause granting the same right to men and women to initiate proceedings was retained without amendment.

The report that resulted from the first meeting of experts in Addis Ababa in November 2001 finally effected a separation between children and property. The draft article 8(c) stipulated that in the event of separation, divorce or annulment, 'men and women shall have the same reciprocal rights and responsibilities towards their children'. It further read that, '[i]n any case, the interests of the children shall be given paramount importance'. Property matters were addressed in draft article 8(d), which stated that 'men and women shall have the same rights to an equitable sharing of the joint property deriving from the marriage'. The use of the word 'same' invited reservations from the delegations of Algeria, Egypt, Libya, and Sudan. They proposed that it be replaced with 'complementary', but that proposal was not adopted.¹⁴

As discussed in the introduction to this Commentary, an NGO forum convened in January 2003 made extensive comments on the Final Draft, including the amendments suggested by the meeting of experts.¹⁵ Foremost among them was an emphasis on the use of the word 'equal' in place of other

8 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).

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

10 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

11 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 Report of the Meeting of Expert (n 11) under draft art 8(a).

13 The trends in Islamic family law reform have been moving in the opposite direction, away from oral pronouncement, toward documentation of divorce for more effective protection of the rights of women and children. See An-Na'im (n 2).

14 The reason for objection by these states that apply Islamic family law can be deduced from the reservations and declarations of these and similarly situated states to art 16(1)(h) of CEDAW, which addresses the subject of property rights in marriage. They invariably cite contradictions with the stipulated property rights of spouses in family codes which are based on Islamic Sharia. See, eg, reservations and declarations by Algeria, Egypt, Kuwait, Libya, Maldives, Morocco, Saudi Arabia, Tunisia, available in CEDAW Committee, 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women', CEDAW/SP/2006/2.

15 See A Rudman 'Introduction' sec 2.5.2 in this volume.

formulations such as ‘same’ or ‘reciprocal’.¹⁶ The NGO push toward equality as the frame of reference was clearly rejected, as the Addis Ababa Draft, adopted by the Meeting of Ministers in Addis Ababa in March 2003, employed the word ‘reciprocal’ with regard to parental rights and responsibility, and the word ‘equitable sharing’ with regard to marital property.¹⁷ This is the current wording contained in article 7 of the Maputo Protocol. This terminological discussion is revisited under section 4 below.

Overall, the drafting process of article 7 is to be commended for the painstaking clarification of the rights issues that arise at the termination of a marriage, rather than having widowhood, matrimonial property and children all tangled up into one.

3 Linkage to related treaty provisions

Logically, article 7 builds onto article 6 of the Protocol, which deals with marriage, especially article 6(d) on the registration of marriages, as this has implications for proving one’s rights when a relationship breaks down. Of further relevance is article 6(j), which accords women equal rights to acquire, administer and manage their own property during the marriage, which has a bearing on the resolution of marital property disputes at the dissolution of marriage. Articles 2 and 8(f) on the elimination of discrimination in all spheres frame all the rights in the Protocol. Article 8(a) on effective access by women to ‘judicial and legal services’ bears relation to article 7(b), which seeks to ensure that women have, on an equal basis with men, the right to initiate proceedings for separation, divorce and annulment of marriage.¹⁸

Article 4, specifically the clauses on violence against women, has relevance in legal systems that have a fault-based approach to divorce. How violence is conceptualised in the Maputo Protocol ought to have a bearing in assessing whether the threshold for cruelty as a ground for divorce has been met and whether the definition of violence is comprehensive enough to go beyond the narrow confines of physical assault.

Also relevant is article 5 on the elimination of harmful practices, which includes legal and social norms and practices that justify the destitution of women or estrangement from their children upon separation or dissolution of marriage. This is shored up by article 16, guaranteeing women the right to adequate housing irrespective of marital status,¹⁹ and article 19(c), which mandates states to promote women’s access to and control of productive resources. Articles 20 and 21 on widowhood and inheritance, respectively, are also relevant in so far as they offer guidance on the conceptualisation and implementation of women’s rights with regard to property and custody of children at all stages of marriage and family life. These articles are the subject of subsequent chapters in this *Commentary*.²⁰

Beyond the Maputo Protocol, article 7 bears relation to the African Charter’s guarantee of property rights under articles 2 and 14. It further relates to article 16(1)(c) of CEDAW, which obligates states to ensure for both women and men ‘the same rights and responsibilities during marriage and at its dissolution’. CEDAW does not go into much detail beyond this statement, so the Maputo Protocol’s

16 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

17 See art 7, of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

18 For the broader discussion on women’s access to justice see A Rudman ‘Article 8’ in this volume.

19 The guarantee of a right to adequate housing is relevant in contexts of dissolution of marriage because it addresses the issue of replacing use of the family home, a concern that was by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in 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 (CEDAW Committee General Recommendation 29) para 47.

20 See UC Mokoena ‘Article 20’ and Z Nampewo ‘Article 21’ in this volume.

provisions relating to the dissolution of marriage are more elaborate. In its General Recommendation 21 of 1994, in which the CEDAW Committee expounded on the articles relating to equality in marriage and family relations, the comment on article 16(1)(c) focused on extending equal protection to women in *de facto* unions but remained silent on the issue of dissolution of marriage.²¹ In 2013, the CEDAW Committee issued General Recommendation 29, which addressed the dissolution of marriage more directly.²²

Articulation of the principle of the best interests of the child under article 4 of the African Charter on Rights and Welfare of the Child (African Children's Charter) is also relevant to article 7(c) of the Maputo Protocol.

4 Concepts and definitions

The substance of article 7 embodies three key concepts: equal and effective access to justice in the dissolution of marriage, reciprocal rights and responsibilities of parents in the context of the paramourcy of the best interests of the child, and equitable sharing of joint property.

4.1 Equal and effective access to justice

Article 7(a) requires states to ensure that separation, divorce and annulment of marriage 'shall be effected by judicial order'. Article 7(b) requires states to assure women and men 'the same rights to seek separation, divorce or annulment'. Taken together, these clauses are clearly concerned that women have equal and effective access to processes that are ascertainable and applied evenly to avail tangible justice. Read together with article 8 of the protocol, which, as mentioned above, deals with equal access to justice and equal protection and benefit of the law,²³ the Protocol's concern under article 7(a) and (b) can be said to be three-pronged: equal access to adjudicatory bodies, non-discriminatory administration of justice, and equal benefit of the law.²⁴

Regarding equal access, women and men must have equal standing to initiate proceedings for separation, divorce or annulment of marriage. Most marital disputes are settled outside of the formal court system, and this fact is not unique to the African context. Customary and religious norms play a predominant role in regulating marriage and family relations.²⁵ While these systems provide an affordable and flexible avenue for resolving disputes, equality of access is largely deficient, with husbands accorded many more options for initiating the termination of marriage than wives.²⁶ It is not without reason that the early framing of this article insisted that the dissolution of marriage be effected *only* by judicial decree. Some systems recognise methods of initiating marriage dissolution that are only open to husbands and not to wives. For instance, Islamic family law grants a husband the prerogative to repudiate a marriage by oral pronouncement of divorce.²⁷

21 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 21: Equality in Marriage and Family Relations (adopted at 13th session, 1994), A/49/38, para 18 (CEDAW General Recommendation 21).

22 CEDAW Committee General Recommendation 29 (n 19).

23 See A Rudman 'Article 8' in this volume.

24 The CEDAW committee has elaborated access to justice under a six-pronged criterion: justiciability, availability, accessibility, good quality, accountability and availing an effective remedy. UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice, 23 July 2015, CEDAW/C/GC/33 (CEDAW Committee General Recommendation 33) para 14.

25 This is in spite of most states having incorporated equality principles in their constitutions. See CEDAW General Recommendation 21 (n 21) para 17.

26 UN Women (n 1) 97.

27 Some countries, such as Tunisia, outlawed verbal divorce (*talaq*). Others, such as Tanzania, have attempted to mitigate the adverse consequences of *talaq* by providing safeguards such as a requirement that the divorce will only be regarded as final if it is followed up by a judicial or quasi-judicial procedure, resulting in a decree of divorce. See An-Na'im (n 2) 47, 159.

In some religious and customary systems, dissolution of marriage is made conditional upon a refund of the bride price or dowry paid to the bride and/or her family or upon a wife's waiver of maintenance or child custody.²⁸ A further complication is added in contexts where the wife is only allowed to initiate proceedings through a male guardian, often the same male kin who becomes liable to refund the bride price and therefore has little incentive to see her exit the marriage.²⁹ Thus, women and men have unequal standing to initiate dissolution because the choice for such a woman is burdened in a way that a man's choice is not.³⁰

Access is also impeded in jurisdictions where no provision has been made for the registration of marriages under customary and religious law or of *de facto* unions, which is the case in most African countries.³¹ In those circumstances, women seeking judicial remedies such as maintenance confront the preliminary hurdle of having to prove the existence and establish the legal status of the relationship in the first place.³²

Regarding the non-discriminatory administration of justice, there must be a clear threshold for discharging the burden of proof and establishing entitlement to an order for separation, divorce or annulment or such related remedy. Where formal process either under civil or religious law involves making a finding of fault, this should not be skewed to favour one spouse by placing a heavier burden of proof on the other, or indeed by exempting one spouse (often the husband) from the requirement to specify any ground at all.³³ With regard to proving cruelty, for instance, historically, the threshold has been set so high that only extreme abuse suffices or so as to disregard psychological abuse.³⁴ Some jurisdictions set a broader definition of adultery for women compared to men.³⁵

Discrimination in the administration of justice is exacerbated by the overall lack of documentation in customary and religious processes. This results in inconsistent and uneven application of criteria for proof. Dissolution of marriage under customary and (some) religious systems invariably relies on undocumented standards of behaviour and criteria for assigning fault.³⁶ Their undocumented nature makes it difficult, if not impossible, to subject the process to scrutiny under a constitutional standard. Yet their determinations often carry financial and other consequences. It is often the case that

28 Armstrong et al (n 2) 351-2; E Cotran *Kenya: the law of marriage and divorce* (Restatement of African Law series; Antony Allot, Series Editor) (1968); An-Na'im (n 2).

29 Armstrong et al (n 2) 352.

30 For instance, Egypt's Personal Status Law of 2000 granted women the right to initiate divorce on condition that they waived their claim to maintenance and *mahr* (dowry). See An-Na'im (n 2) 159. See also CEDAW Committee General Recommendation 29 (n 19) para 41.

31 For discussion on implementation of the Maputo Protocol's requirement of the establishment of a system for universal registration of marriages see C Musembi 'Article 6' in this volume.

32 CN Musembi et al *Promoting the human rights of women in Kenya: a comparative review of the domestic laws* (UNIFEM Regional Office for East and Horn of Africa, 2010) 31.

33 While trends in the West have moved toward no-fault divorce, on the African continent though, the picture is mixed. While some states such as Malawi (see secs 63 & 64 of Marriage, Divorce and Family Relations Act, 2015) have embraced no-fault divorce, when Kenya had opportunity to enact a new marriage and divorce law in 2014, it opted to retain fault-based divorce, despite a long history of recommendations by various commissions and task forces to move in the opposite direction. See, for instance, Government of Kenya, *Report of the Presidential Commission on the Law of Marriage and Divorce* (1968); Kenya Law Reform Commission, *Draft Marriage Bill* (2007).

34 M Freeman, C, Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2012) 'Article 16' 426. On the global phenomenon of trivialising or normalising violence in intimate relationships see SE Merry *Human rights and gender violence: translating international law into local justice* (2006) 181-184.

35 Cameroon is one such jurisdiction. See Concluding Observations on the combined 4th and 5th reports of Cameroon, Committee on the Elimination of all Forms of Discrimination against Women (9 March 2014) UN Doc CEDAW/C/CMR/CO/4-5 (2014) para 38(b). See also Women and Law in Southern Africa Research and Educational Trust Swaziland, *Charting the maze: Women in pursuit of justice in Swaziland* (2000) (WLSA Swaziland, *Charting the maze*) 185.

36 M Freeman 'Article 16' in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2012) 426.

establishment of fault for divorce results in punitive consequences, such as forfeiting spousal support or a share of the property, or indeed restriction of custody rights over children. In some jurisdictions, penal sanctions are applied to women for adultery but not to men.³⁷ This would no doubt deter women – especially those who are economically dependent – from seeking the judicial remedy altogether, rendering nugatory any provision that guarantees equal access to the judicial process for men and women.³⁸ Even women who have economic means would be deterred by the social cost, for instance, of losing custody of their children or simply strained relationships with their in-laws. A similar deterrent effect flows from customary and religious laws that make a wife's initiation of divorce proceedings conditional upon her family's refund of marriage payments (bridewealth or dowry) received.³⁹ Her access to justice is thus burdened in a way that a man's not.

On the third prong, the Maputo Protocol does not stop at simply requiring equal access to justice or equal protection of the law in a formalistic sense. It goes further to require that states ensure 'equal benefit of the law'. Thus, the process that results in a judicial decree of separation, divorce or annulment of marriage must fulfil this three-pronged criterion under the Maputo Protocol resulting in substantive equality.⁴⁰

Equal benefit of the law must mean that whatever remedy is availed must be effective and available on an equal basis. Thus, in the context of article 7, outcomes from the dissolution of marriage – such as division of property – must benefit women on an equal basis with men.⁴¹ As the CEDAW Committee puts it, '(t)he guiding principle should be that the economic advantages and disadvantages related to the relationship and its dissolution should be borne equally by both parties'.⁴²

On the face of it, the protocol is concerned that women are treated no worse than men in matters of access to justice in the context of family relations. However, the spirit of the protocol in general, as well as the specific wording of article 8(a) – 'effective access' – suggests that the protocol goes beyond simply formalistic concern about how women are treated in relation to men. The access referred to must amount to tangible transformation in the circumstances, both of the specific woman seeking justice as well as the overall structural context in which justice is sought.⁴³

4.2 'Reciprocal' parental rights and responsibilities

Matters of child custody and maintenance in the context of dissolution of marriage in most African countries are marked by tension between rigid customary and religious rules assigning rights to one parent or the other and the principle of the paramountcy of the best interests of the child, which most states have encoded into their constitutions and/or statutory laws.⁴⁴ The African Committee of Experts has emphasised that a proper interpretation of the paramountcy of the principle of the best interests of

37 Gabon applies penal sanctions for adultery against women but not against men. See Concluding Observations on the 6th Periodic Report of Gabon, Committee on the Elimination of all Forms of Discrimination against Women (11 March 2015) UN Doc CEDAW/C/GAB/CO/6 (2015) para 44(c).

38 M Freeman 'Article 16' in Freeman et al (n 36) 425-426.

39 CEDAW Committee General Recommendation 29 (n 19) observes that women face a steeper decline in income following divorce compared to men (hereinafter CEDAW/C/GC/29) para 41. See also An-Na'im (n 2) 43-49; Armstrong et al (n 2) 352.

40 See A Rudman 'Article 8' sec 3.1.1 in this volume for a discussion of the concept of substantive equality.

41 CEDAW Committee General Recommendation 29 (n 19) para 4.

42 CEDAW Committee General Recommendation 29 (n 19) para 45.

43 The Protocol's emphasis on substantive equality in access to justice is elaborated on in greater detail in A Rudman 'Article 8' in this volume.

44 African Child Policy Forum (ACPF), *In the best interests of the child: harmonising laws on children in West and Central Africa* (2011); African Child Policy Forum (ACPF), *Harmonisation of children's laws in Eastern and Southern Africa: Country Briefs* (2012) <https://africanchildforum.org/index.php/en> (accessed 20 April 2023).

the child means that the interests of the child must be ranked above all other competing interests, in all settings, including family.⁴⁵ Yet customary and religious principles tend to automatically vest custody and guardianship in the father, with the narrow exception of matrilineal systems, which vest custody and guardianship in a male maternal relative. In most societies, whether patrilineal or matrilineal, if the man has paid bridewealth, he acquires unchallengeable rights to the children.⁴⁶

Statutory laws, too, influenced by English common law and civil law doctrines, reflect the assumption that the father is the sole legal guardian.⁴⁷ Several family codes on the continent still retain the concept of the father as the legal head of the family, thus privileging his position with respect to disputes over custody and maintenance following the dissolution of the marriage. This privileging of the father's authority in matters of custody has not always been commensurate with the apportionment of responsibilities for the care and maintenance of children, despite the fact that fathers are more likely to be economically secure compared to mothers.⁴⁸

Arguably, it is against the background of this uneven gendered apportionment of parental rights and responsibilities that article 7(c) employs the term 'reciprocal', reflecting a concern for balance between rights and responsibilities with respect to children, but not so as to override the principle of the paramountcy of the best interests of the child.

4.3 Equitable sharing of joint property

Article 7(d) deals with the issue of division of marital property upon dissolution of marriage. The clause employs the term 'equitable' rather than 'equal' sharing of the joint property deriving from the marriage. These two terms – 'equal' and 'equitable' – have generated no small amount of discussion in the field of women's human rights.⁴⁹ As discussed in section 2 above, during the drafting process, various states led by Egypt objected to the language of 'equal rights to property'.⁵⁰

In contrast, the text of CEDAW's article 16 features the phrase 'the same rights' throughout in addressing various aspects of equality in marriage. The CEDAW Committee in General Recommendation 29 employs the term 'equal', in calling for equal access by both spouses to marital property, equal legal capacity to manage property, and women's right to acquire and manage separate or non-marital property.⁵¹ The CEDAW Committee in General Recommendation 28 has taken the position that 'equal' and 'equitable' are not synonymous and made it clear that the first term is what should apply because 'equitable' may not translate to fair outcomes for women.⁵² CEDAW reiterated this position in its engagement with The Gambia in 2015, taking issue with the fact that Gambia's

45 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), General Comment 5 on State Party Obligations under the Africa Charter on the Rights and Welfare of the Child (art 1) and Systems Strengthening for Child Protection (2018) 11-12, https://www.acerwc.africa/sites/default/files/2022-09/GENERAL_COMMENT_ON_STATE_PARTY_OBLIGATIONS_UNDER_ACRWC_%28ARTICLE%201%29_%26_SYSTEMS_STRENGTHENING_FOR_CHILD_PROTECTION_0.pdf (accessed 20 April 2023).

46 Armstrong et al (n 2) 340. See also A Kent 'Custody, maintenance and succession: the internalization of women's and children's rights under customary law in Africa' (2007) 28 *Michigan Journal of International Law* 507-538.

47 Armstrong et al (n 2) 346; 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.

48 M Freeman 'Article 16' in Freeman et al (n 36) 427.

49 See Freeman et al, CEDAW Commentary, 2012:17-18; F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50(1) *Journal of African Law* 72.

50 Banda (n 49) 77.

51 CEDAW Committee General Recommendation 29 (n 19) para 38.

52 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 22.

Women's Act 'provides only for women's "equitable" access to property, which is not compliant with the Committee's standard of equality.'⁵³

Following the pattern set in article 16 of CEDAW, the UN Human Rights Council (HRC), in a 2015 resolution on the elimination of discrimination against women, called on states to guarantee 'the *same rights* for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property'.⁵⁴

The drafters of the Maputo Protocol were no doubt aware of the intense debate that has taken place at the global level concerning this usage of terminology. The choice of the term 'equitable' in article 7(d) must therefore be seen as deliberate. One plausible (and generous) explanation for this deliberate choice of terminology is that the protocol is signalling that what matters is not adherence to rigidly defined rules under either separate property or community of property regimes but rather achieving just outcomes that reflect substantive equality in adjudicating marital property claims. This reading is borne out by the African Commission General Comment 6, issued in March 2020 to aid the interpretation of article 7(d). The Commission states the purpose of the General Comment as providing 'guidance on how marital property should be shared fairly and, in a manner, consistent with the notion of substantive equality between women and men'.⁵⁵ The Commission underlines that article 7(d) must be read together with the opening statement of the article, which calls upon states to ensure that women and men enjoy the same rights in case of separation, divorce and annulment of marriage. The clause must therefore be interpreted not in isolation but in a manner consistent with the general spirit of the article. General Comment 6 then goes on to define equitable distribution as

[t]he apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.⁵⁶

The General Comment further defines 'joint property deriving from the marriage' as having the same meaning as 'marital assets', which 'includes all property acquired during the course of the marriage, regardless of who holds the title to it'.⁵⁷

Regrettably, the General Comment fails to accomplish the task of clarifying the textual meaning of 'equitable' in article 7(d). Notwithstanding its textual ambiguity, it is possible to draw out various

53 See Concluding Observations on the combined 4th and 5th Periodic Reports of Gambia, Committee on the Elimination of Discrimination against Women (28 July 2015) UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 48(b). Malawi's Marriage, Divorce and Family Relations Act of 2015 similarly employs the term 'equitable' (sec 74), and the African Commission commends Malawi for enactment of this provision. See Concluding Observations on the initial and combined reports of Malawi on Implementation of the African Charter on Human and Peoples' Rights, 1995-2013, African Commission on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015) Banjul, The Gambia.

54 My emphasis. See UN Human Rights Council Resolution 29/4 of 2015, para 6(d), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/161/67/PDF/G1516167.pdf?OpenElement> (accessed 21 April 2023). The resolution followed the report of the UN Human Rights Council's Working Group on discrimination against women in law and practice. See A/HRC/29/40, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/070/03/PDF/G1507003.pdf?OpenElement> (accessed 21 April 2023).

55 General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 para 11.

56 African Commission General Comment 6 (n 55) para 14.

57 African Commission General Comment 6 (n 55) para 14. In para 45 the Commission expresses the view that marital assets should include property inherited by a spouse in the course of the marriage, unless this is expressly excluded by state law or by contract between the parties. Inheritance and gifts acquired prior to marriage, however, are to be excluded, unless the spouses have treated it as joint property in the course of the marriage para 46.

conceptual threads from the Commission's General Comment. First, the Commission appears to be setting a threshold to be applied in determining what falls within the category of 'joint property deriving from the marriage'. The Commission takes the view that, at the very least, this must amount to something '*in excess of half*'⁵⁸ of the total assets acquired in the course of the marriage. Since the majority of matrimonial regimes operating on the continent are neither purely separate property nor purely community of property regimes, many disputes revolve around where to draw the line in classifying some assets as 'marital assets.' The General Comment usefully provides a minimum guideline of at least half of the property.

Second, the General Comment signals that an equitable approach to defining and sharing marital assets must be one that takes context into account, which signals a focus on substantive equality:⁵⁹

that women invariably endure unequal enjoyment of property rights during the subsistence of the marriage, and that in many cases, their contribution tends to be non-monetary and is often overlooked and therefore does not congeal into tangible, registrable interests in property. These contextual factors are elaborated in the background paragraphs of the General Comment, which cite continent-wide trends such as women's limited or absolute lack of economic decision-making power in the household, restrictive practices in registration of land and land-based assets, traditional and statutory property rights institutions that vest control of family property exclusively in husbands as the holders of 'marital power' or as 'heads of households', as well as 'gendered responsibilities dictating that women use their resources for the upkeep of the family and maintaining the home while men use theirs for the acquisition of properties'.⁶⁰

Third, although the text of the Protocol does not dictate the choice of one over the other, the African Commission's General Comment 6 appears to express a preference for the community of property regimes over separate property regimes, seeing them as more consistent with an equitable approach. After defining 'joint property deriving from the marriage', the Commission adds that it 'should be viewed through the lens of marriage in community of property'.⁶¹

The CEDAW Committee, similarly, appears to take the view that equality ought to translate into a community of property regime. By way of illustration, the CEDAW Committee took issue with Togo's 2012 Code of Persons and Family for designating separate property as the default regime where couples omit to specify, terming it potentially discriminatory against women and recommending a community of property regime as the default instead.⁶²

A less generous reading of article 7(d) is that perhaps the use of 'equitable' rather than 'equal' bends the clause too far in the direction of making concessions to systems of personal law based on religion and custom that are far from equal. 'Equitable' implies the notion that these personal law systems will not be required to do too much to adjust their rigid gender-defined rules so as to attain equality with respect to control and distribution of property at crucial moments such as divorce and death. It is no coincidence that article 21, which deals with inheritance rights, also employs the term 'equitable'.⁶³ Arguably, while many states have moved some way toward tolerating the language of

58 African Commission General Comment 6 (n 55) para 14. My emphasis.

59 African Commission General Comment 6 (n 55) para 40.

60 African Commission General Comment 6 (n 55) paras 2, 3 & 5. See also elaboration of context in Armstrong et al (n 2) 346-347. The CEDAW Committee has also expressed concern that decisions on division of roles during the marriage should not be used to bring about adverse economic consequences for any party to the marriage, see CEDAW Committee General Recommendation 29 (n 19) para 45.

61 African Commission General Comment 6 (n 55) paras 14 & 40.

62 Concluding Observations on the combined 6th and 7th Periodic Reports of Togo, Committee on Elimination of all Forms of Discrimination against Women (8 November 2012) UN Doc CEDAW/C/TGO/CO/6-7 (2012), para 40-41.

63 See Z Nampevo 'Article 21' in this volume.

equality in matters such as the transmission of nationality, child custody and guardianship, matters of family property are seen as core to religious injunction and customary kinship systems, and therefore ‘stickier’ to legislate equality in.⁶⁴

5 Nature and scope of state obligation

Set against the background of a constitutional and legal framework founded on non-discrimination, article 7 expects states to establish ‘judicial, quasi-judicial, administrative, traditional and other processes’ that guarantee women’s effective access to justice in the context of separation, divorce and annulment of marriage.⁶⁵

Clearly, the drafters of the Protocol were aware of the reality of the prevalence of customary and religious (personal law) systems in settlement of family disputes. It is, therefore, unlikely that they might have envisioned that the requirement of non-discriminatory treatment in marital dissolution disputes would only apply to formal judicial institutions. Therefore, the requirement under article 7(b) that women and men must have the same rights to seek separation, divorce or annulment of marriage is as important in the Family Division of the High Court as it is in a kinship-based forum convened to arbitrate a customary divorce. Even in contexts of legal pluralism, the state is not absolved of its obligation to ensure that the application of all domestic laws operate so as to yield substantive equality in the sphere of family relations. The state’s obligation to harmonise standards in a plural legal context is underlined in the African Commission General Comment 6.⁶⁶

The state has an obligation to subject all dispute settlement procedures to the principles of equality and non-discrimination. There should be no enclaves that are out of reach of constitutional scrutiny, as is the case with the continued operation of personal law exemption clauses in some African constitutions. These are clauses that exempt customary and religious norms regulating matters such as marriage, divorce and succession from the application of the constitution’s non-discrimination provisions.⁶⁷ Robust application of the constitution would require that its human rights standards govern all ‘public officers’ broadly defined to include those implementing customary and religious law, as well as the actions of private parties. Constitutions that make the bill of rights binding on all persons offer even greater scope. Examples of constitutions that already permit broad application of the bill of rights include Kenya and South Africa.⁶⁸ Backed by a legal framework that enables broad access to the constitutional court, avenues such as the seeking of declaratory judgments on the constitutionality of restrictive alternative justice procedures will potentially afford opportunities to improve compliance with human rights standards in family-related proceedings.

64 See similar observations in C Musembi “‘We agree ... on condition no one asks why’: evaluating the Global Mandate for Equal Security of Women’s Property Rights’ in R Patel (ed) *Gender and land rights in changing global contexts* (2022) 21-47; World Bank, *World Development Report 2012: Gender Equality and Development* (2012) 13 & 72.

65 African Commission General Comment 6 (n 55) para 56.

66 African Commission General Comment 6 (n 55) paras 48-51.

67 African states whose constitutions still contain personal law exemption clauses include: Botswana, Lesotho, Eswatini and Mauritius. See Concluding Observations on the combined initial to 3rd Periodic Report of Botswana, Committee on the Elimination of all Forms of Discrimination against Women (26 March 2010) UN Doc CEDAW/C/BOT/CO/3, paras 11-12; Concluding Observations on the combined initial to 4th Periodic Reports of Lesotho, Committee on the Elimination of all Forms of Discrimination against Women (8 November 2011) UN Doc CEDAW/C/LSO/CO/1-4, paras 12-13; Concluding Observations on the 1st to 9th Periodic Reports of Eswatini on the Implementation of the African Charter on Human and Peoples’ Rights 2001-2020, African Commission on Human and Peoples’ Rights, adopted at the 70th ordinary session 23 February-9 March 2022; and Concluding Observations on the combined 6th to 8th Periodic Reports of Mauritius on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 60th ordinary session (8-22 May 2017) para 62.

68 See art 20(1) of the Constitution of Kenya; art 8(1) & (2) of the Constitution of the Republic of South Africa, 1996.

Beyond simply extending constitutional scrutiny to informal disputing processes, the state has an obligation to create institutional mechanisms for actual exercise of oversight by the formal courts, thus allowing routine judicial review as well as appeals from customary and religious forums.⁶⁹ State-funded legal aid and decentralisation of justice institutions will be indispensable in facilitating such appeals and ensuring effective access to justice. The Commission could certainly offer more guidance and standard-setting in the area of interfacing customary and religious forums for accessing justice with formal institutions.

Giving concrete effect to marital property rights, according to General Comment 6, includes enacting and implementing legislation that is clear, accessible, enforceable and justiciable, one that makes the threat of dispossession in the event of separation or divorce punishable.⁷⁰ The CEDAW Committee sets out the scope of issues that a substantive law on marital property rights upon dissolution of marriage must address. In summary, it must go beyond immovable property and household goods to include considerations such as future earning capacity, interest in pensions and insurance schemes, and lost economic opportunity (as a result of putting one's career advancement on hold, for instance).⁷¹

The African Commission's General Comment 6 underlines that legislation must pay special attention to the categories of women most vulnerable to dispossession and discounting of their contributions, for instance, childless women, women with disabilities, and older women.⁷² It must be accompanied by the necessary investment in the training of officers and adequate financing of the implementing institutions, as well as awareness raising.⁷³ The General Comment calls upon states to engage in awareness raising toward the transformation of discriminatory practices relating to marriage and divorce, particularly those that justify dispossessing women of their marital property.⁷⁴ Some governments are commended by the Commission for awareness-raising campaigns in the area of marriage and divorce, most of them undertaken jointly with civil society groups.⁷⁵

6 State practice/implementation

This section evaluates jurisprudence and state practice in relation to article 7. The section reviews state practice with respect to the implementation of equal and effective access to justice, reciprocal parental rights and responsibilities, and 'equitable sharing' of marital property rights.

6.1 Implementation of equal and effective access to justice

The African Commission expressed the idea that the state should make provision for women to access remedies connected with the dissolution of marriage, whether these be through judicial, quasi-judicial,

69 See CEDAW Committee General Recommendation 33 (n 24) para 46; C Nyamu-Musembi, 'Review of experience in engaging with non-state justice systems in East Africa', (Commissioned by Governance Division, UK Department for International Development- DFID, 2003), available at <http://gsdrc.org/docs/open/ds37.pdf>; UN-Women, UNICEF, UNDP, *Informal justice: Charting a course for human rights-based engagement* (nd), available at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/1/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> (accessed 20 April 2023).

70 African Commission General Comment 6 (n 55) paras 51 & 52.

71 CEDAW Committee General Recommendation 29 (n 19) para 47. In *Ellen Tewesa v Chimwemwe S. Tewesa* (Matrimonial Cause 9 of 2012, High Court of Malawi) Malawi's High Court broke new ground in 2012 when it ruled that a spouse's contribution to enhancing the other spouse's future earning potential arising from an academic or professional qualification could be taken into account in adjudicating marital property disputes.

72 African Commission General Comment 6 (n 55) para 54.

73 African Commission General Comment 6 (n 55) paras 56-61.

74 African Commission General Comment 6 (n 55) para 58.

75 See, eg, African Commission Concluding Observations on the Democratic Republic of Congo (2015) 43.

traditional or other forums, regardless of what system of law they are married under.⁷⁶ The Commission, through General Comment 6, also called upon states to pay particular attention to categories of women encountering particular hardship in accessing justice.⁷⁷ Besides the General Comment, though, there is scant evidence of engagement with states parties on the issue of equal and effective access to justice, particularly with reference to the context of legal pluralism. While both the Commission and states decry the constraints imposed variously by customs, ‘deeply entrenched practices’ or ‘deep rooted cultural and religious practices’, there is no specific discussion of these in terms of how they might pose barriers to women’s access to justice, specifically in the adjudication of family disputes, or indeed how those barriers might be overcome.⁷⁸ The CEDAW Committee, by contrast, has engaged African states on the matter of fair adjudication in marital disputes and recommended that judicial safeguards should extend beyond civil marriages to cover traditional and religious marriages as well.⁷⁹

Ideally, decisions of customary and religious forums should be subjected to constitutional standards through appeal and routine judicial review or some process that allows coordination and collaboration with formal institutions to permit scrutiny of the former’s compliance with constitutional principles. The process must be well-resourced and complemented by legal aid so that it does not end up with a very thin presence on the ground, as has been observed in Sierra Leone, or unevenly applied as was observed in Mozambique, or marginalised within the judicial system.⁸⁰

Women encounter multiple barriers to effective access to justice on account of factors such as illiteracy, cost, and inadequate decentralisation of structures for the delivery of justice.⁸¹ These barriers disadvantage citizens in general, but more so women and rural women in particular. There is also the additional layer of stigmatisation of women who bring to court matters such as family disputes and

76 African Commission General Comment 6 (n 55) para 56.

77 As above.

78 See, eg, Concluding Observations on the 3rd Periodic Report of Togo on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 50th ordinary session (24 October-5 November 2011); Concluding Observations on the combined 11th to 15th Periodic Reports of Zimbabwe on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 65th ordinary session (21 October-10 November 2019); Concluding Observations on the 2nd Periodic Report of The Gambia 1994-2018 on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 64th ordinary session (24 April-19 May 2019); Concluding Observations on the combined 12th and 13th Periodic Report of Kenya on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 71st ordinary session (21 April-13 May 2022); Concluding Observations on the combined 2nd to 8th Periodic Report of the Kingdom of Lesotho 2001-2017 on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 64th ordinary session (24 April-19 May 2019); Concluding Observations on the combined 15th to 17th Periodic Report of the Islamic Republic of Mauritania 2018-2021 on the Implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 73rd ordinary session (21 October-10 November 2022).

79 See eg, Concluding observations on the 6th Periodic Report of Equatorial Guinea, Committee on Elimination of all Forms of Discrimination against Women, (9 November 2012) UN Doc CEDAW/C/GNQ/CO/6 (2012) para 43; CEDAW Committee Concluding Observations Gabon (2015) para 45(b).

80 See A Kent ‘Custody, maintenance and succession’ 524; Women and Law in Southern Africa Research Trust Mozambique *The justice delivery system and the illusion of the transparency* (2000) 93-95; Women and Law in Southern Africa Research Trust Botswana, *Chasing the mirage: women and the administration of justice* (1999) (WLSA Botswana, *Chasing the mirage*) 153,163; Women and Law in Southern Africa Research and Educational Trust Swaziland, *Charting the maze: women in pursuit of justice in Swaziland* (2000) (WLSA Swaziland, *Charting the maze*); Women and Law in Southern Africa Research Trust Lesotho, *In search of justice: where do women in Lesotho go?* (2000).

81 CEDAW Committee General Recommendation 33 (n 24) paras 3, 13.

gender-based violence.⁸² States have not done enough to overcome these barriers.⁸³ Some traditional and religious dispute resolution forums forbid women to appear before them unaccompanied by their husbands or other male representatives.⁸⁴

6.2 Implementation of reciprocal parental rights and responsibilities

There is still a long way to go in implementing the principle of reciprocal parental rights and responsibilities. As mentioned above, several African jurisdictions have family codes that privilege a father's claim to custody by legally designating him as head of the family.⁸⁵ In some jurisdictions, a divorced mother surrenders her rights to child custody upon remarriage, which a father is not required to do.⁸⁶

- 82 See eg, Concluding Observations on the 4th Periodic Report of Benin, Committee on the Elimination of all Forms of Discrimination against Women (28 October 2013) UN Doc CEDAW/C/BEN/CO/4 (2013) para10; CEDAW Committee Concluding Observations Gabon (2015) para.14; Concluding Observations on the 6th and 7th Periodic Reports of Ghana, Committee on Elimination of all Forms of Discrimination against Women (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para. 14; Concluding Observations on the combined initial to 6th Periodic Report of Liberia, Committee on Elimination of all Forms of Discrimination against Women (7 August 2009) UN Doc CEDAW/C/LBR/CO/6 (2009) para. 38; 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) para. 13; Concluding Observations on the combined 7th to9th Periodic Reports of Rwanda (9 March 2017) UN Doc CEDAW/C/RWA/CO/7-9 (2017) para 12. See also Women and Law in Southern Africa Research Trust Botswana, *Chasing the mirage: women and the administration of justice* (1999) (WLSA Botswana, *Chasing the mirage*); Women and Law in Southern Africa Research Trust Zimbabwe, *In the shadow of the law: women and justice delivery in Zimbabwe* (2000); WLSA Swaziland, *Charting the maze*; SF Hirsch *Pronouncing and persevering: gender and the discourses of disputing in an African Islamic Court* (1998); SE Merry *Human rights and gender violence: translating international law into local justice* (2006).
- 83 See recent evaluations, such as Human Rights Watch & International Federation of Women Lawyers (FIDA-Kenya), 'Once you get out you lose everything: Women and matrimonial property rights in Kenya' (2020), available at https://www.hrw.org/sites/default/files/media_2020/06/kenya0620_web.pdf (HRW/FIDA, 'Once you get out'; International Justice Mission (2019), *Justice Review: a Journal on Protection and Justice for the Poor* available at <https://www.ijm.org/documents/studies/IJM-JusticeReview2019-compressed.pdf>.
- 84 Examples of such restricted forums include Liberia's traditional courts under the Revised Rules and Regulations Governing the Hinterland of Liberia. See CEDAW Committee Concluding Observations Liberia (2009) paras 38, 40. See also WLSA Botswana, *Chasing the mirage*, 161-162.
- 85 See, Concluding Observations on the initial report of the Republic of Congo on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, African Committee of Experts, adopted at the 26th ordinary session (16-19 November 2015) para 28; CEDAW Committee Concluding Observations Cameroon (2014) paras 38-39; Concluding Observations on the initial and 2nd to 5th Periodic Reports of the Central African Republic, Committee on Elimination of all Forms of Discrimination against Women (24 July 2014) UN Doc CEDAW/C/CAF/CO/1-5 (2014) para 45(d); Concluding Observations on the initial, 2nd and 3rd Periodic Reports of the Djibouti, Committee on Elimination of all Forms of Discrimination against Women (2 August 2011) UN Doc CEDAW/C/DJI/CO/1-3 (2011) para 36; Concluding Observations on the 7th Periodic Report of the Congo, Committee on Elimination of all Forms of Discrimination against Women (14 November 2018) UN Doc CEDAW/C/COG/CO/7 (2018) para 52; CEDAW Committee Concluding Observations Gabon (2015) para 44(b); Concluding Observations on the combined 7th and 8th Periodic Reports of Guinea, Committee on Elimination of all Forms of Discrimination against Women (14 November 2014) UN Doc CEDAW/C/CO/GIN/7-8) para 54; Concluding Observations on the combined 6th and 7th Periodic Reports of Mali, Committee on Elimination of all Forms of Discrimination against Women (25 July 2016) UN Doc CEDAW/C/MLI/CO/6-7 (2016) para 43; Concluding Observations on the 8th Periodic Report of Senegal, Committee on Elimination of all Forms of Discrimination against Women (1 March 2022), UN Doc CEDAW/C/SEN/CO/8 (2022) para 42(e); CEDAW Concluding Observations Togo (2012) para 40; 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.
- 86 See Concluding Observations on the 5th and 6th Periodic Reports of Algeria 2010-2014 on the implementation of the African Charter on Human and Peoples' Rights, adopted at the 57th ordinary session (4-18 November 2015); Concluding Observations on the 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 (16-19 November 2015). Egypt has similar provisions, with a mother's custody rights ceasing when the child turns 15. See Concluding Observations on the combined 8th to 10th Periodic Reports of Egypt, Committee on Elimination of all Forms of Discrimination against Women (26 November 2021) UN Doc CEDAW/C/EGY/CO/8-10 (2021) para 49.

Even where the principle has been codified into law, there are disconnects and gaps, with some areas of law operating without any regard for the principle. Laws on immigration and on registration of births and deaths have been slow to move away from the presumption of a father's sole guardianship. In Kenya, for instance, a mother requires the written consent of the child's father or a court order granting her custody in order to apply for a passport for a child under 16 years of age. The mother will only be regarded as the legal guardian if the father is no longer alive.⁸⁷ The application form does not specify whether this requirement applies only to parents who are married to each other, potentially imposing a burden on single and divorced mothers.

Zimbabwe was reprimanded by the African Children's Committee in 2015 concerning the unequal treatment of men and women in its Guardianship of Infants Act and its Births and Deaths Registration Act.⁸⁸ By 2019 Zimbabwe had addressed this issue, as it was commended by the African Commission for giving legal recognition to joint parental responsibility.⁸⁹

Reciprocal parental rights and responsibilities in the case of unmarried parents are far from legal reality. In most jurisdictions, while legal responsibility attaches to the birth mother automatically, a biological father only assumes legal parental responsibility either through voluntary acknowledgement of paternity and assumption of child support duties or through a court order based on proof of paternity, proof of cohabitation for a designated period with the mother of the child, or a parental responsibility agreement with the mother of the child.⁹⁰ Some states' constitutions recognise every child's right to parental care and protection from both parents, and the parents' equal rights and responsibilities, whether married to each other or not.⁹¹ Fewer still have backed up this constitutional right with laws and regulations to implement automatic joint parental responsibility.⁹²

A pattern of weak enforcement of court orders for child maintenance, described in the early 1990s as 'a general crisis'⁹³ is still an issue. In 2014 the African Children's Committee took Kenya to task over the high rate of default on child maintenance and urged the government to take measures to ensure that both parents equally bear parental responsibility. The CRC Committee echoed this concern two years later.⁹⁴ Lesotho was similarly urged to ensure that non-custodial parents (read unwed or divorced fathers) pay maintenance and that the government takes measures to transform societal attitudes concerning children born out of wedlock.⁹⁵ The African Children's Committee also expressed concern

87 See Form 19, <https://www.kenyaembassyaddis.org/wp-content/uploads/forms/passport-application-form-19.pdf> (accessed 20 April 2023).

88 See Concluding Observations on the report of Zimbabwe on 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 25th ordinary session (20-24 April 2015).

89 See African Commission Concluding Observations Zimbabwe (2019).

90 See, eg, South Africa's Children's Act (2005) sec 21; Malawi's Child Care, Protection and Justice Act (2010) sec 6; Kenya's 2001 Children Act (only repealed in 2022).

91 See, eg, Constitutions of Kenya (2010) art 53(1)(e); Malawi (2017) art 23(4); Côte d'Ivoire (2016) art 31; Eritrea (1997) art 22(2) generally assigns men and women 'equal rights and duties as to all family affairs'; Eswatini (2005) art 29(4); Ghana (1996) art 28(1)(b); Zimbabwe (2013) art 80(2) states: 'Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.'

92 See, eg, Children Act 2022 (Kenya), secs 32 & 110; Namibia's Maintenance Act (2003), Child Status Act (2006), and Child Care and Protection Act (2015).

93 Armstrong et al (n 2) 360.

94 See Concluding Observations on the first Periodic Report of Kenya, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 1st extraordinary session (6-11 October 2014). See also Concluding Observations on the combined 3rd to 5th Periodic Report of Kenya, Children's Rights Committee (21 March 2016) UN Doc CRC/C/KEN/CO/3-5 (2016) para 39(c).

95 See Concluding Observations on the initial report of Lesotho on 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 (16-19 November 2015).

over high numbers of disowned children receiving no support from fathers in Liberia.⁹⁶ CEDAW, too, has taken issue with the trend of laxity in enforcing child support obligations, directing the government of Zambia to undertake awareness raising on the shared responsibility of both parents to ensure the well-being and care of children.⁹⁷

6.3 Implementation of ‘equitable sharing’ of joint property

The African Commission’s engagement with states suggests that the picture is mixed on the issue of marital property rights upon dissolution of marriage. There are states who are commended for taking positive legislative measures, for instance, to set out clear options at the time of entering into marriage⁹⁸ or to remove restrictions to married women’s capacity to transact in property. There are those that have not adopted any laws on the matter at all.⁹⁹ Some states still retain the husband’s ‘marital power’ to administer property belonging to the wife or restrict a married woman’s legal capacity to administer and transact in property.¹⁰⁰ Others maintain fault-based divorce laws with negative property consequences for women found to be at fault in a context where many are ignorant of these economic consequences.¹⁰¹

Some states have enacted laws, but those laws have only partial application.¹⁰² The perennial sticky issue of non-application of marital property law to customary and religious marriages and *de facto*

96 See Concluding Observations on the initial report of Liberia on 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 23rd ordinary session (9-16 April 2014).

97 Concluding Observations on the combined 5th and 6th Periodic Reports of Zambia, Committee on Elimination of all Forms of Discrimination against Women (19 September 2011) UN Doc CEDAW/C/ZMB/CO/5-6 (2011) para 42(b).

98 See, eg Concluding Observations on the 11th to 13th Periodic Reports of the Democratic Republic of Congo 2005-2015 on implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 61st ordinary session (1-15 November 2017), p 41. See also Concluding Observations on the Combined 11th to 13th Periodic Reports of Rwanda on implementation of the African Charter on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, adopted at the 61st ordinary session (1-15 November 2017), p 80.

99 See eg African Commission Concluding Observations Gabon (2013). Eswatini was cited by the African Commission in 2022 for lacking a law that addresses property rights of women married under customary law. See African Commission Concluding Observations Eswatini (2022). Botswana (not a party to the Maputo Protocol), only removed the restriction on married women’s capacity to transact and hold separate property when it amended the Deeds Registry Act and enacted the Abolition of Marital Power Act in 2004. See CEDAW Committee Concluding Observations on Botswana, CEDAW/C/BOT/CO/3, para 41 (2010). It is not unusual that some African states have no laws governing marital property. Kenya’s parliament only enacted a law on marital property for the first time at the end of 2013 (Matrimonial Property Act 49 of 2013). Malawi only codified its marital property regime through enactment of its Marriage, Divorce and Family Relations Act No.4 of 2015. Prior to these statutes, courts applied an English statute, the Married Women’s Property Act, 1882, whose application was extended into former British colonies. See C Nyamu-Musembi ‘“Sitting on her husband’s back with her hands in his pockets”: trends in judicial decision-making on marital property in Kenya’, in A Bainham (ed) *The International Survey of Family Law* (2002) 229-241.

100 CEDAW Committee Concluding Observations Cameroon (2014) para 38; Concluding Observations on the combined first to 4th Periodic Reports of Chad (4 November 2011) UN Doc CEDAW/C/TCD/CO/1-4 (2011) para 42; CEDAW Committee Concluding Observations Gabon (2015) para 44.

101 Concluding Observations on the combined initial to 2nd Periodic Reports of Swaziland (Eswatini), Committee on Elimination of all Forms of Discrimination against Women (24 July 2014) UN Doc CEDAW/C/SWZ/CO/1-2 (2014) para 42. See general concern raised about linking fault in divorce to marital property: CEDAW Committee General Recommendation 29 (n 19) paras 39 & 40.

102 Namibia, for instance, introduced a simplified system of registering ownership, mostly in informal settlements. The law permits joint registration only in the case of persons married in community of property. However, this option is open only to those married under civil law (sec 9(8) Flexible Land Tenure Act of 2012). See Concluding Observations on the combined 4th and 5th Periodic Report of Namibia, Committee on Elimination of all Forms of Discrimination against Women (28 July 2015) UN Doc CEDAW/C/NAM/CO/4-5 (2015) para 40. The CEDAW Committee had raised the concern about neglect of the property rights of women in *de facto* unions as far back as 1994. See CEDAW General Recommendation 21 (n 19) para 33.

unions further limits the reach of marital property laws. In 2014 the CEDAW Committee urged Ghana to sensitise traditional authorities to understand and accept that women seeking divorce outside of the formal court system must still be accorded property rights.¹⁰³ The CEDAW Committee has also expressed concern over the laws of countries such as Rwanda and Mauritius, which only recognise civil monogamous marriages, leaving women's property rights in *de facto* unions or polygamous marriages unprotected.¹⁰⁴ This is linked to the issue of inadequate legal and institutional frameworks for the registration of all marriages. The lack of registration and documentation leaves women's claims to property precarious, a matter that both the African Commission and CEDAW Committee have raised.¹⁰⁵

Some states have produced draft legislation or tried to codify customary law and align it with the constitution, but these law reform efforts have been pending for an inordinately long time.¹⁰⁶

While the Commission in General Comment 6 is keen on ensuring that women's indirect and non-financial contribution is considered in determining marital property rights,¹⁰⁷ it is also concerned that a narrow mathematical focus on computing contribution is likely to result in inequitable outcomes. It was this concern that motivated a constitutional petition in 2016 by the Kenya chapter of the International Federation of Women Lawyers (FIDA-Kenya), assisted by the Initiative for Strategic Litigation in Africa. FIDA-Kenya challenged section 7 of the Matrimonial Property Act. The section states that unless the parties to a marriage have an agreement to the contrary, the division of matrimonial property upon divorce shall be based on each party's contribution.¹⁰⁸

103 CEDAW Committee Concluding Observations Ghana (2014) para 41(e).

104 CEDAW Committee Concluding Observations Rwanda (2017) para 50; Concluding Observations on the 8th Periodic Report of Mauritius, Committee on Elimination of all Forms of Discrimination against Women (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 38.

105 The issue of weak systems for universal registration of marriage is discussed in C Musembi 'Article 6' in this volume. See Concluding Observations on the 2nd and 3rd Periodic Reports of Botswana 2011-2015 on implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 63rd ordinary session (24 October- 13 November 2018); African Commission Concluding Observations Eswatini (2022). See also CEDAW Committee General Recommendation 29 (n 19) paras 25, 26 & 30; CEDAW Committee Concluding Observations Gabon (2015) para 44(d); Concluding Observations on the 4th Periodic Report of Côte d'Ivoire, Committee on Elimination of all Forms of Discrimination against Women (30 July 2019) UN Doc CEDAW/C/CIV/CO/4 (2019) para 51; CEDAW Committee Concluding Observations Gambia (2015) para 49; CEDAW Committee Concluding Observations Ghana (2014) para 40; Concluding Observations on the 6th Periodic Report of Zimbabwe, Committee on Elimination of all Forms of Discrimination against Women (10 March 2020), UN Doc CEDAW/C/ZWE/CO/6 (2020) para 50.

106 Examples include Botswana (See African Commission Concluding Observations Botswana (2015)); Central African Republic (See CEDAW Committee Concluding Observations Central African Republic (2014) para 45(a)); Uganda, whose Marriage and Divorce Bill had been pending for 15 years as of 2015 (See Concluding Observations on the 5th Periodic Report of Uganda 2010-2012 on implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 56th ordinary session (21 April-7 May 2015); Burundi, whose draft legislation had been pending since 2009 (See Concluding Observations on the combined 5th and 6th Periodic Reports of Burundi, Committee on Elimination of all Forms of Discrimination against Women (25 November 2016) UN Doc CEDAW/C/BDI/CO/5-6 (2016) para 50. CEDAW castigated Ghana in 2014 over its Property Rights of Spouses Bill, pending since 2009 on account of disagreements as to whether it should apply to cohabitation unions (See Concluding Observations on the combined 6th and 7th Periodic Reports of Ghana, Committee on Elimination of all Forms of Discrimination against Women (14 November 2014) UN Doc CEDAW/C/GHA/CO/6-7 (2014) para 40. Tanzania indicated in its report to the CEDAW Committee in 2008 that it had proposed reforms to the Law of Marriage Act. This is indicated again in the 2016 report (See Concluding Observations on the combined 7th and 8th Periodic Reports of Tanzania, Committee on Elimination of all Forms of Discrimination against Women (9 March 2016) UN Doc CEDAW/C/TZA/CO/7-8 (2016) paras 48-50; Chad's long-delayed efforts to codify over 200 customary laws, harmonise them with civil law and align them with the constitution (See CEDAW Committee Concluding Observations Chad (2011) para 12); Gabon's revisions to its Civil Code have been pending since 1997 (See CEDAW Committee Concluding Observations Gabon (2015) para 44.

107 The CEDAW Committee raised this concern in General Recommendation 21 (n 21) para 32.

108 See *Federation of Women Lawyers (Kenya) v Attorney General*, Petition.164B of 2016, High Court, Constitutional and Human Rights Division, eKLR 2018 (*FIDA Matrimonial Property Petition*).

Citing prior cases that showed that courts tend to place greater weight on financial contribution than contribution in kind, FIDA argued that a marital property regime that assigned rights based on strict proof of contribution would disadvantage wives and contravene the constitutional principle of equality. In addition, it fell short of the constitutional obligation to eliminate gender discrimination in the laws, customs and practices relating to land and property, which also offended the Maputo Protocol.¹⁰⁹ FIDA lost the petition. The court concluded that since the statute laid out clearly what counts as non-monetary contribution, there was significant mitigation of any bias that might operate to disadvantage wives. According to the Court, the demands of equality were met by treating monetary and non-monetary contributions equally.¹¹⁰ As Kenyan law now stands, contribution, whether monetary or non-monetary, must be proven. A rebuttable presumption of equal entitlement only applies to property jointly registered.¹¹¹

Uganda has adopted a similar approach, namely, one that bases marital property rights on assessment of contribution, even citing Kenyan Court of Appeal cases in support of this position.¹¹²

The Gambian case of *Matty Faye*¹¹³ does not cite the Maputo Protocol, but it offers insight into the ‘equity v equality’ debate. A wife quantified her investment in developing an unfinished building built on land purchased by her husband, registered in his name and serving as the matrimonial home. The court did not have before it a full valuation of the property since the husband did not provide the purchase price of the land.¹¹⁴ Her quantified contribution established her beneficial interest in the property. Based on that, the appeal court applied the English maxim that ‘equity is equality’. The result was that the court awarded the parties 50 per cent each of the (undetermined) total value of the property, reversing the judgment of the lower court that had awarded the wife half the value of her proven improvements on the land rather than half of the total value of the property.¹¹⁵

Essentially, the Gambian appeal court took the position that FIDA would have preferred, namely, rather than base the division on strict proof of contribution only, where property is registered in the name of one spouse, as long as there is established a beneficial interest in favour of the other spouse on the basis of contribution (monetary or non-monetary), then a rebuttable presumption of equal shares kicks in. The evidentiary burden, therefore, shifts to the title-holding spouse and can only be discharged by specific proof of contrary intention. This would make it easier for women whose claims invariably are unregistered.

Malawi’s Marriage, Divorce and Family Relations Act of 2015 takes a different approach. Contribution is simply one of a wide range of factors that a court will take into account so as to ‘equitably divide and re-allocate property’ among the parties. Other factors include the parties’ income, assets, financial needs and obligations, age, health, and the standard of living that the family had during the subsistence of the marriage.¹¹⁶

109 *FIDA Matrimonial Property Petition* (n 108), the petition cited art 7 of the Maputo Protocol, as well as arts 15 & 16 of CEDAW, art 22 of the International Covenant on Civil and Political Rights (ICCPR), and art 3 of the African Charter.

110 *FIDA Matrimonial Property Petition* paras 45 & 61. At the CEDAW Committee’s consideration of Kenya’s Periodic Report in 2017, it expressed concern about the requirement to prove contribution and quantify non-monetary contribution. See Concluding Observations on the 8th Periodic Report of Kenya, Committee on Elimination of all Forms of Discrimination against Women (22 November 2017) UN Doc CEDAW/C/KEN/CO/8 (2017) para 50(b).

111 Section 14(b) Matrimonial Property Act 2013. This position was confirmed in the case of *Joseph Ombogi Ogentoto v Martha Ogentoto*, Supreme Court of Kenya Petition 11/2020 (decided 27 January 2023).

112 See *Ambayou Joseph Waigo v Aserua Jackline*, Civil Appeal 0100 of 2015 (decided 15 November 2022) available at <https://ulii.org/ug/judgment/court-appeal-uganda/2022/272> (accessed 21 April 2023).

113 *Matty Faye v Dawda Jawara*, Civil Appeal No. GCA 27/2013 (*Matty Faye*).

114 *Matty Faye* (n 113) p 12.

115 *Matty Faye* (n 113) p 16, 19-21.

116 Section 74, Marriage, Divorce and Family Relations Act of 2015 (Malawi).

7 Conclusion

Destitution and estrangement from one's children should not be accepted as an inevitable (even deserved) consequence of divorce for women. Article 7 of the Maputo Protocol, read with article 6, is intended to mitigate the uncertainty around relationships and entitlements at the point of relationship breakdown so as to change this fatalistic attitude.

This chapter has shown that states could do more to ease access to adjudicative forums, whether judicial, quasi-judicial or traditional, subjecting the processes and outcomes to constitutional standards of equality and non-discrimination. The area of marital and family dispute resolution is addressed largely through customary, religious and other alternative dispute resolution forums. The African Commission could offer guidance through deeper engagement with states and a general comment on interfacing these forums with judicial institutions to ensure effective and accountable integration of human rights principles. Sub-regional bodies such as the Southern African Development Community Parliamentary Forum and the Economic Community of West African States (ECOWAS) Parliament could propose a model law in this area, as the former has so expertly done on the eradication of child marriage.¹¹⁷

How the Protocol's provisions on 'equitable sharing' and 'reciprocal parental rights and responsibilities' are to sit in relation to national constitutional standards that refer explicitly to equality is a matter that has not been subjected to interpretation by the African Court, the African Commission or other regional forums such as the ECOWAS Community Court of Justice. The regional human rights forums need to move the jurisprudence in the clear and unequivocal direction of substantive equality. More opportunities are needed in order for the jurisprudence of the treaty to develop coherently and take concrete form in the laws and judicial decisions of state parties. Although some landmark cases on marital property in national courts refer to the Protocol and help to advance its jurisprudence,¹¹⁸ there are also missed opportunities.¹¹⁹ This underlines the crucial role of civil society mobilisation, bringing together researchers who generate the necessary data and public interest litigators who advocate for interpretation and implantation of the Protocol's jurisprudence through national courts.

117 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 20 April 2023).

118 See eg FIDA *Matrimonial Property Petition* (n 108).

119 See eg, marital property cases which made no reference to the Protocol: *Matty Faye, Makhosazane Eunice Sacolo (nee Dlamini) and Another v Jukhi Justice Sacolo and 2 Others* (1403/16) [2019] SZHC (166), decided 30 August 2019 (*Sacolo*). *Sacolo* resulted in the abolition of marital power in Eswatini.