5 A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice

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Abstract:

This chapter explores articles 2(2) and 5 the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which set out member states' obligations to modify the social and cultural behaviour of women and men through education, information, and communication strategies. These obligations are, as argued in this chapter, key to achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes or on gender stereotypes.

The analysis in this chapter departs from a three-pronged assumption: (i) that the position of women will not improve unless the underlying causes of discrimination are addressed; (ii) that modification or resocialisation, as it is referred to in this chapter, can play a key role in eliminating the root causes of gender-based discrimination; and (iii) that resocialisation as it is provided in the Maputo Protocol is underutilised by states and continental and sub-regional courts alike in the pursuit of the realisation of the rights of African women. This chapter aims to draw attention to the potential of the modification provisions in the Maputo protocol, and to provide examples of best practices emerging from the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the African Court

on Human and Peoples' Rights (African Court) and the ECOWAS Court of Justice (ECOWAS Court).

1 Introduction

The realisation of women's rights has long been the subject of advocacy and debate. While safeguarded by international and regional law, the privilege of living a life free from discrimination remains a distant reality for most women and girls the world over.[1] Varied in substance and form, gender-based discrimination (GBD) continues to influence all aspects of women's lives. However, many legal advances have been made thus far to protect women's rights.[2] To a large extent, however, these legal advances remain paper tigers. This is so because patriarchal oppression expressed through cultural and religious practices, stereotyping, and other forms of harmful behaviour – the root causes of GBD – continue to impede the acceleration of gender equality when left unaddressed.[3]

In essence, international and regional human rights law provides comprehensive protection for women. However, these provisions alone are insufficient to effect meaningful change to the lived realities of women if they remain 'filtered through the biases and limitations of the individuals and institutions, public and private, responsible for grounding [them] in reality'.[4]

In recognition of the negative influence that societal behaviours, stereotypes, attitudes, and practices have on the rights of women, international human rights law emphasises the importance of modifying those harms that comprise the root causes of GBD. Both CEDAW[5] and

1 World Economic Forum 'Global Gender Gao Report 2020' https://www3.weforum.org/docs/WEF_GGGR_2020.pdf (accessed 19 September 2023).

2 For instance, the UN Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); African Union Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 (Maputo Protocol).

3 UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child '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 on harmful practices' (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (2019) paras 6-7.

4 UN General Assembly 'Report of the Working Group on the issue of discrimination against women in law and in practice' (19 April 2017) UN Doc A/HRC/35/29 (2017) para 20.

5 CEDAW (n 2) art 5.

the Maputo Protocol[6] incorporate specific legal provisions that aim to modify harmful behaviour.

Notwithstanding the fact that CEDAW was adopted some 40 years ago, its drafters were seemingly alive to the reality that any meaningful attempts at the realisation of the rights of women remain contingent upon the modification of harmful socio-cultural patterns of thought and action. Resocialisation, therefore, is deeply embedded within international law through the adoption of CEDAW and, more specifically, through its transformative equality provisions. Article 5, read in conjunction with article 2(f), provides the necessary legislative authority to states to implement resocialisation methods to re-orient people away from harmful notions and practices towards those that acknowledge the equal humanity of women. Similarly, article 2(2) of the Maputo Protocol, read in conjunction with articles 4, 5, 8, 12 and 25, have for almost 20 years provided the same scope in the regional domain. While these provisions do not employ the term 'resocialisation', the reference to the obligation to 'modify the social and cultural patterns of conduct of women and men' implies a shift from harmful conceptions of women legitimising discrimination to one which gives effect to the overall object and purpose of CEDAW and the Maputo Protocol, namely equality. This process of modification is referred to as resocialisation in this chapter.[7]

Considered through the lens of feminist legal theory, which asserts that the law is not neutral, legitimating patriarchal oppression,[8] this chapter suggests that until a greater emphasis is placed on the modification provisions through active resocialisation, understood as an obligation, right and remedy, the underlying root causes of GBD will remain intact, making the realisation of the rights of women unattainable. Thus, the analysis departs from a three-pronged assumption: first, that the position of women will not improve unless the underlying causes of GBD are addressed; second, that resocialisation can play a key role in eliminating the root causes of GBD; and third, that resocialisation as it is provided for in the Maputo Protocol is underutilised by states and continental and sub-regional courts alike in pursuit of the realisation of the rights of African women.[9]

6 Maputo Protocol (n 2) arts 2(2) & 5.

7 See sec 2.1 for a further discussion on the term 'resocialisation' and secs 4 and 5 for the relevant case law.

8 MA Fineman 'Gender and law: feminist legal theory's role in new legal realism' (2005) *Wisconsin Law Review* 407. The framework acknowledges the influence of intersectional vectors of harm as well as the substantive and transformative equality of the Maputo Protocol.

9 See sec 2.

To elaborate on the options and opportunities for resocialisation, this chapter analyses the (un)responsiveness of the African Court on Human and Peoples' Rights (African Court) and the Economic Community of West African States Court of Justice (ECOWAS Court) to applying the legal provisions of modification through resocialisation. The aim is to analyse how the African and ECOWAS Courts have approached applications where victims of different forms of GBD, predominantly gender-based violence (GBV), have requested the courts to apply the resocialisation provisions or where resocialisation remedies have been prescribed by the courts as a remedy to harmful practices.[10] Furthermore, this chapter contrasts the approach to resocialisation in continental and sub-regional African jurisprudence with that of the CEDAW Committee to demonstrate how the interpretation and application of resocialisation can be improved to give full effect to women's rights.

In light of the above, section 2 explains resocialisation as a legal standard grounded in international and regional law, together with its aim, scope and target. This is followed by a discussion about the importance of establishing resocialisation as an obligation, right and remedy to eliminate prejudices and harmful traditional, religious, or customary practices. Section 3 examines cultural relativism as justification for the violation of women's rights, together with arguments situated within the ambit of other competing rights. Thereafter, section 4 presents the relevant international law to provide the necessary and overarching framework within which arguments in favour of resocialisation are made. Section 5 considers the African regional legislative framework, analysing the triple approach to resocialisation, as evidenced in the case law of the African and ECOWAS Courts. In conclusion, section 6 demonstrates how the interpretation and application of resocialisation can be improved to give full effect to the rights of African women.

2 Objectives of resocialisation

The influence of existing patriarchal culture on undermining women's rights and freedoms remains largely undisputed. Few, however, have considered the role that resocialisation – by way of the modification obligations – can and arguably should play in accelerating gender equality.[11]

10 See sec 5.1.

11 E Sepper 'Confronting the "sacred and unchangeable": the obligation to modify cultural patterns under the women's discrimination treaty' (2008) 30 *University of Pennsylvania Journal of International Law* at 585; S Cusack & H Timmer 'Gender stereotyping in rape cases: the CEDAW Committee's decision in *Vertido v The Philippines*' (2011) *Human Rights Law Review* at 329; R Holtmaat 'Article 5' in MA Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against*

Patriarchal culture and dominance came about as a result of long periods of socialisation.[12] Socialisation is the 'process by which individuals internalize the norms, values and culture of their society and learn to behave in socially acceptable ways'.[13] Feminist legal scholar MacKinnon notes that societal power includes 'the power to determine decisive socialization processes and therefore the power to produce reality'.[14] Societal power continues to remain within the grasp of men. Where societal narratives exist, which serve to place groups hierarchically superior to one another, socialisation allows those narratives to thrive from generation to generation. Thus, because men have retained societal powers for centuries, they have also retained the power to produce social reality. Such realities include harmful conceptions of women and stereotyping, and because these notions are so deeply embedded in societal functioning, they remain uncritiqued, informing behaviours and practices of women and men that ultimately undermine the rights and freedoms of women.[15]

Resocialisation is concerned with changing dominant patriarchal narratives, those dominant narratives that speak to the value and worth of women and girls, dictating the extent to which women and girls are afforded the right to live lives free from the harms emanating therefrom. Such deeply embedded and internalised narratives are, in fact, rooted in fallacious conceptions about women and their gendered roles in society. Yet despite its flawed premise, these conceptions continue to heavily influence the extent to which the humanity of women is respected. Resocialisation for the benefit of women and girls seeks to alter those dominant narratives to those recognising the inherent dignity and value of women and girls. Resocialisation is about relearning and, instead, offering humanity-affirming narratives while disrupting masculine constructs in all arena of society. It seeks to modify harmful norms and cultural practices underpinning discrimination, looking to all individuals as subjects of change.[16] The act of resocialisation seeks to address the root causes of gender inequality, working in tandem with efforts made towards

Women: A commentary (2011); S Cusack & L Pusey 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* at 1.

12 AL Mtenje 'Patriarch and socialization in Chimamanda Ngozi Adichie's Purple Hibiscus and Jamaica Kincaid's Lucy' (2016) 27 *Marang: Journal of Language and Literature* at 63.

13 Z O'Leary *The social science jargon buster* (2007) 266.

14 CA MacKinnon *Toward a feminist theory of the state* (1991) 230.

15 United Nations Development Programme 'Tackling social norms: a game changer for gender inequalities' (2020) https://www.un-ilibrary.org/content/books/9789210051705 (accessed 5 July 2023).

16 See CEDAW (n 2) art 5.

the realisation of substantive and formal gender equality.[17] Resocialisation in this context, therefore, refers to the legal obligations resting on states to modify those harms underpinning gender discrimination.[18]

The United Nations Development Fund confirms the value of resocialisation by stating that '[s]ince gender remains one of the most prevalent bases of discrimination, policies addressing deep-seated discriminatory norms and harmful gender stereotypes, prejudices and practices are key for the full realization of women's human rights'.[19] States parties, therefore, have an obligation to implement measures aimed at modifying harmful attitudes, behaviours and practices underlying gender discrimination.

Legal socialisation, as suggested by Trinkner and Tyler, 'assumes the law is an essential institution within the fabric of the social environment, one that is just as important in terms of ordering society, guiding human behaviour, and facilitating interpersonal interactions as the home, the school, and other social institutions'.[20] In this regard, article 5 of CEDAW serves as the point of departure for resocialisation, reinforcing the important role the law plays in guiding human behaviour.[21]

17 In this regard it is worth a brief mention here that resocialisation and indoctrination are not synonymous. Indeed, within international human rights law, states are required to educate their population on internationally accepted human rights norms and standards for the purposes of ensuring the alignment of individual behaviour with those norms and standards. Such education is one way in which resocialisation finds expression. Indoctrination implies brainwashing to effect change in a manner that does not usually align itself with international law standards and practices. It has negative connotations to it and is not protected by international law, unlike resocialisation, which is.

18 See CEDAW (n 2) art 5.

19 UN Development Programme 'Tackling social norms: a game changer for gender inequalities' (2020) 6 https://www.un-ilibrary.org/content/books/9789210051705 (accessed 14 July 2023).

20 R Trinkner & TR Tyler 'Legal socialization: coercion versus consent in an era of mistrust' (2016) 12 *Annual Review of Law and Social Science* at 418.

21 CEDAW (n 2) art 5. It states that:
State Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypes roles for men and women;
(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

In General Recommendation 25, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) affirms articles 1 to 5 of CEDAW as forming the general interpretive framework for all substantive provisions.[22] Here, three central obligations arise comprising *de facto*, *de jure* and transformative equality. As noted by the CEDAW Committee, transformative equality requires addressing 'prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through acts by individuals but also in law, and legal and societal structures and institutions'.[23] It further notes that states must implement temporary special measures to accelerate resocialisation.[24] As article 5 stipulates, such modification is targeted at both women and men, implying the entirety of the population.[25] This includes those responsible for the conceptualisation and implementation of laws and policies to ensure that they remain free from biased and harmful conceptions regarding women and their perceived role in society. Similarly, it mandates the altering and transformation of the attitudes and behaviours of ordinary people.[26]

2.1 Resocialisation as an obligation, right and remedy

Resocialisation as an *obligation* mandates states to respect, fulfil and protect the human rights of women. The *obligation to respect* requires that states

22 UN Committee on the Elimination of Discrimination against Women, 'General Recommendation 25: Article 4, paragraph 1 on the Convention (Temporary Special Measures)' (2004) UN Doc HRI/GEN/1/Rev.1 para 6.

23 General Recommendation 25 (n 22) para 7.

24 General Recommendation 25 (n 22) para 38.

25 Indeed, as noted in the case African Court in *Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (merits) (2018) 2 AfCLR 380, the Court notes at para 126 the request for reparations being the education and enlightenment of the *population*. As the cases below also illustrate, the target of resocialisation is context-specific and will largely be determined on the facts of the case. Thus, in some instances, resocialisation as a remedy may only target parts of society, such as the police force, judicial officers and the like, rather than the entire population. This narrow application of resocialisation as a remedy to targeted audiences only simply demonstrates that gaps exist insofar as the interpretation of resocialisation as a remedy is concerned.

26 The CEDAW Committee makes specific reference to the importance of eliminating the root causes of gendered discrimination, such as patriarchal attitudes, in several of its reports to states. See, eg, UN GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (1999) UN Doc A/54/38/Rev.1, where the role of prevailing attitudes serves to impede the realisation of women's rights. See also, UN GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (2004) UN Doc A/59/38; Committee on the Elimination of Discrimination against Women 'Concluding comments: Italy' (2005) UN Doc CEDAW/C/ITA/CC/4-5. See also UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against

refrain from developing and implementing laws, policies, programmes and the like, resulting in the denial of rights.[27] The *obligation to fulfil* mandates the implementation of measures, including temporary special measures, to guarantee *de jure* and *de facto* equality.[28] Thus, the fulfilment of resocialisation requires the adoption of measures targeting harmful social and cultural norms, attitudes and practices, including stereotypes, in an effort to eliminate the root causes of gendered discrimination. Finally, the *obligation to protect* calls on states to exercise due diligence and prevent discrimination at the hands of the state and private actors through resocialisation.[29] Therefore, resocialisation as an obligation implies the implementation of positive steps to prevent violations of rights both at the hands of state and non-state actors and to refrain from actions undermining the rights of women.

Resocialisation as a *right* finds expression with women asserting this right. Within international law, this is made possible through the CEDAW Committee's individual complaints mechanism, which allows for complaints by individuals from states that are party to the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.[30] As noted by Holtmaat, 'within the

women, 1992, UN Doc A/47/38 as well as 'General Recommendation 35 on Gender-Based Violence against Women, updating General Recommendation 19' (2017) UN Doc CEDAW/C/GC/35.

27 UN Committee on the Elimination of Discrimination against Women, 'General Recommendation 28: Core obligations of state parties under article 2 of the Convention on Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28 para 9.

28 General Recommendation 28 (n 27) para 9.

29 Cusack & Timmer (n 11) 339. Here the authors note that the Committee of CEDAW affirms 'that there is a due diligence obligation inherent in Article 2(f) and 5(a) of CEDAW to address wrongful gender stereotyping by private actors'. See also, African Commission on Human and Peoples' Rights 'Guidelines on Combating Sexual Violence and its Consequences in Africa' (2017) https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (accessed 19 September 2023) para 7 which provides that '[s]tates must take the necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls …' This provision refers to the general international law framework that seeks to address sexual violence against women, including CEDAW. See also para 11, which provides that:
'States must conduct campaigns to raise awareness – paying particular attention to the most vulnerable populations – about the causes of sexual violence, the different forms it takes and its consequences. These campaigns must address the root causes of sexual violence, combat gender-stereotypes, raise awareness of unacceptable nature of this violence, and help people to understand that it represents a grave violation of the rights of victims, especially those of women and girls'.

30 UN Optional Protocol to the Convention on the Elimination of All Forms of

framework of the individual complaints procedure, article 5 is conceived of as a right that an individual can invoke against her own government'.[31] This position is confirmed by the CEDAW Committee in several cases, where it finds violations of the right to resocialisation based on the merits of the case.[32]

At a regional level, article 2(2) of the Maputo Protocol is justiciable through the African Commission on Human and Peoples' Rights (African Commission) and the African Court. The latter is only accessible to individuals from states that have made an article 34(6) Declaration in terms of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol).[33] At present, only eight such declarations are in effect.[34] At a sub-regional level, the ECOWAS Court allows broader access to individuals within member states to file complaints directly with the Court.[35]

Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) UN Doc A/RES/54/4.

31 Holtmaat (n 11) 167.

32 See Communication 138/2018, *SFM v Spain* (28 February 2020) UN Doc CEDAW/C/75/D/138/2018 (2018). Here the CEDAW Committee in considering the merits of the case, notes at para 7.6 a 'violation of the rights of the author under articles … 5 … of the Convention'. See also, Communication 18/2008, *Vertido v Philippines* (22 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010) para 8.9. Note, further, the distinction in language in Communication 47/2012, *Angela González Carreño v Spain* (15 August 2014) UN Doc CEDAW/C/58/D/47/2012 (2014) para 9.7, where the Committee finds that the state 'applied stereotyped and therefore discriminatory notions in a context of domestic violence and failed to provide due supervision, infringing their *obligations* under articles … 5(a) … of the Convention' (emphasis added). Later, at para 10, the Committee notes a violation of *rights* in terms of Article 5(a). This difference in language further supports the position that resocialisation exists as right, just as resocialisation is an obligation.

33 AU Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5 (Protocol on the Establishment of an African Court) See art 5(3) of the Court Protocol, which provides for direct individual access to the African Court where states make such an art 34(6) declaration. Individual access is not provided by default in the Protocol.

34 These are Burkina Faso, Malawi, Mali, Ghana, Tunisia, Gambia, Niger, and Guinea Bissau. See African Court 'Declarations' https://www.african-court.org/wpafc/declarations/ (accessed 13 August 2023).

35 Economic Community of West African States (ECOWAS) 'Supplementary Protocol Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol' (2005) art 10(d). Here, it states that access to the Court is open to '(d) individuals on application for relief for violation of their human rights'.

Finally, the right to a *remedy*, while not explicitly provided for in CEDAW is, according to the CEDAW Committee, implied through article 2(c).[36] Here states are required to 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals, and other public institutions the effective protection of women against any act of discrimination'.[37] Remedies take many forms and, in the case of a violation of resocialisation rights, could take the form of resocialisation as a remedy.[38] These remedies are most often expressed through the pleading of applicants in individual complaints, though sometimes by the CEDAW Committee *mero motu*.[39]

While no established pattern is discernible insofar as the CEDAW Committee's approach to resocialisation as a remedy is concerned and while it seemingly takes its cue from the pleadings of individual complaints, the CEDAW Committee, similarly to the African and ECOWAS Courts as further discussed under 5, could benefit from an enhanced understanding and implementation of resocialisation as a remedy. For instance, in *VK*,[40] the author made no requests in terms of resocialisation as a remedy. This is reflected in the CEDAW Committee's omission of resocialisation as a remedy in its findings, missing an opportunity to engage with resocialisation as a remedy and to see the potential thereof. In contrast, the author in *Vertido*[41] provides detailed resocialisation requests to which the CEDAW Committee, in response, provides detailed resocialisation remedies. In *AT*,[42] while the complainant requests resocialisation as a remedy, the CEDAW Committee provides a vague and general remedy instead. Regardless of a lacking pattern, resocialisation as a remedy operates as a means for the enforcement of the right to resocialisation, holding states accountable for their failure to uphold their obligation to modify harmful behavioural and societal patterns of action while aiming to ensure the prevention of future such violations.

36 Communication 22/2009, *LC v Peru* (4 November 2011) UN Doc CEDAW/C/50/D/22/2009 (2011). This is similarly reflected in the Maputo Protocol arts 2, 8 & 25.

37 CEDAW (n 2) art 2(c).

38 See, eg, the cases cited in secs 5.1 and 5.2.

39 For instance, Communication 99/2016, *SL v Bulgaria* (10 September 2019) UN Doc CEDAW/C/73/D/99/2016 (2019).

40 Communication 20/2008, *VK v Bulgaria* (27 September 2011) UN Doc CEDAW/C/49/D/20/2008 (2011).

41 *Vertido* (n 32)

42 Communication 2/2003, *AT v Hungary* (26 January 2005) UN Doc CEDAW/C/36/D/2/2003 (2005).

3 Competing rights

It is trite that, in general terms, human rights are not absolute, with the balancing of rights often a necessity. Women's rights are, however, frequently afforded lesser significance than competing rights, exemplified in the frequent appeals to cultural relativism operating as a prevalent source of oppression.[43] This is true, too, of oppressive patriarchal behaviour in the name of religion.[44] If the purpose of international human rights law is to safeguard the rights and freedoms of all, including those of women, the current default practice of discounting women's rights in favour of other rights cannot survive critical scrutiny.[45]

The point of departure when balancing rights is that '[a]ll human rights are universal, indivisible and interdependent and interrelated'.[46] States are required to promote and protect all human rights in 'a fair and equal manner, on the same footing, and with the same emphasis'.[47] As the former Special Rapporteur on Freedom of Religion and Belief suggests, 'on a normative level, human rights norms must be interpreted in such a way that they are not corrosive of one another but rather reinforce each other'.[48] Despite this view, however, harmful cultural practices and oppression in the name of religion continue to undermine efforts at realising the rights of women, contrary to international human rights law.

Harmful cultural practices in this regard not only refer to practices steeped in years of tradition and custom, or those practices of a religious nature, but equally refer to behaviours characterising societies considered 'westernised', those assumed to be lacking a singular dominating, or motivating cultural or religious tradition.[49] Insofar as women's rights are

43 UN General Assembly Report of the Special Rapporteur in the field of cultural rights 'Cultural rights' (2012) UN Doc A/67/287 para 3; UN Human Rights Council, 'Freedom of religion or belief' (2020) UN Doc A/HRC/43/48.

44 UN General Assembly Report of the Special Rapporteur in the field of cultural rights (n 43) para 3; UN Human Rights Council (n 43) para 8.

45 UN General Assembly Report of the Special Rapporteur in the field of cultural rights (n 43); UN Human Rights Council (n 43).

46 The World Conference on Human Rights 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23 para 5.

47 UN General Assembly Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance* (2013) UN Doc A/68/290 para 19.

48 As above.

49 Sepper (n 11). Some examples include the gender pay gap, motherhood penalty and parental leave rights.

concerned, the culture of discrimination against women does not solely manifest itself in GBV such as female genital mutilation, child marriages or honour killings, practices egregious in nature, often justified as discipline for women violating patriarchal constructs and norms relating to the role of women in society. They similarly find expression in normalised 'lesser' infringements such as degrading language found in music lyrics[50], sexual harassment in the workplace, online harassment of women on social media, the gender pay gap and other such examples, which speak to common perception and belief in the inferiority of women. These, too, constitute a cultural practice of discrimination and violence against women.[51] Failure to include all cultural practices within the rubric of discrimination against women for which resocialisation is required inevitably results in the demonising of groups that have historically faced imperialism and criticism for their differences while providing other states with an out insofar as their own obligations to modify harms is concerned. Caution ought to be exercised, therefore, that the dominant and inaccurate view of the 'West' as progressive and the rest as backward does not infiltrate and influence the discourse on women's rights.[52] In the African context, a dominating and singular focus on egregious, harmful practices to the exclusion of other infringements fails to consider the impact that all forms of harmful cultural practices have on the rights and freedoms of African women, implicating pockets of society while absolving others.

Women's rights and cultural or religious rights do not always operate in conflict with one another. The contemporary view of cultural and religious rights as inherently oppressive to women is, therefore, inaccurate. As Xanthaki notes, 'the binary vision of culture versus women's rights is

50 A Rudman "'Whores, sluts, bitches and retards" – what do we tolerate in the name of freedom of expression?' (2012) 26 *Agenda* at 72. While it remains beyond the scope of this paper, it is worth noting that the right to freedom of expression is limited where expression manifests in harm, which is often the case when normalised, derogatory lyrics perpetuate harmful narratives about the worth and value of women, legitimising discrimination on the basis of inferiority to men.

51 Joint General Recommendation (n 3). At para 15, the CEDAW Committee notes that '[h]armful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that such practices cause to the victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of human rights and fundamental freedoms of women and children'.

52 As an example, focusing attention only on states where female genital mutilation and child marriage is dominant overlooks the egregious harms states such as the United States of America inflict on women through their anti-abortion stance. See RJ Cook 'Women's international human rights law: the way forward' in RJ Cook (ed) *Human rights of women: national and international perspectives* (1994) 7.

overly simplistic and ultimately harms women's rights'.[53] The same is true of rights to freedom of religion and belief, where religion is conceived of in predominantly negative terms insofar as women are concerned, resulting in the marginalisation of women from religious groups.[54] Taking an intersectional approach,[55] which understands that human beings comprise multiple identities, often resulting in compounded discrimination, the value of recognising the importance of religious and cultural freedoms as a crucial component of the rights of some women becomes that much more acute. Notwithstanding, however, oppression in the name of culture and religion remains a reality, often employed as a shield against criticism of harmful practices that violate the rights of women.

In this regard, it is useful to note that the right to culture includes the right to choose a particular culture and the right not to participate in specific traditions.[56] The violence and discrimination women experience due to harmful practices in the name of culture, therefore, is antithetical to the right to culture and falls outside of its ambit.

The Maputo Protocol is reflective of the positive aspect of the right to culture with its inclusion of article 17.[57] This provision speaks to the right of women to a positive cultural context, which necessarily excludes those contexts threatening the integrity of women's rights. The legal guarantee given to women through article 17 enjoins states to ensure that women possess the necessary freedom to choose cultural contexts that suit their greater good, discarding those that do not. It also guarantees the right of women to participate in the formulation of cultural policies based on African values without fear of intimidation or retribution.[58] The

53 A Xanthaki 'When universalism becomes a bully: revisiting the interplay between cultural rights and women's rights' (2019) 41 *Human Rights Quarterly* at 702.

54 UN General Assembly Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt (n 47) para 17.

55 K Crenshaw 'Demarginalizing the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *The University of Chicago Legal Forum* art 8.

56 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 3 UNTS 993. Article 15 stipulates that 'everyone has the right to freely participate in the cultural life of the community'. See also UN General Assembly Report of the Special Rapporteur in the field of cultural rights (n 43) para 25.

57 Maputo Protocol (n 2) art 17.

58 The Maputo Protocol's Preamble ensures that African values are determined 'based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy'. In this regard, it is useful to briefly note that no margin of appreciation exists with respect to how states balance rights. Aside from the fact that the theory of the margin appreciation finds its origins in Europe, finding little equivalence and emphasis in the

African Commission interprets the right to culture as 'positive African values consistent with international human rights standards, and implies an obligation on the state to ensure the eradication of harmful traditional practices that negatively affect human rights'.[59] Thus, appeals to cultural rights as justification for discrimination are untenable given that the right to culture protects positive practices and the rights of individuals to choose whether and if they want to participate in such cultures. This is similarly true for the right to freedom of religion and belief. This right does not allow harmful practices against women and girls to be undertaken in the name of religion. As the former Special Rapporteur on Freedom of Religion and Belief notes, '[i]t can no longer be taboo to demand that women's rights take priority over intolerant beliefs that are used to justify gender discrimination'.[60]

Cultural and religious rights remain the rights most frequently employed as justification for discrimination against women.[61] International law does not, however, protect harmful practices in the name of culture and religion.[62] In addition to the fundamental right of individuals to choose their own culture and religion, the very nature and existence of resocialisation as a tool to modify harmful socio-cultural patterns of conduct, attitudes and stereotypes underlying harmful practices confirms

African context, states are required to operate within the bounds of cultural rights as a choice, and the African values as defined by the Maputo Protocol's Preamble, amongst others. Equality remains at the heart of African values, dictating the realisation of the rights of women including their rights to positive cultural contexts over harmful cultural and religious practices. No room exists for states to suggest otherwise. While beyond the scope of this chapter, it is helpful to note the findings of the African Commission on Human and Peoples' Rights with regard to the margin of appreciation. In the case of *Garreth Anver Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), the Commission at 4, takes exception to the South African state's restrictive construction of this doctrine as permitting wide discretionary decision-making powers based on its intimate knowledge of societal functioning 'and the fine balance that need[s] to be struck between the competing and sometimes conflicting forces that shape a society'. It notes at 7, in this regard, that whatever discretion the margin of appreciation does confer on the state, it does not remove the promotional and protectional mandate of the Commission in instances where 'domestic practices [are found] wanting'.

59 African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (November 2010) https://www.achpr.org/legalinstruments/detail?id=30 (accessed 14 August 2023) para 75.

60 UN General Assembly, Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangi, 'Elimination of all forms of religious intolerance' (2010) UN Doc A/65/207 para 69.

61 MR Abdulla 'Culture, religion, and freedom of religion or belief' (2018) 16 *The Review of Faith and International Affair*s at 102.

62 Joint General Recommendation (n 3) para 7.

the position that such practices are unprotected, even if in the name of cultural or religious rights.[63]

4 The CEDAW Committee on resocialisation

The significant role that resocialisation plays in international human rights law is aptly displayed in the General Recommendations of the CEDAW Committee and in its decisions. The CEDAW Committee has long been vocal on the barriers to gender equality, including those due to 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes'.[64] The CEDAW Committee notes that:

> the causes of harmful practices are multidimensional and include stereotyped sex – and gender-based roles, the presumed superiority or inferiority of either of the sexes, attempts to exert control over the bodies and sexuality of women and girls, social inequalities and the prevalence of male-dominated power structures. Efforts to change the practices must address those underlying systemic and structural cases of traditional, re-emerging and emerging harmful practices, empower girls and women and boys and men to contribute to the transformation of traditional cultural attitudes that condone harmful practices, act as agents of such change and strengthen the capacity of communities to support such processes.[65]

As evidenced by the above statement, the CEDAW Committee supports and encourages resocialisation. Similarly, in its General Recommendation 35, which updates General Recommendation 19 on violence against women, the Committee notes that states are required to 'address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes'.[66]

The individual complaints mechanism has also provided insight into the importance placed on resocialisation as a means for the realisation of the substantive rights of women. For instance, in *SFM*,[67] the CEDAW Committee was faced with a matter involving obstetric violence. Here the author experienced discrimination at the hands of health professionals

63 UN Educational, Scientific and Cultural Organisation (UNESCO) 'UNESCO Universal Declaration on Cultural Diversity' (2001) art 4. See also Joint General Recommendation (n 3).

64 CEDAW (n 2) art 5(a).

65 Joint General Recommendation (n 3) para 17.

66 General Recommendation 35 (n 26) para 24.

67 *SFM* (n 32).

who forced her to undergo unnecessary medical interventions, resulting in trauma. The harms the author experienced resulted from dominant stereotypes, including those that perpetuate the narrative of women being valuable only insofar as their reproductive roles are concerned. Her voice and wishes were disregarded entirely and substituted for those of biased healthcare professionals who believed that women are not only incapable of making their own decisions but should, as a result, simply follow the orders of doctors without question.[68] In *Belousova*,[69] a case involving sexual harassment in the workplace, the Committee emphasises that states have an obligation to 'modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and a consequence of discrimination against women'.[70] *Carreño*[71] is yet another example of how resocialisation could have prevented violence against women. Here the CEDAW Committee notes the lack of protection afforded to the author who, despite lodging several complaints against the perpetrator for verbal, physical and psychological abuse, was ignored by authorities.[72] The Committee confirms that the 'unresponsiveness of the administration and courts to the violence suffered by the author points to the persistence of prejudices and negative stereotypes, taking the form of an inadequate appreciation of the seriousness of her situation'.[73] Resocialisation may have prevented the authorities from applying stereotyped and discriminatory notions to the facts of the case, prohibiting unsupervised visitation rights to the author's daughter, thereby preventing her death.[74] Instead, those harmful notions and conceptions about women dictated a lack of action, resulting in a failure to protect the author and her daughter.

Moreover, harmful practices have the potential to result in the denial of other substantive rights of women, such as access to justice. In this regard, several cases have been brought before the CEDAW Committee that highlight the impact that harms such as gender stereotyping have on

68 *SFM* (n 32) para 3.7.

69 Communication 45/2012, *Belousova v Kazakhstan* (25 August 2015) UN Doc CEDAW/C/61/D/45/2012 (2015).

70 *Belousova* (n 69) para 10.10.

71 *Carreño* (n 32).

72 *Carreño* (n 32) para 3.3.

73 *Carreño* (n 32) para 3.5.

74 *Carreño* (n 32) para 9.7.

women's rights to access to justice.[75] In *X&Y*,[76] the CEDAW Committee engages with the problematic nature of stereotyping and the impact such have on the right to access to justice, noting that:

> [t]he Committee also emphasizes that the full implementation of the Convention requires State parties … to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and a consequence of discrimination against women … The Committee also stresses that stereotyping affects the right of women to a fair trial and that the judiciary must be careful not to create inflexible standards on the basis of preconceived notions of what constitutes domestic or gender-based violence.[77]

Again, the Committee notes the indispensable role of resocialisation in ensuring substantive gender equality. The rights of women to equal inheritance and to protection from unfair dismissal are similarly implicated in cases brought before the CEDAW Committee. In *RKB*,[78] the Committee confirms that the domestic court allowed stereotypes to influence its reasoning and judgment, all while remaining silent on the inclusion of discriminatory and gender-biased evidence provided by the employer in defence of the dismissal in question. In particular, it notes the problematic nature of the Court examining 'the evidence adduced by the employer and scrutiniz[ing] only the moral integrity of the author, 'female' employees and not that of male employees'.[79] In *ES & SC*,[80] which dealt with inheritance rights, the CEDAW Committee importantly held that 'the application of discriminatory customs perpetuates gender stereotypes and discriminatory attitudes about the roles and responsibilities of women and prevents women from enjoying equality of status in the family and in society at large'.[81]

75 See, eg, *Vertido* (n 32) paras 3.5.1-3.5.7; Communication 34/2011, *RPB* (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014) para 3.3; *Carreño* (n 32) para 3.10; Communication 32/2011, *Jallow v Bulgaria* (28 August 2012) UN Doc CEDAW/C/52/D/32/2011 (2012) para 8.6.

76 Communication 100/2016, *X & Y v Russian Federation* (9 August 2019) UN Doc CEDAW/C/73/D/100/2016 (2019).

77 *X & Y* (n 76) para 9.9.

78 Communication 28/2010, *RKB v Turkey* (13 April 2012) UN Doc CEDAW/C/51/D/28/2010 (2012).

79 *RKB* (n 78) para 8.7.

80 Communication 48/2013, *ES & SC v Tanzania* (13 April 2015) UN Doc CEDAW/C/60/D/48/2013 (2015).

81 *ES & SC* (n 80) para 7.5

5 The African regional legislative framework

Article 18(3) of the African Charter[82] enjoins states to ensure the elimination of discrimination against women.[83] This is the point of departure insofar as resocialisation on the continent is concerned. Additionally, article 25 provides a general duty to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms'. Such an exercise implies resocialising people, through teaching, education, and publication, on rights and freedoms contained in the African Charter, including the rights conferred by article 18(3). While this provision is general and unspecific in scope, the promotion of respect for the rights and freedoms contained in the African Charter implies an ongoing process of resocialisation targeted at everyone. This provision provides credence to the assertion that resocialisation is a legislatively mandated requirement.

Supplementing the protection afforded by the African Charter by providing more comprehensive protections, the Maputo Protocol is a notable advancement in the field of women's rights on the continent. As referred to in the introduction, it refers to resocialisation in several provisions, the central provision being article 2(2), which largely echoes article 5 of CEDAW.[84]

In addition to article 2(2), article 5 of the Maputo Protocol targets harmful practices, defined as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls'.[85] Moreover, article 4(2)(d) speaks to the obligation of states to uphold the rights of women to life, integrity, and security of person. In doing so, it mandates the implementation of measures to 'actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and

82 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

83 Over and above this regional obligation on states, CEDAW remains almost universally applicable to African states too. Thus, its provisions, including art 5's resocialisation provision, must influence the manner in which African states engage with the rights of women as contained in the African Charter.

84 Maputo Protocol (n 2) art 2(2) which states that:
States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.

85 Maputo Protocol (n 2) art 1(g).

stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women'.[86] Article 8 protects women's access to justice, with article 8(c) specifically referring to the establishment of educational and other structures with a view to sensitising everyone on the rights of women, while article 8(d) proscribes that law enforcement organs at all levels must be 'equipped to effectively interpret and enforce gender equality rights' clearly implying an educational process. Article 12 provides for the right to education, with article 12(b) obligating states to 'eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate … discrimination'.[87] Article 17, as mentioned under section 3 above, protects the rights of women to a positive cultural context.[88] Finally, article 25 refers to the right to a remedy involving both a procedural and substantive right.

The inclusion of resocialisation in multiple provisions in the African Charter and the Maputo Protocol underscores the prevalence of deeply embedded harmful conceptions and stereotypes regarding the role and value of women in society and the critical yet overlooked role that resocialisation plays in addressing the root causes of discrimination, impacting the lived realities of women. The following sub-sections reference and discuss claims of GBD and GBV against women and relate these violations to claims of resocialisation made before the African and ECOWAS Courts.

5.1 The African Court

5.1.1 APDF v Mali

The African Court had, at the time of writing this chapter, only decided one matter based on the Maputo Protocol, in *APDF*.[89] The respondent state, Mali ratified the Maputo Protocol in 2005. Therefore, the point of departure in *APDF* was an effort from Mali's side to bring its family laws in line with the Maputo Protocol.[90] To accomplish this, the Malian

86 Maputo Protocol (n 2) art 4(2)(d).

87 Maputo Protocol (n 2) art 12(3).

88 Maputo Protocol (n 2) art 17.

89 *APDF* (n 25). For a further discussion on this case see A Rudman 'The responsiveness of continental and regional courts in providing redress to African women as victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* at 437-440.

90 African Union List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2019) https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20

government made a wide-ranging attempt to codify existing family rights. After broad popular consultation, a draft bill establishing the Persons and Family Code (2009 Code) was adopted. However, the 2009 Code was not promulgated due to extensive protests by Islamic organisations.[91] These protests eventually swayed the government to abandon the 2009 Code and draft a new Code, which was adopted in December 2011 (2011 Code).

The applicants, in this case, approached the Court with claims that sections of the 2011 Code violated articles 2(2), 6(a) and (b) and 21(2) of the Maputo Protocol.[92] In this regard, they set out four main arguments. First, the stipulated minimum age for marriage was different for boys (18 years) than for girls (16 years).[93] Second, the 2011 Code preserved religious and customary law by default as the applicable legal regime with regard to inheritance. Third, the consent from the parties to a marriage differed between civil marriages and traditional/religious marriages. Finally, the argument that is of most interest to the discussion in this chapter is that these breaches represented an unwillingness on the part of Mali to eradicate harmful cultural practices common within Malian society.

Two parts of the judgment can be used to highlight Mali's position on the impact of the social construct and, arguably, resocialisation in Mali. First, as a response to the applicants' question about why Mali shelved the 2009 Code, it stated that:

> [A] mass protest movement against the [2009] Family Code halted the process; … the State was faced with a huge threat of social disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion; that the mobilisation of religious forces attained such a level that no amount of resistance action could contain it.[94]

Second, against this background, Mali tried to justify its failure to uphold the rights in the Maputo Protocol. In this regard, Mali brought forward arguments as to why it should have been allowed to deviate from the legal obligations in articles 6 and 21 of the Maputo Protocol. Regarding

WOMEN%20IN%20AFRICA.pdf (accessed 14 August 2023).

91 *APDF* (n 25) para 6.

92 The applicants also submitted claims under other international instruments not further discussed in this chapter. See *APDF* (n 25) para 9.

93 The applicants further indicated, at para 60, that the 2011 Family Code allows for special exemption for marriage from 15 years, with the father's or mother's consent for the boy, and only the father's consent, for the girl.

94 *APDF* (n 25) para 64.

the visible discrimination against girls in relation to marriable age, Mali suggested that:

> [T]he established rules must not eclipse social, cultural and religious realities; that the distinction contained in … the Family Code should not be seen as a lowering of the marriage age or a discrimination against girls, but should rather be regarded as a provision that is more in line with the realities in Mali; that it would serve no purpose to enact a legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with sociocultural realities; that it would serve no useful purpose creating a gap between the two realities, especially as, according to the Respondent State, at the age of fifteen (15), the biological and psychological conditions of marriage are in place, and this, in all objectivity, without taking sides in terms of the stance adopted by certain Islamist circles.[95]

From these submissions, it can be concluded that rather than harmonising social and cultural practices with existing legal obligations under the Maputo Protocol, Mali suggested that legal obligations be harmonised with its sociocultural 'realities'. This shows a limited understanding of the position of international obligations, alongside a complete disregard for women's experiences of these sociocultural realities and the state's responsibilities under the Maputo Protocol to resocialise the populace in furtherance of women's rights.[96]

After interpreting and applying the relevant provisions of the Maputo Protocol, the African Court found that some sections of the 2011 Family Code[97] indeed violated the minimum age for marriage, the right to consent to marriage and the right to inheritance for women.[98] It held that by adopting the 2011 Code, the Respondent maintained discriminatory practices protected therein, which in turn undermined the rights of women in Mali.[99] For the purposes of the analysis in this chapter and in relation to the violation of article 2(2) of the Maputo Protocol, the applicants requested Mali to introduce a:[100]

95 *APDF* (n 25) para 66.

96 *APDF* (n 25).

97 2011 Family Code, secs 283-287.

98 Maputo Protocol (n 2) arts 6(d), 6(a) & 21(2).

99 *APDF* (n 25) para 124.

100 *APDF* (n 25) para 16.

(i) sensitisation programme on the dangers of early marriage;
(ii) training programme for religious ministers on the procedure for contracting a marriage;
(iii) sensitisation and educational programme to ensure equal share of inheritance; and,
(iv) strategy to eradicate unequal share of inheritance between men and women.

In this regard, article 2(2) refers to state parties' obligations to 'modify social and cultural patterns … through public education'. As such, this is a clear legal obligation resting on the state party. In *APDF* the Court determined that such obligations require state parties to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights, as well as corresponding obligations and duties, are understood'.[101] From this perspective, *APDF* is not only a landmark case with respect to the material findings but also with regard to its interpretation and application of article 27(1) on the remedies of the Court.[102]

5.2 The ECOWAS Court

5.2.1 Hadijatou Mani Koraou v Niger

Compared to the African Court, the ECOWAS Court has produced a larger number of judgments that involve women's rights.[103] In *Hadijatou Mani Koraou*,[104] the issue of slavery under the guise of traditional practices was dealt with. Although this case does not refer to the Maputo Protocol, the ECOWAS Court was confronted with the applicant's supplicates for resocialisation, situating this case within the ambit of the discussion in this chapter.

101 *APDF* (n 25) para 131, referring to the African Charter art 25.

102 Protocol on the Establishment of an African Court (n 33) art 27(1) stipulates that: '[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.

103 In addition to the cases discussed in this chapter see for example *Mary Sunday* v *Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (2018); *Aircraftwoman Beauty Igbobie Uzezi v The Federal Republic of Nigeria* ECW/CCJ/JUD/11/21 (2021); *Ekundayo Idris v Federal Republic of Nigeria* ECW/CCJ/JUD/09/22 (2022) and *Adama Vandi v State of Sierra Leone* ECW/CCJ/JUD/32/22 (2022).

104 *Hadijatou Mani Koraou v Republic of Niger* ECW/CCJ/JUD/06/08 (2008). There is no official English version available of this case. Therefore, the unofficial translation of the original French text was used in this analysis, available at https://www.refworld.org/cases,ECOWAS_CCJ,496b41fa2.html (accessed 14 August 2023). For a further discussion on this case see Rudman (n 89).

On the merits of the case, in 1996, the then 12-year-old Hadijatou Mani Koraou (Ms Koraou or applicant) was sold to a 46-year-old tribal chief (Chief). Ms Koraou was to become his fifth wife under the *Wahiya* custom.[105] Under this custom, a '*Sadaka*' or 'fifth wife' is a wife who is not one of the legally married wives.[106] The *Sadaka* traditionally takes care of the housework and 'services' the 'master'.[107] The Chief could, at any time, have sexual relations with Ms Koraou. The first sexual act was imposed on her shortly after she became a Sadaka.[108] Nine years later, the Chief terminated the 'agreement'. However, he declared that she was still his wife and that she was not allowed to leave his house.

Before the ECOWAS Court Ms Koraou argued that she had been subjected to slavery, GBD and that she had been deprived of her right of access to justice.[109] Ms Koraou submitted that she was a victim of slavery, violence, and discrimination through the application of customary law because she is a woman and that she, as a woman, could find no remedy before the domestic courts. Niger argued that Ms Koraou was not a slave but rather the wife of her enslaver, with 'whom she lived with more or less in happiness as any couple'.[110]

As with the statements of Mali in *APDF* as quoted above in section 5.1.2 this statement demonstrates Niger's complete lack of appreciation for the position of women within the context of harmful social practices. On the issue of slavery, the ECOWAS Court found in favour of Ms Koraou.[111] Importantly, the court held that Niger had not done enough to protect Ms Koraou against the Wahiya custom as a form of harmful cultural practice, stating that this responsibility resulted from 'the tolerance, passiveness, inaction, and abstention'[112] of the authorities. In relation to these violations, Ms Koraou requested the ECOWAS Court to prescribe the following remedies:[113]

105 *Hadijatou Mani Koraou* (n 104) para 8.

106 *Hadijatou Mani Koraou* (n 104) para 9.

107 *Hadijatou Mani Koraou* (n 104) para 10.

108 *Hadijatou Mani Koraou* (n 104) para 11.

109 In violation of the African Charter arts 1, 2, 3, 5, 6 & 18(3).

110 *Hadijatou Mani Koraou* (n 104) para 78.

111 *Hadijatou Mani Koraou* (n 104) para 85.

112 As above.

113 *Hadijatou Mani Koraou* (n 104) para 28.

(a) Condemn the Republic of Niger for violation of Articles 1, 2, 3, 5, 6 and 18(3) of the African Charter of Human and Peoples' Rights;
(b) Request Niger authorities to adopt legislation that effectively protects women against discriminatory customs relating to marriage and divorce;
(c) Ask Niger authorities to revise the legislation relating to Courts and Tribunals in order to enable justice to fully play its part in order to safeguard victims of slavery;
(d) Urge the Republic of Niger to abolish harmful customs and practices founded on the idea of women's inferiority;
(e) Grant Hadijatou Mani Koraou a fair reparation for the wrong she was victim of during the 9 years of her captivity.

The ECOWAS Court only responded to the applicant's compensation claim.[114] Thus, it rejected the requests for the adoption of legislation and importantly for the discussion in this chapter it ignored the plea to instruct the state to abolish harmful practices. In rejecting this aspect of Ms Koraou's request, the ECOWAS Court arguably failed to apply the obligation under articles 1, 2 and 25 of the African Charter to resocialise the relevant societies to abolish harmful customs and practices founded on the idea of women's inferiority.

5.2.2 Dorothy Njimenze v Nigeria

Nigeria became a party to the Maputo Protocol in 2005.[115] When the ECOWAS Court handed down its judgment in *Dorothy Njemanze*[116] it became the first international court to pronounce on violations of the Maputo Protocol. Dorothy Njemanze, Edu Oroko,[117] Justina Etim, and Amarachi Jessyford brought claims of sexual and GBV, cruel, inhuman, degrading, and discriminatory treatment. They complained about having been abducted, arbitrarily arrested, beaten, sexually harassed, sexually violated, humiliated, and degraded at the hands of the Abuja Environmental Protection Board and the Society against Prostitution and Child Labour as agents of the Nigerian state.

The underlying reason for their ordeals, as confirmed by the state, was that they were perceived (by the state) to be 'prostitutes' or at least

114 The ECOWAS Court awarded 10 000 000 CFA francs in damages.

115 African Union List of countries (n 90).

116 *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v The Federal Government of Nigeria* ECW/CCJ/JUD/08/17 (2017). For a further discussion on this case see Rudman (n 89).

117 The second applicant's action was statute barred for not having been brought within the three-year period stipulated by Supplementary Protocol art 9(3).

perceived to be related to prostitution either by involving themselves with women that were branded by the authorities as 'prostitutes' or by being in the wrong place at the wrong time.[118] In this regard, the applicants pleaded for two types of remedies under the Maputo Protocol: financial compensation for the pain, suffering and harm to their dignity; and orders to:[119]

(a) enact laws eliminating all forms of violence against women;
(b) train police, prosecutors, judges on laws on violence against women and provide gender sensitivity training to the same;
(c) create specialised police units and courts dealing with cases of violence against women;
(d) provide support services for victims of SGBV; and
(e) implement awareness-raising education and communication strategies aimed at the eradication of beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women.

The ECOWAS Court awarded damages for the breach of the applicants' human rights.[120] It, however, did not engage with any of the five broad-based, educational, and preventative measures requested by the applicants, failing in its obligation to uphold the state's responsibility towards resocialisation.

5.2.3 Aminata Diantou Diane v Mali

In *Aminata Diantou*,[121] the ECOWAS Court was faced with deep-rooted patriarchal structures set within the context of a male-dominated household and the influence of men within the extended family.

Here, the applicant was subjected to various forms of abuse by her family-in-law following a stroke that rendered her husband incapacitated. Ms Aminata claimed that after her husband fell ill, she was physically assaulted by her brothers-in-law, who also confiscated most of her and her husband's property. Ms Aminata's in-laws then proceeded to abduct her husband, taking him to an unknown location, leaving Aminata alone with their five children, the youngest aged 4.[122] After the abduction, Ms

118 *Dorothy Njemanze* (n 116) 15, para 5.3.

119 *Dorothy Njemanze* (n 116) 12-13.

120 The ECOWAS Court awarded 6 000 000 Naira in damages.

121 *Aminata Diantou Diane v Mali* ECW/CCJ/JUD/14/18 (2018). For a further discussion on this case see Rudman (n 89) 449-452. *Hadijatou Mani Koraou* (n 104) para 8.

122 *Aminata Diantou* (n 121) para 10.

Aminata's brothers-in-law presented her with a power of attorney, giving them the power to administer Ms Aminata's and her husband's property. At the same time, the three brothers initiated divorce proceedings between Ms Aminata and her husband.

On the merits, the applicant raised two principal issues. First, the violation of the right to the protection of Ms Aminata's person as a wife and that of her family (including her rights to dignity and property).[123] Second, the right to a fair hearing within a reasonable time is violated.[124] As with the applicants in Mani Koraou and Dorothy Njemanze, Aminata requests the Court to take a broader, systemic view – to acknowledge that her experience was not an isolated event. In this regard, Aminata, similar to the victims in Mani Koraou and Dorothy Njemanze, pleaded with the ECOWAS Court to order the state to:[125]

(a) enact a law repressing all forms of violence against women;
(b) organise the training of the police, prosecutors, judges on the effective implementation of the laws protecting women's rights against violence;
(c) create specialised units within the police and courts to deal with cases of violence against women;
(d) adopt other legislative, administrative, social and economic measures necessary for the elimination of violence and all forms of discrimination against women;
(e) provide support services to women victims of violence; and
(f) develop and implement awareness, education, and communication strategies for the eradication of the customs, practices, and stereotypes that legitimise and exacerbate the persistence and tolerance of violence and discrimination against women.

As in *Hadijatou Mani Koraou* and *Dorothy Njemanze* the Court took no notice of these remedies and dismissed them without further engagement. The ECOWAS Court only upheld the claim of compensation in relation to the breach of Aminata's right to access to justice.[126]

6 Conclusion

Feminist legal theory asserts that the law is not neutral. On the contrary, it legitimates patriarchal oppression. Thus, it is unsurprising that the

123 In violation of the African Charter arts 1, 3 & 18(3) and the Maputo Protocol arts 2, 3, 4, 6.

124 In violation of the Maputo Protocol arts 8 & 25.

125 *Aminata Diantou* (n 121) para 11.

126 The ECOWAS Court awarded 15 000 000 CFA francs in damages.

rights and freedoms of women, which have traditionally been viewed with comparatively less concern *vis-à-vis* other rights, remain out of reach despite the existence of progressive laws seeking to protect women. Laws, regulations, policies and the like, while often reflective of the equal humanity and dignity of women, fail to impact the lived realities of women in a meaningful way because their utility remains subject to the attitudes, norms, and stereotypes that inform their application. Thus, the position of women will not improve until such time as a greater emphasis is placed on resocialisation.

Resocialisation seeks to address the underlying causes of gendered discrimination by modifying existing harms in favour of those acknowledging the inherent dignity and value of women and girls. This internationally and regionally mandated requirement finds expression in measures taken by the state in fulfilment of this obligation as well as through individuals asserting their rights to resocialisation. Resocialisation as a remedy provides yet another means with which to hold states accountable for their inaction. Viewing resocialisation through this triple approach – as an obligation, right and remedy – not only bolsters the utility of resocialisation but also acknowledges the approach taken by the CEDAW Committee thus far.

The transformative potential of resocialisation finds its roots in the General Recommendations of the CEDAW Committee, signals the significant role that resocialisation plays in the realisation of the rights of women, and finds expression in the decisions of the CEDAW Committee. Noting the prevalence of wrongful gender stereotyping as well as those of harmful notions and conceptions about women as underpinning acts of discrimination, the CEDAW Committee emphasises that the adequate implementation of CEDAW and the realisation of rights requires the active engagement of states with resocialisation. In the cases discussed in this chapter, relating to GBV, access to justice, equal inheritance, unfair labour practices and the right to health, the CEDAW Committee draws on resocialisation to encourage state compliance with general CEDAW obligations to reinforce resocialisation as a right belonging to women and employs resocialisation as a remedy in cases where its absence has notably impacted the rights and freedoms of women. Through such an analysis, the emergence of best practices becomes apparent and instructional at a regional level.

In analysing the responsiveness of the African and ECOWAS Courts to resocialisation through the relevant case law, it is clear that the scope for enhancing the capacity to understand the value and import of resocialisation remains vast. Indeed, its application is similarly capable

of enhancement. *APDF,* the only case at the African Court to refer to resocialisation, provides an illuminating example of the effects of harmful socio-cultural norms, attitudes, and stereotypes on the rights of women. Whereas the Court was given an opportunity to deeply engage with resocialisation in terms of the Maputo Protocol, it refers to resocialisation only in terms of the remedy and, even then, in terms of article 25 of the African Charter. Thus, it failed to engage with resocialisation as contained in the Maputo Protocol, arguably missing an opportunity for meaningful engagement with resocialisation.

The ECOWAS Court has, in contrast, been faced with more than one case where resocialisation featured in the pleadings of the applicants. In *Mani Koraou*, while the Court found the state had failed to protect Ms Koraou against a harmful cultural practice, it overlooked the necessity of ordering resocialisation as a remedy, as prayed for, and simply responded to the claim for monetary compensation. This act of overlooking resocialisation arguably demonstrates a lack of appreciation regarding the necessity of resocialisation to realising the rights of women in terms of the African Charter. The Court in *Dorothy Njimenze* was given the first opportunity to pronounce on violations to the Maputo Protocol and yet failed to engage with any of the broad-based, educational, and preventative measures requested by the applicants. This, too, demonstrates an underutilisation of resocialisation and a lack of appreciation of its utility. Equally, in the case of *Aminata Diantou*, the Court again missed an opportunity to engage with resocialisation, dismissing any requests for resocialisation as a remedy.

Evidently, the responsiveness of the African and ECOWAS Courts to resocialisation could be enhanced. Notwithstanding these missed opportunities, the African regional system is presented with a unique opportunity to address resocialisation using the Maputo Protocol as its point of departure and to do so correctly while still in its comparatively early stages of jurisprudence. No formula exists for the African and ECOWAS Courts to implement when resocialisation surfaces. Often the facts of a case dictate the content and scope of resocialisation measures on a more practical level. However, this chapter provides conceptual clarity on the legal requirements of an overlooked concept by raising it out from obscurity into the discourse on gender equality. While the topic of resocialisation is given comparatively less attention than the other substantive rights of women, the practice of the CEDAW Committee provides ample scope for the development of resocialisation at a regional level. Where a greater emphasis is placed on resocialisation, the capacity to engage with it develops. The realisation of women's rights remains contingent upon this.

Table of abbreviations

CEDAW	Convention on the Elimination of Discrimination against Women
ECOWAS	Economic Community of West African States
GBD	Gender-based discrimination
GBV	Gender-based violence
IHRDA	Institute for Human Rights and Development in Africa
SGBV	Sexual and gender-based violence

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