

# APDF & IHRDA v Republic of Mali

**Case citation:** APDF & IHRDA v Republic of Mali (046/2016) [2018] AfCHPR 15; (11 May 2018) (African Court on Human and Peoples' Rights) [Decision of May 11, 2018.](#)

## The Court Holding

The African Court on Human and Peoples' Rights (the Court) held that it had jurisdiction over the case since Mali had ratified the treaties under contention. The case was also admissible before it because it conformed with Article 6(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Court Protocol),<sup>1</sup> and Rule 40(6) of the Court.<sup>2</sup>

The Court further held that the Persons and Family Code (Family Code) violated Articles 1(3), 2, 3, 4 and 21 of the African Charter on the Rights and Welfare of Children (Children's African Charter); Articles 2(2), 6(a) and (b), and 21(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol);<sup>3</sup> and Articles 5(a), 16(a) and (b) of The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which the state has ratified.<sup>4</sup> These violations were in relation to child marriage, consent to marriage, discriminatory inheritance and marriage practices. The Court held Mali culpable of these violations, proposing amendments and other revisions to the Family Code.

## Summary of Facts

The Government of Mali, in a quest to revise legislation, drafted a Persons and Family Code No. 2011-087 (Family Code), taking into consideration experts' views, public opinion and stakeholder consultations to protect the rights of individuals and the family unit. The Family Code received an initial good reception and was adopted by National Assembly of Mali for promulgation. However, a fierce protest by Islamic groups prevented the adopted Family Code from being promulgated. These protests led to a second review that ended in drafting a

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<sup>1</sup> CH Heyns, Compendium of key human rights documents of the African Union (2016) 42

<sup>2</sup>[http://en.african-court.org/images/Protocol-Host%20Agrmt/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_English\\_7\\_sept\\_1\\_.pdf](http://en.african-court.org/images/Protocol-Host%20Agrmt/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf) (accessed 18 April 2019)

<sup>3</sup> CH Heyns (note 1 above) 81, 65

<sup>4</sup> <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 18 April 2019)

new Family Code which was adopted on 2 December 2011. The applicants opposed the new Family Code and alleged it violated provisions in the Children's African Charter, The Maputo Protocol, and CEDAW related to minimum (18) years of age to marry, consent to marriage, right to inheritance, and elimination of practices harmful and discriminatory to the rights of women and children.

## Issues

The issues the court debated in making its decision were:

- 1) Whether the Court had jurisdiction to consider the case and if they did, was the case admissible to the Court;
- 2) Whether the violations alleged by the applicant regarding Articles 1(3), 2, 3, 4 and 21 of the Children's Charter, Articles 2(2), 6(a) and (b), and 21(2) of the Maputo Protocol and Articles 5(a), 16(a) and (b) of the CEDAW in relation to minimum age and consent to marriage, inheritance discrimination and the duty of the state to eliminate harmful traditional practices against women and children were of substance and merited consideration; and
- 3) What recourse, if any, was to be taken to stop the continual violations of rights of women and girls.

## Court's Analysis

The Court first dealt with the issue of jurisdiction to entertain the case. In this regard, the Court rejected the argument of the respondent state (Mali) who claimed that the action brought before the Court by the applicant was not consistent with Rule 26 (1) of the establishing protocol of the African Court. Rather, the Court reasoned that the appropriate provisions to consider in this instance is article 3(1) of the Protocol, which relates to the jurisdiction of the Court. In this instance, the allegations by the petitioners against the respondent state involved violations of human right instruments, which Mali had ratified; as such the Court had jurisdiction to hear the case.<sup>5</sup>

On the grounds of minimum age of marriage, the respondent state argued that they had to change the minimum age by reducing the ages, especially that of girl, because of the pressure from Islamic groups and also to align the laws of Mali regarding marriage to the sociocultural

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<sup>5</sup> *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*, Application No. 046/2016, African Court on Human and Peoples' Rights. (2018) Para 27-28

standards of the country. However, the Court opined that the respondent state's reasoning of *force majeure* (unforeseen societal pressures) on grounds of religious protests that disturbed the peace and stability of the country, and the reasoning of synchronising the Malian laws on marriage and inheritance among others as professed by the applicant to meet the sociocultural demands of the Malian society, were in clear violation of ratified human rights instruments.

In addition, the Court rejected the state's argument that a girl of 15 is biologically and psychologically prepared for marriage, noting that this approach undermines the fundamental rights of girls as enshrined in the Children's African Charter and the Maputo Protocol. Therefore, the Court held that Article 281 of the Family Code, which sets a marital age at 18 for boys and 16 or 15 for girls (subject to consent of her father) is inconsistent with the human rights treaties Mali has ratified. In that regard, the Court ruled confirming that the lower age of marriage for girls was a violation of the minimum marriage age (18) citing Article 6(b) of the Maputo Protocol and Articles 2, 4(1) and 21 of the Children's African Charter.<sup>6</sup>

The Court further held that the provisions of the impugned Law (articles 283, 287 and 300) amount to violations of the right to consent to marriage, where unlike civil registry officials; religious leaders could perform marriages without affirming the consent of the principal parties involved, but rather the consent of the parent, especially the father, without facing any sanctions. The Family Code also allowed for a discriminatory multi regime of marriage celebrations between religious leaders and civil registry officials. It permitted religious leaders to apply religious and customary laws that perpetuate the violations of the rights of girls and women. The Court affirmed the violations of international instruments which Mali has ratified. It hinged its judgment on the inconsistency of the new Family Code with the provisions of Articles 2 (1) (a) and 6 of the Maputo Protocol and Articles 10 and 16 CEDAW.

The Court also took cognisance of the violation of the right to inheritance by the adoption of and retention of the Islamic inheritance laws that were included in Article 751 of the new Family Code. Under this Family Code, legitimate female offspring (born in an officially recognised marriage) inherited half of what males did. Children born out of wedlock (illegitimate children) were entitled to inheritance only as a favour, meaning they did not possess any legitimate, legal right of inheritance. The Court held that these practices are

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<sup>6</sup> *APDF & IHRDA v Republic of Mali* (n 3) paras 75-78.

discriminatory and violate article 21(2) of the Maputo Protocol, Articles 3 and 4 of the African Children's Charter and Articles 16(a) and (b) of CEDAW.<sup>7</sup> Furthermore, the Court observed that by adopting the new law, Mali had undermined the rights and freedoms of women and children. The Court ordered the Government of Mali to amend the Family Code and embark on sensitization programmes in order to meet its obligations under ratified treaties.<sup>8</sup>

## Conclusion

The petition succeeded. The Court held the government of Mali to be in violation of its obligations under international law and ordered the State to review and make changes in the Family Code.

## Significance

Many scholars have written on child marriage and discriminatory inheritance dispositions as well as the adverse effects of these entrenched practices on the child's wellbeing and rights.<sup>9</sup> One of the key narratives that runs through the literature is the lack of willingness of states to enforce the rights of the child in the face of customary and religious laws in the African sub-region.<sup>10</sup> This decision serves as an important precedent, requiring states to ensure that provisions of national laws are consistent with obligations under the human rights instruments they have ratified. The Court observed that having ratified The Maputo Protocol, The African Children's Charter and CEDAW, Mali is expected to abide with the provisions of these treaties, regardless of the situation or sentiments shared.<sup>11</sup> This position of the Court sends a strong message to all other African countries that are party to these treaties to ensure

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<sup>7</sup> *APDF & IHRDA v Republic of Mali* (n 4) paras 110-115

<sup>8</sup> *APDF & IHRDA v Republic of Mali* (n 5) paras 124-131

<sup>9</sup> See Chuma Himonga, "Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice, (2002) 9 *International Journal of Children's Rights* at 103-122; Miriam Chinyere Anozie, Milicent Ele and Elizabeth Ijemaka Anika, "The Legal, Medical and Social Implications of Child Marriage in Nigeria" (2018) 32:3 *International Journal of Law, Policy and the Family* 119-139; Nnadi, Ine. "Son Preference - A Violation of Women's Human Rights: A Case Study of Igbo Custom in Nigeria." (2013) 6 *Journal of Politics and Law* at 137-138; and Wodon, Q., Nguyen, M. C., and Tsimpo, C. "Child Marriage, Education, and Agency in Uganda." (2016) 22(1) *Feminist Economics* at 55.

<sup>10</sup> E Neumayer "Do International Human Rights Treaties Improve Respect for Human Rights?" (2005) 49(6) *Journal of Conflict Resolution*, at 926.

<sup>11</sup> *APDF & IHRDA v Republic of Mali* (n 6) para 135

their implementation, especially regarding sensitive issues like child marriage and inheritance discrepancies, which are widespread problems in the continent.<sup>12</sup>

The Court used this case to reaffirm the importance of safeguarding the rights of women and children and the need to abolish or reform obsolete religious and socio-cultural practices that discriminate against women and children. For instance, the Court noted that Islamic and customary laws applied in Mali for inheritance were discriminatory and not in conformance with contemporary human rights provisions. The Court, however, failed to consider the legality of customary and religious succession laws and practices, which continue to serve as a strong area of discrimination against women and children in Africa.<sup>13</sup>

This disposition of the Court is consistent with the outlook of the judicial insensitivities and inconsistencies that arise with the protection of the rights of the African child, especially in circumventing sensitive cultural and religious nuances.<sup>14</sup> The literature on the reconciliation between the right of the child and the cultural and customary laws on the African continent predominantly observe a protective and entrenched position of the customary law provisions over the general rights of the child. As opined by scholars such as Chuma Himonga (2002) in the analysis of The Mthembu case of South Africa, this continuous struggle between the two facets of the laws always put courts in a dilemma when dealing with cases that involve an issue concerned with customary laws and child rights.<sup>15</sup> In some cases, it is even difficult for the courts to properly contextualise what constitute customary laws and at which instance these rules contravene international, regional and national laws. The unfortunate effect is that either the judiciary, as in the current case, decides to be silent on discussing the realities of violations against children and vulnerable groups or takes a position leading to no significant advancement in the protection of child rights regarding customary issues, especially the archaic official versions of this law.<sup>16</sup>

It would have been expected that, being a parent court with high influence over the African sub-region, the Court would have taken time to critically digest the controversies surrounding

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<sup>12</sup>UNICEF ‘Child Marriage’ March 2018 <https://data.unicef.org/topic/child-protection/child-marriage/> (accessed 22 April 2019)

<sup>13</sup> Korang-Okrah, R., Haight, W., Gibson, P., & Black, J. (2019) “Solutions to property rights ‘violations’ experienced by Ghanaian (Akan) widows and their children: The role of international social workers in addressing human rights”, *International Social Work* 62, 1, at 406-408

<sup>14</sup> Chuma, Himonga (note 9 above) 111; See also Braimah, T.S. (2014) ‘Child marriage in northern Nigeria: section 61 of Part 1 of the 1999 constitution and the protection of children against child marriage’, *African Human Rights Law Journal* 14, 474, at 466-477

<sup>15</sup> Chuma Himonga (note 9 above) 104

<sup>16</sup> Chuma Himonga (n4) 102 (2002)

customary succession, placing particular emphasis on the best interest of the child and gender discriminatory practices that are prevalent in the continent. Progressive reasoning put forward by scholars and case law including for instance the vulnerability analysis put forward in *Harksen v Lane NO and Other*,<sup>17</sup> where the South African Constitutional Court maintain that key factors in deciding cases is to assess the vulnerabilities of victims, their position (child, adult, persons with disability...) and the impact of the particular kind of discrimination on the victims, could have been utilised to provide a robust analysis that could have served as landmark jurisprudence for all African states. Moreover, the jurisprudential analysis of the *Cotton Field v. Mexico*,<sup>18</sup> where the Inter-American Court of Human Rights made its first attempt at gender sensitive case analysis and reparation, noting specifically the duty of the Court to critically scrutinise violation not only on prayers of victims but also on the general human rights sensitivities, specifically those on gender based violence, could have again be adopted in the African Court's analysis.<sup>19</sup>

That notwithstanding, this decision is crucial, as it was the first time the Court applied the provisions of the Maputo Protocol in its decision.<sup>20</sup> This is significant because the decision has injected some form of authority, and practical usefulness, into the Maputo Protocol. Although the Maputo Protocol contains progressive and ground-breaking provisions to safeguard the rights of women in the region,<sup>21</sup> it has been underutilised. However, this decision of the African Court breathes life and substance into the Protocol and this has an enormous ripple effect in advancement of women rights in Africa. It also shows a change in the Court's outlook towards protecting women rights.

Again, this decision reinforces authoritative guidance provided by treaty monitoring bodies on issues of child marriage and harmful discriminatory practices against women and children.<sup>22</sup> The precedent set by the African Court has subtly elevated the relevance and

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<sup>17</sup> *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997)

<sup>18</sup> *Gonzalez et al. v. Mexico ("Cotton Field")* Inter-Am. Ct. H.R. (ser. C) No. 205 (16 Nov. 2009)

<sup>19</sup> Ruth Rubio-Marin and Clara Sandoval, (2011) "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment", *Human Rights Quarterly* 33, 4, at 1065-1069

<sup>20</sup> [https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing\\_Life\\_into\\_Maputo\\_Protocol\\_Case\\_DigestJurisprudence\\_on\\_the\\_Rights\\_of\\_Women\\_and\\_Girls\\_in\\_Africa.pdf?1543482389](https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing_Life_into_Maputo_Protocol_Case_DigestJurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf?1543482389) (accessed 22 April 2019)

<sup>21</sup> <https://www.chr.up.ac.za/opinion-pieces/1372-op-ed-balanceforbetter-investing-in-african-women-and-girls-rights-will-lead-to-their-empowerment> (accessed 22 April 2019)

<sup>22</sup> See for instance, General Recommendation 31 of the CEDAW Committee, and the Joint General Comment by the Expert Committee of the Rights of the Child in Africa and the African Commission on Child Marriage 2017.

potency of regional treaties, particularly the Children's African Charter and the Maputo protocol since state parties now see a practical repercussion and reparations of violating these treaties.

Critically, in as much as this ruling was significantly progressive in tackling children's age and consent to marriage respectively, the Court, as in the inheritance analysis above, again failed to tackle the discriminatory customary and religious laws and influences forming the realities underpinning child marriage. It should be noted that a vast portion of gender-based discrimination against women and children, especially the girl child, is rooted in religious and customary provisions that are unfortunately confirmed in legal status in guises such as the right to celebrate one's culture.<sup>23</sup> In this decision for instance, the Court only responded to the violations on articles professed by the applicant on child and consent to marriage respectively, without any further analysis of the dynamics fuelling these issues, such as reasons why those customary rules are so entrenched in the Malian society and why they are gender biased and discriminatory towards females, strategies to properly balance particularly living customary laws (customary laws that are dynamic, liberal and responsive to human rights evolution) with the contemporary human rights provisions that protect women and children among others.<sup>24</sup> At bare minimum, the Court should have at least discussed the thought and justification of the respondent state finding it worthy to sacrifice the rights of the child on the altar of religious protest, because this position and behaviour of Mali applies to many African countries that will undermine the rights of the vulnerable at the slightest opportunity, showing their level of commitment in safeguarding the rights of vulnerable groups including children. Arguably, this behaviour of African countries is the root of almost all human rights challenges faced in this sub-region.<sup>25</sup>

It is therefore prudent, whilst commending this decision by the African Court for championing the rights and health of the girl child and women to also observe the realities that underlie the causes of discrimination that manifest into the violations.

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<sup>23</sup> Chuma Himonga (note 9 above) 95-96

<sup>24</sup> Chuma Himonga (note 9 above) 96

<sup>25</sup> Moore, E., and Himonga, C. (2018) "Living Customary Law and Families in South Africa", *The South African Child Gauge*, 2018 (South Africa: Children's Institute, University of Cape Town). 61, at 68