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WOMEN'S EQUALITY AND ECONOMIC RIGHTS

WHITE PAPER



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ABBREVIATIONS AND ACRONYMS

ACPHR	African Commission on Human and People’s Rights
AU	African Union
Banjul Charter	African Charter on Human and Peoples’ Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social, and Cultural Rights
GBV	Gender Based Violence
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Civil Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
IAWRAW	International Women’s Rights Action Watch Asia Pacific
Maputo Protocol	Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

INTRODUCTION

This White Paper discusses women’s equality and economic rights in Southern and Eastern Africa. It focuses specifically on women’s equality and economic rights and does not delve into many other important rights, such as the rights to health, education, or political participation. The international and regional human rights provisions and case law discussed in this piece reflect research conducted up to December 2020.

This White Paper is part of a broader research project to assess progressive judicial developments with regards to women’s economic rights and access to justice. It is accompanied by a Case Compendium with summaries of important judicial decisions in Eastern and Southern Africa and a Mapping of judicial officers and advocates in Eastern and Southern Africa who have been instrumental in advancing women’s economic rights and access to justice.

This White Paper on Women’s Equality and Economic Rights was drafted by Rebecca Ramirez, a legal intern with the Human Rights Clinic of the University of Miami School of Law, under the supervision of the Clinic’s Acting Director, Tamar Ezer. Ishita Dutta of the International Women’s Rights Action Watch Asia Pacific (IWRAP Asia Pacific) further provided important guidance. Additionally, valuable review and suggestions were provided by Allan Maleche and Nerima Were of the Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN), Lesego Nchunga of the Initiative for Strategic Litigation in Africa (ISLA) and Anneke Meerkotter of the Southern Africa Litigation Centre (SALC).

The right to equality is essential for the realization of all women’s rights— equality and dignity stand as bases from which all subsequent rights are respected, protected, and fulfilled. In examining women’s economic rights, this paper thus focuses on equality, including within marriage and the family, property rights, and work rights. Laws and policies related to women’s economic rights can empower women or reinforce inequality creating the conditions for gender-based violence (“GBV”). Discrimination against women is often channeled into harassment and exploitation which then results in GBV. GBV refers to “violence that is directed against a woman because she is a woman or that affects women disproportionately”¹ and encompasses “physical, sexual, psychological or economic harm or suffering to women.”² A 2017 estimate from The World Health Organization found that “about 1 in 3 (35%) of women worldwide have experienced either physical and/or sexual intimate

¹ CEDAW, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19 (Sixty-eighth session, 2017), U.N. Doc. CEDAW/C/GC/35 at para. 1 (2010) [hereinafter *CEDAW GR 35*]; See also Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa [Maputo Protocol] (Addis Ababa, Ethiopia, 28 Mar. 2003) (2003), *entered into force* 25 Nov. 2005 at art.1(j)(“all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.”).

² *Id.* at para. 1 (“discrimination against women . . . includes gender-based violence, that is, ‘violence which is directed against a woman because she is a woman or that affects women disproportionately,’ and, as such is a violation of their human rights.”). Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa [Maputo Protocol] (Addis Ababa, Ethiopia, 28 Mar. 2003) (2003), *entered into force* 25 Nov. 2005 (stating “violence against women’ means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts.”).

partner violence or non-partner sexual violence in their lifetime.”³ A 2016 report from the Social Institutions and Gender Index, an average of “43% of women in [sub-Saharan Africa] have experienced gender-based violence in their lifetime.”⁴ Judicial interpretation in this area is thus pivotal for gender justice, as highlighted by the **Bellagio Declaration** on “state obligation and role of the judiciary in ensuring access to justice for gender based violence, including sexual violence in an effective, competent manner and with a gender perspective.”⁵ Specifically, the Declaration acknowledges “the vital role that an independent judiciary plays in the elimination of sexual violence against women and girls in interpreting and applying national constitutions and laws in the light of those [human rights] principles.”⁶ Members of the judiciary, therefore, “have a responsibility to be aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws and apply them systematically.”⁷

Judges occupy a unique position within the State that greatly impacts the rights enjoyed by women. Judges can play a critical role in advancing women’s rights by ensuring access to justice and providing a forum to address violations. Members of the judiciary at all levels have opportunities to develop or apply the law in ways that are consistent with human rights and women’s equality. **The Bangalore Principles of Judicial Conduct** recognizes several core values that should be upheld by judges in their professional endeavors: “independence, impartiality, integrity, propriety, equality, competence and diligence.”⁸ Additionally, the Principles mandates that judges “shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.”⁹ Judges have a particularly important role when it comes to the implementation of international and regional human rights standards. The Bangalore Principles, like the Bellagio Declaration, requires that judges stay “informed about relevant developments of international law, including international conventions and other instruments establishing human rights

³ *Violence Against Women*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (last visited Nov. 20, 2020).

⁴ *Sub-Saharan Africa SIGI Regional Report*, SOCIAL INSTITUTIONS AND GENDER INDEX 1, 8 (2016) https://www.genderindex.org/wp-content/uploads/files/docs/Brochure_SIGI_SSA_web.pdf. (While “many African states have ratified the Maputo Protocol and CEDAW, laws in effect continue to discriminate against women and girls and contribute to the perpetuation of sexual violence across the continent.”)

⁵ *The Bellagio Declaration*, INTERNATIONAL WOMEN’S RIGHTS ACTION WATCH ASIA PACIFIC, 1 (2017), https://www.iwraw-ap.org/wp-content/uploads/2018/04/The-Bellagio-Declaration_2017.pdf.

⁶ *Id.* at 3.

⁷ *Id.* at 4; *See also Guidelines on Combatting Sexual Violence and its Consequences in Africa*, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS 1, 18 (Oct. 2010), <https://docplayer.net/84277593-Y-b-n-iv-e-r-e-s-p-o-u-r.html>. (The ACHPR provides guidelines on combatting sexual violence and its consequences in Africa and reported that under the due diligence principle, “States must adopt the necessary legislative and regulatory measures to act with due diligence to prevent and investigate acts of sexual violence committed by State and non-State actors, prosecute and punish perpetrators, and provide a remedies to victims.” The ILO mandates that States “guarantee that their national legal framework criminalizes forms of sexual violence” and that this legal framework is disseminated into judicial services); *See also* UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, (Eleventh session, 1992), U.N. Doc. A/47/38 (1992) [hereinafter *CEDAW GR 19*]; *See also CEDAW GR 35*, *supra* note 1.

⁸ *Commentary on the Bangalore Principles of Judicial Conduct*, UNITED NATIONS OFFICE OF DRUG AND CRIME at 8, https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf (last visited September 6, 2019).

⁹ THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, 1, 6 (2002), https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

norms.”¹⁰ This is in line with the United Nations (UN) Human Rights Committee’s recognition that “all branches of government (executive, legislative and judicial) . . . at whatever level - national, regional or local” play a role in fulfilling the state’s human rights obligations under the International Covenant on Civil and Political Rights.¹¹ The judiciary can ensure enjoyment of rights “in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.”¹² **CEDAW**, Article 2 likewise highlights the role of “competent national tribunals” to ensure “the effective protection of women against any act of discrimination.”¹³

Access to justice mandates addressing discrimination in the judicial system. The CEDAW Committee in **General Recommendation No. 33** defines the ‘State obligation’ to address discrimination to include access to justice for women.¹⁴ The Recommendation recognizes several obstacles prevalent in global judicial systems that impede women’s access to justice, including “gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.”¹⁵ Moreover, the Recommendation acknowledges that “in some communities, women are unable to approach justice systems without the assistance of a male relative, and social norms hinder their ability to exercise autonomy outside the household.”¹⁶ Additionally, **CEDAW General Recommendation No. 21** illustrates that a “woman’s right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts.”¹⁷ Other countries accord women less respect or weight in court when women provide evidence or act as witnesses.¹⁸ Accordingly, court systems must ensure women’s access to justice by according them equal weight at all stages of litigation. Finally, the Committee in **Recommendation No. 33** mandates that justice systems be “free of myths and stereotypes” and States Parties should strive for impartiality in an effort to ensure equality and justice for women.¹⁹

This Paper is organized thematically and examines the human rights standards and interpretations for each of the following: (1) equality rights; (2) rights to equality within marriage and the family (3) property rights; and (4) work rights. Within each category of rights, the Paper draws on the relevant regional and international human rights instruments and interpretations. At the regional level, this

¹⁰ *Id.* at 7.

¹¹ Human Rights Committee, General Comment 31, (Eightieth session, 2004), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1 at para. 3 (2004). [hereinafter *HRC GC 31*].

¹² *Id.* at 6.

¹³ Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 13,19 I.L.M. 33 (1980), *entered into force* 3 Sept. at art. 2 [hereinafter *CEDAW*].

¹⁴ CEDAW, General Recommendation 33 on Women’s Access to Justice (Sixty-first session, 2015), U.N. Doc. CEDAW/C/GC/33 at para. 2 (2015) [hereinafter *CEDAW GR 33*].

¹⁵ *Id.* at para. 3.

¹⁶ *Id.* at para. 43.

¹⁷ CEDAW, General Recommendation 21 Equality in marriage and family relations (Thirteenth session, 1994), U.N. Doc. A/49/38 at 1, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 250, para. 8 (2003) [hereinafter *CEDAW GR 21*].

¹⁸ *Id.*

¹⁹ *CEDAW GR 33*, *supra* note 14, at para. 28.

entails the [African Charter on Human and Peoples' Rights \(“Banjul Charter”\)](#)²⁰, the [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa \(“Maputo Protocol”\)](#)²¹ and finally the [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons](#).²² The African human rights system itself explicitly incorporates international standards. **Article 18** of the [Banjul Charter](#) obligates States to “ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”²³ **Article 60** urges drawing “inspiration from international law on human and peoples' rights,” including “the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”²⁴ At the international level, this Paper examines rights through the three instruments that comprise the international bill of rights: The [Universal Declaration of Human Rights \(“UDHR”\)](#)²⁵, the [International Covenant on Economic, Social and Cultural Rights \(“ICESCR”\)](#)²⁶, and the [International Covenant on Civil and Political Rights \(“ICCPR”\)](#)²⁷. Next, the Papers identifies relevant provisions from the [Convention on the Elimination of All Forms of Discrimination against Women \(“CEDAW”\)](#)²⁸ and from the [International Labor Organization \(“ILO”\)](#)²⁹. The Paper then provides an analysis based on important court opinions from Southern and Eastern African countries, organized in reverse chronological order, with the most recent cases listed first, and includes a brief explanation of the importance of these rights within the African context. Finally, the Appendix includes a review of Constitutional provisions relating to each of the four clusters of rights discussed in this Paper.

The judiciary in Southern and Eastern African states are in a critical position to ensure women’s access to justice and fundamental rights, including equality rights, rights to equality within marriage and the family, property rights, and work rights. Judges, by virtue of their role as leaders and administrators of justice in the community, can interpret laws recognizing women as empowered, capable, and deserving

²⁰ African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), *entered into force* 21 Oct. 1986. [hereinafter *Banjul Charter*].

²¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [Maputo Protocol] (Addis Ababa, Ethiopia, 28 Mar. 2003) (2003), *entered into force* 25 Nov. 2005 [hereinafter *Maputo Protocol*].

²² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Addis Ababa, Ethiopia, 31 Jan. 2016) (2016), *entered into force* 05 July 2019 [hereinafter *Rights of Older Persons*].

²³ *Banjul Charter*, *supra* note 20, at 6.

²⁴ *Banjul Charter*, *supra* note 20, at 16.

²⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). [hereinafter *UDHR*].

²⁶ International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976 [hereinafter *ICESCR*].

²⁷ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979 [hereinafter *ICCPR*].

²⁸ *CEDAW*, *supra* note 13.

²⁹ Conventions, INTERNATIONAL LABOR ORGANIZATION, <https://www.ilo.org/dyn/normlex/en/f?p=1000:12000::NO:::> (last visited Sept. 6, 2019) [hereinafter *ILO*].

of equal treatment and opportunity. Judges can thus play a transformational role, helping to free society of gender biases and stereotypes that hinder women, as well as the country's development.³⁰

EQUALITY RIGHTS

I. *International and Regional Instruments and Interpretations*

This section discusses women's right to equality in Southern and Eastern Africa as enshrined in regional and international human rights instruments. The **Maputo Protocol** defines "discrimination against women" in **Article 1** to mean "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life."³¹ In interpreting the right to equality under the ICCPR, the **Human Rights Committee General Comment No. 31** elaborates that "all branches of government (executive, legislative and **judicial**), and other public or governmental authorities, at whatever level - national, regional or local" are a potential categorical extension of the State Party.³² As such, the role of the judiciary plays a critical role when discussing and considering the impact a judge's decision can have on furthering women's rights. This section covers the right to equality, providing a general overview of this right, and a particular focus on state obligations, substantive equality, addressing discrimination in custom and practice, and the rights of older women.

Right to Equality: General Overview

Women's fundamental right to equality is enshrined in all major regional and international human rights instruments, guiding the conduct of states. The **Banjul Charter** lays the framework for equality in **Article 2** by mandating that "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."³³ The Charter carries this message into **Article 3** by requiring that "every individual shall be equal before the law" and are "entitled to equal protection of the law."³⁴ The **Banjul Charter** obligates the State in **Article 18** to "ensure the elimination of every discrimination against women."³⁵ Individuals have a duty under **Article 28** to "respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing

³⁰ See also *Empowering Women Is Key To Building A Future We Want, Nobel Laureate Says*, UNITED NATIONS DEVELOPMENT PROGRAMME (Sep. 27, 2012), <https://www.undp.org/content/undp/en/home/presscenter/articles/2012/09/27/empowering-women-is-key-to-building-a-future-we-want-nobel-laureate-says.html> (Amartya Sen, "professor of economics and philosophy at Harvard University...Nobel laureate and a founder of UNDP's Human Development Index" believes that "empowering women and girls with more choices and more freedoms is crucial to achieving a better future for all... Women agency and freedom are among the crucial means for enhancing [economic] development").

³¹ *Maputo Protocol*, note 21, art. 1; See also *CEDAW*, *supra* note 13, art. 1 (defining discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.).

³² *HRC GC 31*, *supra* note 11, at para. 4.

³³ *Banjul Charter*, *supra* note 20, at art. 2; See *UDHR*, *supra* note 25, at art. 2.

³⁴ *Id.* at art. 3.

³⁵ *Id.* at art. 18.

mutual respect and tolerance.”³⁶ The [Maputo Protocol](#) elaborates upon the Banjul Charter and goes a step further to identify women as a group who are categorically vulnerable to prejudice and discrimination.³⁷ **Article 3** requires States Parties to prohibit the exploitation and degradation of women in order to respect her dignity, especially in the interest of protecting women from sexual and verbal violence.³⁸ **Article 8** requires States Parties to afford women equal access to justice and equal protection before the law by ensuring “effective access by women to judicial and legal services, including legal aid.”³⁹ States Parties must “punish the perpetrators of violence against women” and adopt “legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women.”⁴⁰

The right to equality is likewise espoused in international instruments. The [UDHR](#)⁴¹ is the foundational document of the international human rights system. **Article 1** says “all human beings are born free and equal in dignity and rights.”⁴² The words “free and equal in dignity and rights” express the Declaration’s thematic and foundational core. Such concepts are prevalent throughout the entire document and informed all equal protection clauses in succeeding human rights instruments. Furthermore, all persons are considered “equal before the law and are entitled without any discrimination to equal protection of the law” in **Article 7**.⁴³ The [ICCPR](#)⁴⁴ provides strong protections for equality as a core civil and political right. The obligation of the State parties to respect civil and political rights regardless of sex is fleshed out early on in **Article 2**.⁴⁵ The ICCPR endeavors for States to ensure that men and women are provided equal rights to the “enjoyment of all civil and political rights.”⁴⁶ **Article 26** identifies all people as “equal before the law and are entitled without any discrimination to the equal protection of the law... shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...”⁴⁷ This article is interpreted by **Human Rights Committee General Comment No. 18** to stand as a general prohibition of “discrimination in law or in fact in any field regulated and protected by public authorities.”⁴⁸ The effect of this clause casts a broad net to ensure that States remain vigilant and conscientious that laws passed are in compliance with the basic principle of non-discrimination. The [ICESCR](#) similarly prohibits discrimination with regards to social, economic, and cultural rights in **Article 2**.⁴⁹ **Article 3** requires that States “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights” laid out in the Covenant.⁵⁰ Finally, **CEDAW** calls on States to “take in all

³⁶ *Id.* at art. 28.

³⁷ *Maputo Protocol*, *supra* note 21, at art. 2.

³⁸ *Id.* at art. 3.

³⁹ *Id.* at art. 8.

⁴⁰ *Id.* at art. 4.

⁴¹ *See generally* UDHR, *supra* note 25.

⁴² *Id.* at art. 1.

⁴³ *Id.* art. 7.

⁴⁴ *See generally* ICCPR, *supra* note 27.

⁴⁵ *Id.* at art. 2.

⁴⁶ *Id.* at art. 3.

⁴⁷ *Id.* at art. 26.

⁴⁸ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) at para. 12 [hereinafter *HRC GC 18*].

⁴⁹ *ICESCR*, *supra* note 26, at art. 2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

⁵⁰ *Id.* at art. 3.

fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.⁵¹

State Obligations

International law identifies three obligations of States Parties: to *protect, respect, and fulfill* the human right to equality. The **Committee on Economic, Social, and Cultural Rights (CESCR)** sets out this tripartite scheme: to *respect* individuals' rights by refraining from direct or indirect discrimination; to *protect* the rights by taking "steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women;" and to *fulfill* the rights by ensuring in practice that "men and women enjoy their economic, social and cultural rights on a basis of equality."⁵² The means by which the State must carry out their duties includes the requirement to "conduct human rights education and training programmes for judges and public officials."⁵³ **CEDAW** in Article 2 condemns "discrimination against women in all its forms,"⁵⁴ which **CEDAW General Recommendation No. 28** interprets as following the same tripartite scheme. The State obligation to *respect* takes the form of refraining from "making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women."⁵⁵ The obligation to *protect* acknowledges the relationship of private-actors inflicting discrimination and implores States to eliminate "customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women."⁵⁶ To *fulfill* its obligation, the Recommendation requires States to take legislative measures, implement national policies, and update statistical databases to prevent all actors from the private, public, and domestic spheres from discriminating against women.⁵⁷ The **Banjul Charter** likewise establishes the State's positive duty with regards to the fulfilment of rights in **Article 25** which vests States with the "duty 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."⁵⁸

Substantive Equality

Substantive equality as defined by the CEDAW Convention is comprised of two parts: (1) "equality of opportunity in terms and access to the resources of a country, to be secured by a framework of

⁵¹ *CEDAW*, *supra* note 13, at art. 3.

⁵² Economic and Social Council, General Comment 16 The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights) (Thirty-fourth session, 2005), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. E/C.12/2005/411 at para. 18-22 (2005). [hereinafter *ECOSOC 16*].

⁵³ *Id.* at para. 21.

⁵⁴ *CEDAW*, *supra* note 13, at art. 2.

⁵⁵ CEDAW, General Recommendation 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (Forty-seventh session, 2010), U.N. Doc. CEDAW/C/GC/28 at para. 9 (2010) [hereinafter *CEDAW GR 28*].

⁵⁶ *Id.* at para. 9.

⁵⁷ *Id.* at 10.

⁵⁸ *Banjul Charter*, *supra* note 20, at art. 25.

laws and policies, and supported by institutions and mechanisms for their operation; [and] (2) Equality of results upon access and opportunity, toward achieving real change for women. State parties to CEDAW have a responsibility to ensure the practical realisation of rights, and are thus obliged to show results.”⁵⁹ The “concept of substantive equality arose out of the recognition that formal equality may not be sufficient to ensure that women enjoy the same rights as men.”⁶⁰ A ‘gender-neutral policy’ may “result in a de facto discrimination against women” as it does not consider “sex or biological differences,” or gender and socially-created differences that result in “norms and assumptions about women and men’s roles in society, and their capability and need.”⁶¹ Moreover, **HRC General Comment No. 18** outlining the principle of non-discrimination in the ICCPR explains that “[t]he enjoyment of rights and freedoms on equal footing, however, does not mean identical treatment in every instance.”⁶² To illustrate this point, the HRC states that in order to achieve equality, States parties must sometimes take affirmative action to “diminish or eliminate conditions” which perpetuate prohibited discrimination.⁶³ An example of this corrective action “may involve [a State] granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.”⁶⁴

States Parties are required under international and regional human rights law to acknowledge and address the prevalence of both de jure and de facto discrimination against women. **CESCR in General Comment No. 16** distinguishes “de jure (or formal) equality and de facto (or substantive) equality.”⁶⁵ “Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner.”⁶⁶ However, substantive equality looks to “the effects of laws, policies and practices” to see that “they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.”⁶⁷ The comment requires legislative respect as well as support by “administrative agencies, and courts and tribunals, and implies that those authorities must apply the law equally to men and women.”⁶⁸ There are two types of discrimination: (1) direct discrimination occurs when the sex and characteristics of men and women create a distinctly different result, “which cannot be justified objectively;” and (2) “indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented.”⁶⁹ Additionally, the **ACHPR** in its comment on **Article 7(d)** of the **Maputo Protocol** provides that pursuant to the doctrine of substantive equality, “the law should consider relevant differences that pose disadvantage to an individual or a particular group.”⁷⁰ Importantly, [a]s opposed to the form of laws, [the] concern [of substantive equality] is with the actual enjoyment of a right and unmasking the factors that hinder attainment of equality in fact.”⁷¹ The **Maputo Protocol** states in **Article 2** that elimination of

⁵⁹ *Substantive Equality*, INTERNATIONAL WOMEN’S RIGHTS ACTION WATCH ASIA PACIFIC, <https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/substantive-equality/> (last visited Sept. 30, 2019).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *HRC GC 18*, *supra* note 55, at para. 8.

⁶³ *Id.* at para. 10

⁶⁴ *Id.*

⁶⁵ *ECOSOC 16*, *supra* note 52, at para. 7.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at para. 9.

⁶⁹ *Id.* at para. 13.

⁷⁰ African Commission on Human and Peoples’ Rights, General Comment on Article 7(d) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Twenty-seventh session, 2020) at para. 42 [hereinafter *ACHPR Art. 7(d)*].

⁷¹ *Id.*

discrimination against women requires States Parties to “take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.” The Protocol urges States to “integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.”⁷²

Addressing Discrimination in Custom and Practice

Human rights instruments call for the elimination of discrimination against women in customs and practice, clarifying that stereotypes and attitudes must not justify the continued violation of women’s right to equality.⁷³ **Article 5** of the **Maputo Protocol** requires States Parties to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women.”⁷⁴ To remediate the prevalence of “harmful practices, violence, abuse, and intolerance,” States must provide support through “legal and judicial support.”⁷⁵ **Article 8** of the **Maputo Protocol** mandates that States reform “existing discriminatory laws and practices in order to promote and protect the rights of women.”⁷⁶ Additional efforts must be made to “modify the social and cultural patterns” with a goal of “achieving the elimination of harmful cultural and traditional practices ... which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”⁷⁷ Education on promoting peace and respect for the lives and integrity of women must be provided by States “in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women.”⁷⁸ The **Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons** affords “protection from abuse and harmful traditional practices” to older women in **Article 8**, which requires States Parties to “prohibit and criminalize harmful traditional practices targeted at older persons” and eliminate practices including “witchcraft accusations, which affect the welfare, health, life, and dignity” of older women.⁷⁹ International law echoes this. The **Human Rights Committee in General Comment No. 28** recognizes that, “inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.”⁸⁰ **Article 2(f)** of **CEDAW** affirms that “States Parties condemn discrimination against women in all its forms” and therefore must undertake “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”⁸¹ Furthermore, **Article 5(a)** underscores that States Parties must “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”⁸² Finally, **CEDAW General Recommendation No. 27** requires States to “eliminate negative stereotyping” and modify patterns of conduct to reduce

⁷² *Maputo Protocol*, *supra* note 21, at art. 2.

⁷³ See generally Human Rights Committee, General Comment 28, Art. 3 (Sixty-eighth session, 2000), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 at 38 (1994) (describing State obligation to ensure the protection of women’s right to equality).

⁷⁴ *Maputo Protocol*, *supra* note 21, at art. 5.

⁷⁵ *Id.*

⁷⁶ *Id.* at art. 8; see also *CEDAW*, *supra* note 13, at art. 2.

⁷⁷ *Id.* at art. 2; see also *CEDAW*, *supra* note 13, at art. 5.

⁷⁸ *Id.* at art. 4.

⁷⁹ *Older Persons*, *supra* note 22, at art. 8.

⁸⁰ *Id.* at para. 5.

⁸¹ *CEDAW*, *supra* note 13, at art. 2.

⁸² *Id.* at art. 5.

the “physical, sexual, psychological, verbal and economic abuses that older women” experience, which stem from “negative cultural practices” and stereotypes.⁸³

Right to Equality and GBV

Human rights law specifically defines GBV as a form of discrimination against women.⁸⁴ **CEDAW General Recommendation No. 35** further affirms that social norms regarding masculinity and men’s entitlement and privilege over women are often at the root of many acts of GBV.⁸⁵ Thus, GBV is “a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.”⁸⁶ GBV harms the enjoyment of many rights and freedoms protected under international and regional human rights law. As it pertains to this White Paper, GBV can impair a woman’s “the right to equal protection under the law, [t]he right to equality in the family, [and] [t]he right to just and favourable conditions of work.”⁸⁷

The judiciary has a particular responsibility to address acts of GBV.⁸⁸ Women who have faced GBV should be provided “[e]ffective complaints procedures and remedies, including compensation.”⁸⁹ Legal proceedings should be accessible to all women “irrespective of residency status,”⁹⁰ and States must “[e]nsure that all legal systems, including plural legal systems, protect victims/survivors of gender-based violence against women.”⁹¹ Moreover, “[f]ees or court charges should not be imposed on victims/survivors.”⁹² Courts further have the responsibility to address legal provisions in “customary, religious, and indigenous law that are discriminatory against women and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence.”⁹³ For example, laws that prevent a woman from reporting GBV, such as guardianship law are discriminatory and should be repealed.⁹⁴

Rights of Older Women

Both regional and international law recognize the particular need to address discrimination older women face. Under the **Banjul Charter**, the “aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”⁹⁵ **Article 3** of **The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons** obligates the States to “prohibit all forms of discrimination against older persons and encourage the elimination of social and cultural stereotypes which marginalize older persons.”⁹⁶ States are required under **Article**

⁸³ CEDAW, General Recommendation 27 on older women and protection of their human rights (Forty-seventh session, 2010), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CEDAW/C/2010/47/GC.1 at para. 36 (2010). [hereinafter *CEDAW GR 27*].

⁸⁴ *CEDAW GR 19, supra* note 7, at para. 6.

⁸⁵ *CEDAW GR 35, supra* note 1, at para. 19.

⁸⁶ *Id.* at para. 9.

⁸⁷ *CEDAW GR 19, supra* note 7, at para. 7.

⁸⁸ *CEDAW GR 35, supra* note 1, at para. 26(c).

⁸⁹ *Id.* at para. 24(i).

⁹⁰ *Id.* at para. 31(b).

⁹¹ *Id.* at para. 29(b).

⁹² *Id.* at para. 32(a).

⁹³ *Id.* at para. 29(c).

⁹⁴ *Id.* at para. 29(c)(iii).

⁹⁵ *Banjul Charter, supra* note 20, at art. 18.

⁹⁶ *Older Persons, supra* note 22, at art. 3.

8 to “prohibit and criminalize harmful traditional practices targeted at Older Persons” and eliminate such practices including “witchcraft accusations, which affect the welfare, health, life and dignity of Older Persons, particularly Older women.”⁹⁷ **Article 9** provides additional protection of the “rights of older women from violence, sexual abuse, and discrimination based on gender.”⁹⁸ **CEDAW General Recommendation No. 27** acknowledges that the “impact of gender inequalities” is “exacerbated in old age and is often based on deep rooted cultural and social norms.”⁹⁹ Sexual violence, domestic violence, and “violence in institutional settings” against older women must be prohibited.¹⁰⁰ The Recommendation calls on States to educate older women by providing them with “information on their rights and how to access legal services.”¹⁰¹ The judiciary, legal aid, and paralegal services should be trained “on the rights of older women” and sensitized to “age- and gender-related issues that affect older women.”¹⁰²

RIGHTS TO EQUALITY WITHIN MARRIAGE AND THE FAMILY

I. *International and Regional Instruments and Interpretations*

This section discusses equality within the context of marriage and the family. It focuses on the marital and family rights enshrined in regional and international human rights instruments and their relevant interpretations.

Marital Rights

Regional human rights law clarifies the equal rights and responsibilities of women and men within marriage. The **Maputo Protocol** places obligation on the state to “ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.”¹⁰³ **Article 6** requires the enactment of national legislation to guarantee that marriage is entered into with “free and full consent of both parties.”¹⁰⁴ **Article 7** of the Maputo Protocol requires the enactment of legislation to “ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage.”¹⁰⁵ Specifically, these rights include an equal right to “seek separation, divorce or annulment of a marriage,” “reciprocal rights and responsibilities towards their children,” and “the right to an equitable sharing of the joint property deriving from the marriage.”¹⁰⁶

Women have the right to marry and are required to provide consent before marriage. The **UDHR** provides in **Article 16** that men and women “without any limitation due to race, nationality or religion, have the right to marry and to found a family” and are entitled to equal rights “during marriage and at its dissolution.”¹⁰⁷ Similarly, **CEDAW** provides in **Article 9** that States shall provide men and women

⁹⁷ *Id.* at art. 8.

⁹⁸ *Id.* at art. 9.

⁹⁹ *CEDAW GR 27, supra* note 83 at para. 11.

¹⁰⁰ *Id.* at para. 37.

¹⁰¹ *Id.* at para. 33.

¹⁰² *Id.*

¹⁰³ *Maputo Protocol, supra* note 21, at art. 26.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at art. 7.

¹⁰⁶ *Id.*

¹⁰⁷ *UDHR, supra* note 25, at art. 16.

equal rights to “change or retain their nationality” and the right to give their children a nationality.¹⁰⁸ No circumstance “shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”¹⁰⁹ Similar to the Maputo Protocol, the UDHR, ICCPR¹¹⁰ and ICESCR¹¹¹ requires intending spouses to provide “free and full consent” prior to marriage.¹¹² Finally, **CEDAW General Recommendation No. 21** states that laws should enforce and protect “a woman’s right to choose when, if, and whom she will marry.”¹¹³

International and regional provisions regarding a minimum age for marriage seek to protect women and girls against exploitation in the marital context. Marriage should only be permitted when prospective spouses “have attained full maturity and capacity to act.”¹¹⁴ The health, education and economic autonomy of minor girls can be adversely affected when they marry and have children.¹¹⁵ The **Maputo Protocol** set the minimum age for at 18 years in **Article 6**.¹¹⁶ **CEDAW General Recommendation No. 21** similarly considers 18 the minimum age for marriage of men and women.¹¹⁷ Countries that permit the betrothal of girls through the consent of family members violate CEDAW and a “a woman’s right freely to choose her partner.”¹¹⁸ Additionally, domestic laws that provide for different ages for marriage for men and women “assume incorrectly that women have a different rate of intellectual development from men” and should be abolished.¹¹⁹

Human rights law further recognizes equal marital rights and responsibilities for women and men. **CEDAW** mandates in **Article 16** that appropriate measures be made to “eliminate discrimination against women in all matters relating to marriage and family relations.”¹²⁰ CEDAW adds that States must provide the “same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.”¹²¹ An effect of discrimination against women “often result[s] in the husband being accorded the status of head of household and primary decision maker and therefore contravene[s] the provisions of the Convention.”¹²² Similarly, the **ACHPR in General Comment on Article 7(d)** of the Maputo Protocol recognizes that women are afforded less economic decision-making power in the household. Instead, the contribution of women are often viewed in terms of their “household and reproductive roles, [yet] neither these roles are taken as having economic value nor any account is given to the economic values of these roles.”¹²³ **Human Rights Committee General Comment No. 19** states that “during marriage, the spouses should have equal rights and responsibilities in the family” including “choice of residence, running of the household,

¹⁰⁸ *CEDAW*, *supra* note 13, at art. 9.

¹⁰⁹ *Id.*

¹¹⁰ *ICCPR*, *supra* note 27, at art. 13.

¹¹¹ *ICESCR*, *supra* note 26, at art. 10.

¹¹² *UDHR*, *supra* note 25, at art. 16.

¹¹³ *CEDAW GR 21*, *supra* note 117, at para. 16.

¹¹⁴ *Id.* at para. 36.

¹¹⁵ *Id.*

¹¹⁶ *Maputo Protocol*, *supra* note 21, at art. 6.

¹¹⁷ *CEDAW GR 21*, *supra* note 17, at para. 36.

¹¹⁸ *Id.* at para. 38.

¹¹⁹ *Id.*

¹²⁰ *CEDAW*, *supra* note 13, at art. 16.

¹²¹ *Id.*

¹²² *Id.* at para. 14.

¹²³ *ACHPR Art. 7(d)*, *supra* note 70, at para. 2.

education of the children and administration of assets.”¹²⁴ Equality must also apply to “arrangements regarding legal separation or dissolution of the marriage” and “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited...”¹²⁵ **CEDAW General Recommendation No. 29** call on States to “establish and fully implement a system of marriage registration” and provide free legal aid “to women who do not have the means to pay for court costs and attorney fees, so as to ensure that no woman is forced to forgo her economic rights to obtain a divorce.”¹²⁶

International and regional human rights standards both challenge the practice of polygamy on the grounds that such relationships create unequal opportunities for men and women, while still protecting women in such marriages, as well as women in informal unions. **Article 6** of the **Maputo Protocol** identifies monogamy “as the preferred form of marriage.”¹²⁷ The **Protocol** states that the rights of women in marriage and family must be promoted and protected, including those in polygamous marital relationships.¹²⁸ Additionally, **CEDAW General recommendation No. 21** seeks to prohibit and discourage polygamous marriages as they “contravene a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents.”¹²⁹ Furthermore, because a de facto union is generally provided no legal protection, “women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law.”¹³⁰ Finally, **CEDAW General Recommendation No. 27** encourages States Parties to “discourage and prohibit polygamous unions” and ensure that a deceased husband’s estate is “shared among the wives and their respective children on a basis of equality” in polygamous marriages.¹³¹

Rights of Families

The family system is regarded by human rights provisions as the core unit of the community and is entitled to respect, protection, and assistance. The **Banjul Charter** identifies the family as the “natural unit and basis of society” which functions as “the custodian of morals and traditional values recognized by the community.”¹³² The **UDHR** similarly defines the family as the “natural and fundamental group unit of society and is entitled to protection by society and the State.”¹³³ **Article 23** of the **ICCPR** mirrors the UDHR by requiring the State to protect the family unit, ensure the “right of men and women to marry and to found a family,” and to “ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”¹³⁴ Accordingly, the

¹²⁴ Human Rights Committee, General Comment 19 (Thirty-ninth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 149, para. 6 (2003). [hereinafter *HRC GC 19*].

¹²⁵ *Id.*

¹²⁶ CEDAW, General Recommendation 29 On Economic consequences of marriage, family relations and their dissolution, U.N. Doc. CEDAW/C/GC/29 (2013), at para. 42 [hereinafter *CEDAW GR 29*].

¹²⁷ *Maputo Protocol*, *supra* note 21 at art. 6.

¹²⁸ *Id.*

¹²⁹ *CEDAW GR 21*, *supra* note 17, at para. 14.

¹³⁰ *Id.* at para. 18.

¹³¹ *CEDAW GR 27*, *supra* note 83, at para. 53.

¹³² *Banjul Charter*, *supra* note 20, at art. 18.

¹³³ *UDHR*, *supra* note 25, at art. 16.

¹³⁴ *ICCPR*, *supra* note 27, at art. 23.

State has the responsibility of taking “care of [families’] physical health and morale.”¹³⁵ To ensure that the family is respected by the community, **Article 29** of the Banjul Charter places duties on the individual to “preserve the harmonious development of the family and to work for the cohesion and respect of the family”¹³⁶ The **ICESCR** acknowledges that a woman’s life surrounding childbirth is particularly sensitive and therefore requires special protection be provided to women before and after childbirth.¹³⁷ Finally, **Article 10** of **ICESCR** places duty on the State to recognize that: “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.”¹³⁸

State responsibility towards the family requires protecting women and girls from family violence. **CEDAW General Recommendation No. 19** characterizes family violence as “one of the most insidious forms of violence against women” and acknowledges its prevalence in all societies.¹³⁹ Women of all ages are subjected to GBV in the home such as rape, sexual assault, and mental violence. Many women are forced to stay in violent relationships because they lack economic independence.¹⁴⁰ Family violence impairs a woman’s health, participation in “family life and public life on a basis of equality.”¹⁴¹ Both criminal and civil penalties are needed to properly address family violence.¹⁴²

Widows’ Rights

Widowed women are entitled to equal human rights protections and must be treated with dignity and respect. The **Maputo Protocol** provides that States should take legal measures to “ensure that widows enjoy all human rights” by ensuring their protection from “inhuman, humiliating or degrading treatment.”¹⁴³ To achieve this goal, widows should “automatically become the guardian and custodian of her children, after the death of her husband,” and have the right to remarry “the person of her choice.”¹⁴⁴

II. Case Analysis

Use of marital power or guardianship as to justify discrimination against women within marriages and in the family directly violates human rights law. The practice of marital power originates from Roman-Dutch common law and prohibits women from bringing a case to court, selling property, signing contracts, taking out a loan, working as the director of a company, or standing as the trustee of a trust.¹⁴⁵ Under marital power, husbands control all of the property of the marriage, whether it was jointly or separately owned prior to the marriage.¹⁴⁶ A leading South African jurist¹⁴⁷ stated that the marital power in its widest sense embraces three elements, namely:

¹³⁵ *Id.*

¹³⁶ *Banjul Charter, supra* note 20, at art. 29.

¹³⁷ *ICESCR, supra* note 26, at art. 10.

¹³⁸ *Id.*

¹³⁹ *CEDAW GR 19, supra* note 7, at para. 23.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at para. 24(r).

¹⁴³ *Maputo Protocol, supra* note 21, at art. 20.

¹⁴⁴ *Id.*

¹⁴⁵ LEGAL ASSISTANCE CENTRE NAMIBIA, *Guide to the Married Persons Equality Act*, 1, 5 (2009).

¹⁴⁶ *Id.*

¹⁴⁷ *See* H.R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 189 (Juta, 5th ed. 1985);

- (a) The husband's power as head of the family by virtue of which he has the decisive say in all matters concerning the common life of the spouses and determines, inter alia, where and in what life style they are to live,
- (b) The husband's power over the person of his wife, including her representation in legal proceedings and
- (c) The husband's power over the property of the wife which enables him, in his absolute discretion, to deal with the joint estate as its administrator and to do the same with the separate assets of his wife, which do not form part of the joint estate.¹⁴⁸

As a result, the “overall effect of the husband's exercise of the marital power is to subject the wife to the husband's guardianship, effectively making her status analogous to that of a minor.”¹⁴⁹

Two types of marriages predominate in Eastern and Southern Africa: civil¹⁵⁰ and customary¹⁵¹ marriages. Women in customary and religious marriages “face the same problems, perhaps to a greater extent, than their counterparts in statutory marriages and deserve to benefit from” provisions and legislation that promote marital equality at the national level. Quansah writes in *Abolition of Marital Power in Botswana: A New dimension in Marital Relationship* that the abolition of marital power has the effect of “freeing of a wife from the shackles of her husband's domicile” and is therefore “another step in the improvement of the status of women.”¹⁵²

The High Court of Eswatini decided the case of *Sacolo v Sacolo*¹⁵³ in 2019. The case concerned a couple married in community of property where the husband sought to retain the marital assets under the doctrine of marital power. The wife brought suit arguing that marital power is discriminatory against women and that portions of Eswatini’s Marriage Act of 1964¹⁵⁴ is racially discriminatory. The Court declared that the doctrine of marital power is invalid as it contravenes Eswatini’s constitutional

See also A. Van Aswegen, *Transactions Between A Spouse and A Third Party: The Effect Of The Matrimonial Property Act 88 Of 1984*, 6 MODERN BUSINESSMAN’S LAW 140, 141 (1984).

¹⁴⁸ E. K. Quansah, *Abolition of Marital Power in Botswana: A New dimension in Marital Relationship*, 1 U. BOTS. L.J. 5, 8 (2005). [hereinafter *Quansah*].

¹⁴⁹ *Id.* at 9.

¹⁵⁰ Civil marriages are defined as marriages conducted by a marriage officer. Marriage officers include all magistrates and most pastors, priests and other church leaders.; See LEGAL ASSISTANCE CENTRE NAMIBIA, *Guide to the Married Persons Equality Act*, 1, 3 (2009).

¹⁵¹ Customary marriages are defined as marriages conducted according to the traditions of the spouses’ community but ceremonies are not officiated by a marriage officer and are not registered. See *Id.*

¹⁵² *Quansah*, *supra* note 120, at 26.

¹⁵³ Makhosazane Eunice Sacolo (nee Dlamini) and Another vs. Jukhi Justice Saco lo and 2 Others (1403/ 16) [2019] SZHC (166) 30th August 2019.

¹⁵⁴ See THE MARRIAGE ACT NO. 47 /1964 at Section 24 and 25 (“24. The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law, as varied from time to time by any law, unless both parties to the marriage are Africans in which case, subject to the terms of Section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi Law and custom; “25 (1) If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnization of the marriage the parties agree that the consequences following (sic) from the marriage shall be governed by the common law. (2) If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the marriage officer shall endorse on the original marriage register and on the duplicate original marriage register the fact of the agreement; and the production -of a marriage certificate, original marriage register or duplicate original marriage register so endorsed shall be prima facie evidence of that fact unless the contrary is proved”).

equality and dignity provisions.¹⁵⁵ Moreover, the Court invalidated portions of the Marriage Act of 1964 where it imposed discriminatory and disparate legal frameworks upon African and non-African married persons.¹⁵⁶ The Court declared that spouses must have “equal capacity and authority to administer marital property.”¹⁵⁷

The 2018 case of *APDF and IHRDA v Republic of Mali*¹⁵⁸ decided by the African Court on Human and Peoples’ Rights addressed whether provisions of the Islamic Family Code, which regulated the rights of individuals and family, including the age of marriage and issues of inheritance, violated women’s rights under international and regional law.¹⁵⁹ The Court found that the Code reinforced discrimination against women and children. Specifically, the Court determined that the Code violated several international and human rights standards including: the minimum of age of marriage requirement, the right to consent to marriage, the right to inheritance for women and children born out of wedlock, and the elimination of traditional and cultural practices harmful to the rights of women and children as codified under the Maputo Protocol, the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁶⁰ and CEDAW. Specifically, the Court held that the Code violated provisions regarding the minimum age to marry including Article 6(b) of the Maputo Protocol,¹⁶¹ Articles 2¹⁶² and 21¹⁶³ of the ACRWC; provisions regarding consent including Article 6(a)¹⁶⁴ of the Maputo Protocol and Article 16(1)(b)¹⁶⁵ of CEDAW; provisions regarding inheritance including Article 21¹⁶⁶ of the Maputo Protocol, and Article 3¹⁶⁷ of the ACRWC; provisions regarding the elimination of harmful

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.* at 13.

¹⁵⁷ *Id.* at 14.

¹⁵⁸ APDF & IHRDA v. Republic of Mali ACtHPR (046/2016), 11 May 2018.

¹⁵⁹ *Id.* at 12.

¹⁶⁰ African Charter on the Rights and Welfare of the Child, OAU DOC. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999. [hereinafter *ACRWC*].

¹⁶¹ *Maputo Protocol*, *supra* note 21, at art. 6 (“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that... the minimum age of marriage for women shall be 18 years.”).

¹⁶² *ACRWC*, *supra* note 160, at art. 2 (stating that a child includes every human being below the age of 18 years).

¹⁶³ *Id.* at art. 21 (“...Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status...”).

¹⁶⁴ *Maputo Protocol*, *supra* note 21, at art. 6 (“no marriage shall take place without the free and full consent of both parties.”).

¹⁶⁵ *CEDAW*, *supra* note 13, at art. 16 (“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same right freely to choose a spouse and to enter into marriage only with their free and full consent.”).

¹⁶⁶ *Maputo Protocol*, *supra* note 21, at art. 21 (“A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. Women and men shall have the right to inherit, in equitable shares, their parents’ properties.”).

¹⁶⁷ *ACRWC*, *supra* note 160, at art. 3 (“Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status”).

practices including Article 2(2)¹⁶⁸ of the Maputo Protocol, Articles 1¹⁶⁹ and 21¹⁷⁰ of the ACRWC, and Article 5(a)¹⁷¹ of CEDAW.

The Constitutional Court of South Africa decided *Mayelane v Ngwenyama*¹⁷² in 2013. The suit was brought by the first wife in a customary polygamous marriage. She claimed that her husband's second marriage should be invalidated on the grounds that she did not consent to allow her husband to enter into another marriage.¹⁷³ The Court agreed and created a brightline rule that requires the first wife in a customary marriage to provide consent to validate any subsequent polygamous marriages. The Court reasoned that all women must have autonomy over their lives and marriages and the practice of marital does not justify disrespect to a woman's dignity. As such, equality requires that a wife provide consent before her husband enters into another marriage.¹⁷⁴ The Court held that the Constitution of the Republic of South Africa "demands equality in the personal realm of rights and duties."¹⁷⁵

In 2012 The Supreme Court of Appeal of South Africa decided *Butters v. Mncora*,¹⁷⁶ a case implicating issues on rights to equality within marriage and family. The issue before the court was whether a universal partnership, encompassing the property of the spouses,¹⁷⁷ existed between a couple who lived for 20 years in a relationship that resembled marriage.¹⁷⁸ During the course of their relationship, the husband "became a very generous provider while the [wife] took responsibility for raising the children and maintaining their common home, which the defendant visited over weekends."¹⁷⁹ The Court applied a three- part test to determine whether a partnership existed between

¹⁶⁸ *Maputo Protocol*, *supra* note 21, at art. 2 (requiring States Parties to "include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.").

¹⁶⁹ *ACRWC*, *supra* note 160, at art. 1 ("1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.").

¹⁷⁰ *ACRWC*, *supra* note 160, at art. 21 ("Governments should do what they can to stop harmful social and cultural practices, such as child marriage, that affect the welfare and dignity of children.").

¹⁷¹ *CEDAW*, *supra* note 13, at art. 5 ("States 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 stereotyped roles for men and women.").

¹⁷² *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at para. 70-1.

¹⁷⁵ *Mayelane v Ngwenyama on the Importance of Consent and its Application to all Polygynous Marriages in South Africa*, LEGAL RESOURCE CENTRE, <http://resources.lrc.org.za/mayelane-v-ngwenyama-on-the-importance-of-consent-and-its-application-to-all-polygynous-marriages-in-south-africa/> (last visited Oct. 5, 2019); *See generally* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996.

¹⁷⁶ *Butters v Mncora* (181/2011) [2012] ZASCA 29 (28 March 2012).

¹⁷⁷ A universal partnership is defined as "partnership where each person gives all of his property to the partnership." *Universal Partnership*, BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁷⁸ *Butters*, ZASCA 29 at 3.

¹⁷⁹ *Id.* at 5.

the couple.¹⁸⁰ The Court found that: (1) the wife “spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children;”¹⁸¹ (2) the husband shared the benefit of his wife’s “contribution to the maintenance of their common home and the raising of the children”¹⁸² and that the wife “shared in the benefits of the defendant’s financial contribution;”¹⁸³ and (3) home life and the business conducted by the defendant was aimed at profit . . . [which] they tacitly agreed to share.”¹⁸⁴ The Court determined that the wife successfully established that she and her husband were in a tacit universal partnership.¹⁸⁵

In 2006 the Lesotho High Court decided *Mohlekoa v. Mohlekoa and Others*,¹⁸⁶ a the leading case on the issue of marital power. In *Mohlekoa*, a wife alleged that her husband attempted to illegally transfer the title of the house without her consent. She also alleged that the husband fraudulently exercised his marital power by selling their motor vehicle to a third party. The Court held that the husband violated the common law rule governing marriages in community of goods. By common law a “husband is not obliged to account to his wife for dispositions of the joint estate.” However, the husband’s actions fell into the exception to this rule as he acted “fraudulently and foolishly to reduce his family to destitution.” The wife was held to be capable of applying for a court order, which prohibited the husband from continuing to defraud his wife.

Case law from Southern African courts acknowledge the discriminatory legacy of marital power over women. Topics addressed in these cases highlight the necessity for equality in decisions handed down by judges on issues relating to consent to marriage, minimum age of marriage, right to inheritance, elimination of harmful practices, equality within customary polygamous marriages, marriage in community of property and universal partnerships.

Court systems should be aware of the economic inequalities faced by women in marriage and family relationships and strive to apply substantive equality in their decisions. The **Colombo Declaration on the role of the judiciary in advancing women’s right to equality in marriage and family relations** was drafted by participants at a regional judicial colloquium in Colomobo, Sri Lanka in 2019.¹⁸⁷ The participants “called on all judicial officers and those involved with the judicial system to implement internationally, regionally, and nationally guaranteed human rights norms requiring equality for women and men in marriage and family relations, without discrimination or gender stereotyping.”¹⁸⁸ Furthermore, The **Colombo Declaration** recognizes:

in many cases family, inheritance, and other laws and their application create or reinforce economic inequality between women and men in marriage and family relations and that it was important for courts to adopt a substantive equality approach to interpreting and applying laws that regulate marriage and family relations, to recognise economic

¹⁸⁰ *Id.* at 6; *See* (R.J. Pothier A Treatise on the Law of Partnership (Tudor’s Translation 1.3.8).

¹⁸¹ *Id.* at 10.

¹⁸² *Id.* at 12.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 14.

¹⁸⁵ *Id.*

¹⁸⁶ *Mohlekoa v Mohlekoa and Others* (CIV/APN/476/05) (CIV/APN/476/05) [2006] LSHC 5 (06 March 2006).

¹⁸⁷ *The Colombo Declaration*, INTERNATIONAL WOMEN’S RIGHTS ACTION WATCH ASIA PACIFIC, 1 (2019), <https://www.iwraw-ap.org/wp-content/uploads/2019/04/The-Colombo-Declaration.pdf> [hereinafter *Colombo Declaration*].

¹⁸⁸ *Id.* at 3.

power imbalances and economic disparities in marriage and upon termination or dissolution thereof, and to take into account both monetary and non-monetary contributions to the family in the context of the termination or dissolution of marriage.¹⁸⁹

PROPERTY RIGHTS

I. *International and Regional Instruments and Interpretations*

This section discusses a variety of property rights in relation to women. This includes rights to own and administer property, to inherit, to an adequate standard of living, including housing, and to access to justice. These rights apply throughout women's lives, including during marriage, after its dissolution or widowhood, and upon old age. The **Banjul Charter** articulates in **Article 14** that the “right to property shall be guaranteed.”¹⁹⁰ Additionally, the **UDHR** mandates in **Article 17** that “[e]veryone has the right to own property alone as well as in association with others [and] no one shall be arbitrarily deprived of his property.”¹⁹¹ The **U.N. Special Rapporteur on adequate housing** exhorted, the “idea that rights over housing, land, property and inheritance fall exclusively within the male domain must be challenged.”¹⁹²

Women's Equal Rights to Own and Administer Property

According to the **Maputo Protocol**, States must take measures to “promote women's access to and control over productive resources such as land and guarantee their right to property.”¹⁹³ The **ACHPR** in **Resolution 262** acknowledges that “women's access to, control over and use of land and productive resources contribute to promoting gender equality and constitute a solid basis for improving women's social, political and economic status.”¹⁹⁴ The resolution encourages the repeal of discriminatory laws and adoption of legislation “to sanction customary practices that limit or have a negative impact on women's access to, use of and control over land and other productive resources.”¹⁹⁵ The Commission further calls on States to afford women legal protection “against forced evictions and dispossession of land for use by public and private actors.”¹⁹⁶ States are also urged to ensure underprivileged women have access to public justice services and free legal assistance “for violations of their right to land and property.”¹⁹⁷

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *Banjul Charter*, *supra* note 20, at art. 14.

¹⁹¹ *UDHR*, *supra* note 25, at art. 17.

¹⁹² Report of the Special Rapporteur, Raquel Rolnik, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, submitted to the United Nations Human Rights Council (Nineteenth session, 2019), U.N. DOC. A/HRC/19/53, para 27 (2011) [hereinafter *Special Rapporteur Rolnik*]; *See also Id.* at para. 73 (The Rapporteur concluded that actors who violate women's right to adequate housing should be held accountable and “awareness about women's right to adequate housing” should be raised amongst “law-makers; lawyers, legal advocates, and members of the judiciary; law enforcement authorities; housing authorities and administrative personnel.”).

¹⁹³ *Maputo Protocol*, *supra* note 21, at art. 19(c).

¹⁹⁴ African Commission on Human and Peoples' Rights, 262 Resolution on Women's Right to Land and Productive Resources (Fifty-fourth session) ACHPR/Res.262 (LIV) 2013.

¹⁹⁵ *Id.* at para 1.

¹⁹⁶ *Id.* at para 6(i).

¹⁹⁷ *Id.* at para 6(iii).

Customs and traditions must further not impede women's enjoyment of equal property rights. According to the **ACHPR in General Comment on Article 7(d)** of the Maputo Protocol, although property regimes in Africa generally allow for both spouses to own property, social and marital gender roles within the home tends to disadvantage wives.¹⁹⁸ Moreover, despite the recognized right for women to own property, customary law often perceives of wives as dependent upon her husband and therefore property acquired with or for her husband is considered the husband's individual property.¹⁹⁹ Many courts and institutions in Africa are "steeped in traditional conceptions of marriage and the role and contribution of women during marriage" and therefore "tend to apply distribution regimes that in most cases disadvantage women."²⁰⁰ Equal property rights are "critical for women not only because of their importance for the socio-economic wellbeing of women but also because women deserve them."²⁰¹

States are similarly required under international human rights law to recognize women's equal right to own and administer property. **CEDAW, Article 16** obligates the same rights for women "in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."²⁰² **CEDAW, Article 15** specifically recognizes women's equal capacity with men and requires that States Parties "shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."²⁰³ **CEDAW General Recommendation No. 29** calls upon States to provide women "equal formal and de facto legal capacity to own and manage property" by recognizing "property rights related to livelihood or compensation."²⁰⁴

Right to Inheritance

States Parties must not discriminate against women regarding the right to inheritance. As the **Special Rapporteur on adequate housing** recognized, in matters of inheritance, equality is "often denied for women and girls on the basis of custom and tradition, whether within the context of the death of a spouse, parent or other relative. This has important ramifications, as inheritance is a primary means by which wealth and resources are transferred within societies, as well as within families."²⁰⁵

Both regional and international human rights law recognize the importance of women's equal right to inheritance. The **Maputo Protocol** states in **Article 21** that "[w]omen and men shall have the right to inherit, in equitable shares, their parents' properties."²⁰⁶ **CEDAW General Recommendation No. 21** calls for the abolition of laws and practices concerning inheritance that grant women limited rights and uneven treatment or shares of property belonging to deceased husbands or fathers.²⁰⁷ **CEDAW General Recommendation No. 29** urges States to "adopt laws relating to the making of wills that

¹⁹⁸ *ACHPR Art. 7(d)*, *supra* note 70, at para. 20.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at para. 23.

²⁰² *CEDAW*, *supra* note 13, at art. 16.

²⁰³ *Id.* at art. 15.

²⁰⁴ *CEDAW GR 29*, *supra* note 126, at para. 47.

²⁰⁵ *Special Rapporteur Rohnik*, *supra* note 192, at para. 49.

²⁰⁶ *Maputo Protocol*, *supra* note 22, at art. 21.

²⁰⁷ *CEDAW GR 21*, *supra* note 17, at para. 35.

provide equal rights to women and men as testators, heirs and beneficiaries.”²⁰⁸ Additionally, States must adopt laws of intestate succession ensuring equal treatment of surviving women and prohibit disinheritance of the surviving spouse.²⁰⁹

Moreover, a woman’s right to inherit cannot be dependent on her marital status. This includes prohibitions on remarriage or forced marriage to a relative, as well as the existence of children. **Article 21** of the **Maputo Protocol** mandates that widows maintain the right “to an equitable share in the inheritance of the property of her husband,” and shall “have the right to continue to live in the matrimonial house.”²¹⁰ If the house belongs to her or if she inherited the house, she shall retain this right upon remarriage.²¹¹ Additionally, **CEDAW General Recommendation No. 29** explains, “customary succession to use rights or title to land cannot be conditioned on forced marriage to a deceased spouse’s brother (levirate marriage) or any other person, or on the existence or absence of minor children of the marriage.”²¹²

Right to an Adequate Standard of Living, Including Housing

Women further have the right to an adequate standard of living, including housing under regional and international law. **Article 16** of the **Maputo Protocol** holds that “[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.”²¹³ **Article 25** of the **UDHR** states that “[e]veryone has the right to a standard of living adequate for the health and well-being.”²¹⁴ **ICESCR** in **Article 11** recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”²¹⁵ **Article 14** of **CEDAW** discusses the right of women to “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”²¹⁶

Recognition of women’s right to adequate housing is critical since it is a prerequisite for enjoyment of other rights. As the **Special Rapporteur on adequate housing** explained, adequate housing is “necessary to ensuring that every woman is able to live a life with dignity”²¹⁷ and “goes to the heart of social inequality and discrimination.”²¹⁸ A woman who is unable to access adequate housing and land is “not only affected in terms of her immediate material needs, she is also relegated to a subordinate and dependent position within society because of her gender.”²¹⁹ Ensuring that women have control

²⁰⁸ *CEDAW GR 29*, *supra* note 126, at para. 50.

²⁰⁹ *Id.* at para. 53.

²¹⁰ *Maputo Protocol*, *supra* note 21, at art. 21.

²¹¹ *Id.*

²¹² *CEDAW GR 29*, *supra* note 126, at para. 53.

²¹³ *Maputo Protocol*, *supra* note 21, at art. 16.

²¹⁴ *UDHR*, *supra* note 25, at art. 25.

²¹⁵ *ICESCR*, *supra* note 26, at art. 11.

²¹⁶ *CEDAW*, *supra* note 13, at art. 14. *See also Special Rapporteur Rolnik*, *supra* note 202, at para. 38 (explaining that “availability of services, materials, facilities and infrastructure, including access to water and sanitation; heating, cooling, and lighting; energy; washing facilities; food storage and refuse disposal; as well as emergency services.”).

²¹⁷ *Special Rapporteur Rolnik*, *supra* note 192, at para. 2.

²¹⁸ *Id.* at para. 3.

²¹⁹ *Id.*

over land and housing is “essential to challenging and changing gender power structures and patterns of gender inequality which continue to oppress, exclude and relegate women to the margins.”²²⁰

States must thus address women’s particular vulnerabilities to violations of the right to adequate housing. **CESCR General Comment No. 7** states that women are especially vulnerable and suffer disproportionately from forced evictions.²²¹ This is a result of the “extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”²²² On the African continent, the **Special Rapporteur on adequate housing** noted that “key issues affecting the status of women’s right to adequate housing,” include “urbanization, climate change, low levels of financial literacy amongst women, and the rising number of female headed households.”²²³

Access to Justice in Realizing Property Rights

Realizing women’s property rights requires access to justice. As the **Special Rapporteur on adequate housing** explained, “women must be able to challenge systemic discrimination with respect to land, housing and property in a range of areas, including inheritance, marriage, divorce, succession and title registration.”²²⁴ This entails addressing discrimination in both formal and informal judicial systems in accordance with **CEDAW, Article 15**, which requires equal treatment “in all stages of procedure in courts and tribunals,”²²⁵ as well as “[c]oncerted efforts ... to provide spaces and support for women to make substantive equality claims in all areas related to housing and through which women-led transformative remedies can be designed and implemented.”²²⁶ As CEDAW General Recommendations indicate, barriers within the formal legal system may include less weight given to women’s testimony in court, inadequate access to legal advice,²²⁷ and “requiring that women furnish documents relating to identity or title to property.”²²⁸ Such laws or customs not only “limit the woman’s right effectively to pursue or retain her equal share of property,” but also “diminish her standing as an independent, responsible and valued member of her community.”²²⁹ The **ACHPR in General Comment on Article 7(d)** of the Maputo Protocol further implores States Parties to “ensure the training of judicial and administrative officers on women’s marital property rights as well as women’s equal rights within the context of marriage, divorce, separation and annulment of marriage.”²³⁰

Rights During Marriage & After Dissolution of Marriage

²²⁰ *Id.*

²²¹ Committee on Economic, Social and Cultural Rights, General comment No. 7, The right to adequate housing (Art.11.1): forced evictions, U.N. Doc. E/1998/22 at para. 10 (1997).

²²² *Id.*

²²³ *Special Rapporteur Rohik, supra* note 192, at para. 12.

²²⁴ Report of the Special Rapporteur, Access To Justice For The Right To Housing, Adequate Housing As A Component Of The Right To An Adequate Standard Of Living, And On The Right To Non-Discrimination In This Context, submitted to the United Nations Human Rights Council (Fortieth session, 2019), U.N. DOC. A/HRC/40/6, para 49 (2019) [hereinafter *Special Rapporteur Housing Justice*].

²²⁵ *CEDAW, supra* note 13, at art. 15.

²²⁶ *Special Rapporteur Housing Justice, supra* note 224, at para. 50.

²²⁷ *CEDAW GR 21, supra* note 17, at para. 8.

²²⁸ *CEDAW GR 33, supra* note 14, at para. 44.

²²⁹ *CEDAW GR 21, supra* note 17, at para. 8.

²³⁰ *ACHPR Art. 7(d), supra* note 70, at para. 57.

Human rights law provides that women’s right to property must be upheld irrespective of marital status. **CEDAW General Recommendation No. 21** states that “[p]roperty laws and customs that discriminate...against married or unmarried women with or without children should be revoked and discouraged.”²³¹ **CEDAW General Recommendation No. 29** holds that “States parties should provide for equal access by both spouses to the marital property and equal legal capacity to manage it.”²³²

Upon divorce or separation, States parties are obligated to divide property equally. **Article 7(d)** of the **Maputo Protocol** states that “[i]n case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.”²³³ The **ACHPR** in **General Comment on Article 7(d)** of the Maputo Protocol further elaborates that Article 7(d) should be read “through the lens of substantive equality”²³⁴ which “requires States to recognize that women are in an unequal position and implement special measures aim at ensuring their property rights during separation, divorce or annulment of marriage.”²³⁵ With this foundation, Article 7(d) shall be interpreted “as the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family within the context of substantive equality.”²³⁶ **CEDAW General Recommendation No. 29** further call on States to “recognize the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage.”²³⁷ The **General Comment on Article 7(d)** by the **ACHPR** also illustrates that “[v]iolations of property rights of women that result from discriminatory laws and practices upon separation, divorce or annulment of marriage can be a precursor to poverty and destitution for many women.”²³⁸ Similarly, **General Recommendation No. 21** highlights that “any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.”²³⁹

Equality in property rights further applies to widowed women. **CEDAW General Recommendation No. 29** recognizes that “widows are subject to ‘property dispossession’ or ‘property grabbing’, in which relatives of a deceased husband, claiming customary rights, dispossess the widow and her children from property accumulated during the marriage, including property that is not held according

²³¹*CEDAW GR 21, supra* note 17, at para. 33.

²³² *CEDAW GR 29, supra* note 126, at para. 38 (declaring that States “should ensure that the right of women to own, acquire, manage, administer and enjoy separate or non-marital property is equal to that of men.”).

²³³ *Maputo Protocol, supra* note 21, at art. 7(d).

²³⁴ *ACHPR Art. 7(d), supra* note 70, at para. 41 (stating that substantive equality “focuses on the nature of the impact of particular laws or their application on women’s lives and their ability to access and enjoy their human rights fully and on an equal basis”).

²³⁵ *Id.* at para. 40.

²³⁶ *Id.* at para. 43.

²³⁷ *CEDAW GR 29, supra* note 126, at para. 43.

²³⁸ *ACHPR Art. 7(d), supra* note 70, at para. 24.

²³⁹ *CEDAW GR 21, supra* note 17, at para. 28.

to custom.”²⁴⁰ The Recommendation calls upon States to adopt laws that criminalize property dispossession and grabbing and ensure that “offenders are duly prosecuted.”²⁴¹

Rights of Older Women

Human rights law recognizes the need for particular property rights protections for older women. The **African Charter Rights on the Rights of Older Persons** states in **Article 9** that States Parties shall “[p]ut in place legislation and other measures that guarantee protection of Older Women against abuses related to property and land rights; and [a]dopt appropriate legislation to protect the right of inheritance of Older Women.”²⁴² Additionally, The **ACHPR in General Comment on Article 7(d)** of the Maputo Protocol calls upon States Parties to ensure the equitable sharing of joint property derived from marriage for “women without children, women with disabilities, older women, widows and other women who may be vulnerable to having their non-financial contributions to marriage discounted or disregarded.”²⁴³ **CEDAW General Recommendation No. 27** recognizes that “[o]lder women are particularly vulnerable to exploitation and abuse, including economic abuse.”²⁴⁴ As such, States should “enable older women to seek redress for and resolve infringements of their rights, including the right to administer property, and ensure that older women are not deprived of their legal capacity on arbitrary or discriminatory grounds.”²⁴⁵ Finally, “[s]tates parties must repeal all legislation that discriminates against older widows in respect of property and inheritance, and protect them from land grabbing.”²⁴⁶

II. Case Analysis

The High Court of Malawi decided *Tewesa v Tewesa*²⁴⁷ in 2020. A wife brought suit against her husband upon the dissolution of their marriage arguing that she was entitled to marital property and a property interest in her husband’s bachelor’s degree because she contributed to the household in monetary and non-monetary ways. The Court held for the wife and ordered the equitable division of household property on constitutional grounds.²⁴⁸ However, the Court determined that while educational qualifications are shared equitably amongst married couples, upon divorce, this property interest ceases to exist and an educational degree obtained by one spouse is not divisible or inheritable family property.²⁴⁹ The Court awarded equal shares of matrimonial property amongst the parties and additional monies to the wife.

²⁴⁰ CEDAW GR 29, *supra* note 126, at para. 50.

²⁴¹ *Id.* at para. 53.

²⁴² *Older Persons*, *supra* note 22, at art. 9.

²⁴³ ACHPR Art. 7(d), *supra* note 70, at para. 54.

²⁴⁴ CEDAW GR 27, *supra* note 83, at para. 27.

²⁴⁵ *Id.* at para. 34.

²⁴⁶ *Id.* at para. 52.

²⁴⁷ *Tewesa v Tewesa* (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 (31 August 2020).

²⁴⁸ *Id.* at 14. *See also* CONSTITUTION OF THE REPUBLIC OF MALAWI at Section 24(1) (“Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right - (b) on the dissolution of marriage- (i) to a fair disposition of property that is held jointly with a husband; and (ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.”)

²⁴⁹ *Id.* at 6.

The 2016 property rights case *Madikhula v. Goba*,²⁵⁰ decided by the High Court of Malawi, determined whether a widow and her daughters successfully established a land grabbing violation when a leader in their community allocated the family's property to business people without prior consent. As a result of losing her property, the widow was traumatized and succumbed to poverty as she was unable to grow crops to support her family.²⁵¹ The Court found that the business man did not legally acquire the land. The case highlighted the prevalence of the discriminatory practice of arbitrary deprivation of property against women and the disastrous consequences that land grabbing has on women's economic independence. The Court ultimately found that the leader in the community unlawfully allocated land to the business people and ordered a permanent injunction against the business people for any attempts to dispossess the widow and her family from their land.²⁵²

The UN Committee on the Elimination of Discrimination Against Women decided *E.S & S.C. v United Republic of Tanzania*²⁵³ in 2015. The case raised issues related to Islamic law, customary marriage, women's inheritance, and financial independence. The case concerned two widowed Tanzanian women who were married to their husbands under customary law. Both women were forcibly evicted from their houses by their families in law after their husbands died. The wives claimed provisional violations of CEDAW including articles 2(c), 2(f), 5(a), 13(b), 15(1), 15(2), 16(1)(c) and 16(1)(h)²⁵⁴ and the Committee's General Recommendations Nos. 21 and 27.²⁵⁵ The Committee called

²⁵⁰ *Madikhula v Goba* [High Court of Malawi] Civil Cause No. 248, 2013 (Malawi); *See also Malawi: Protecting Women From Illegal Land Seizure*, SOUTHERN AFRICA LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/> (last visited Aug. 21, 2019).

²⁵¹ *Businessman Clings to Granny's 3 Hectares Land: Judge Madise ruled against Madikhula*, NYASA TIMES, <https://www.nyasatimes.com/businessman-clings-grannys-3-hectares-land-judge-madise-ruled-madikhula/> (last Visited Aug. 21, 2019).

²⁵² *Malawi: Protecting Women From Illegal Land Seizure*, SOUTHERN AFRICA LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/> (last visited Aug. 21, 2019).

²⁵³ CEDAW, Communication 48 Views of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Sixtieth session, 2015), U.N. Doc. CEDAW/C/60/D/48/2013 (2015) [hereinafter *CEDAW Communication 48*].

²⁵⁴ *CEDAW*, *supra* note 13, at art. 2(c) "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: 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; and 2 (f):To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Article 13 (b) states: States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: The right to bank loans, mortgages and other forms of financial credit. Article 15 states: (1) States Parties shall accord to women equality with men before the law; and (2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. Finally, Article 16 states: 1(c). States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women; and 1(h): The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.")

²⁵⁵ Specifically, E.S. and S.C. claimed that they were: discriminated against based on their sex/gender and therefore denied the ability to administer and inherit property after their husbands' deaths and an effective remedy, in violation of articles 2(c), 2(f) and 5(a) of CEDAW denied equal economic rights and opportunities, including access to mortgages and other forms of financial credit, in violation of article 13(b) denied equality before the law, in violation of article 15(1) prevented them from administering their husbands' property, as their legal capacity was not

upon Tanzania to repeal or amend its customary laws related to inheritance.²⁵⁶ The Committee also reiterated that under Articles 2(f) and 5(a) of CEDAW, States parties have an obligation to adopt appropriate measures to amend or abolish not only existing laws and regulations but also customs and practices that discriminate against women, including when States parties have multiple legal systems in which different personal status laws apply to individuals on the basis of identity factors such as ethnicity or religion. Additionally, under Article 13 of CEDAW, States are required to take action to eliminate discrimination against women. The Committee added that under article 16 (1)(h) and article 15 (2), States are under the obligation to protect women's equal rights to administer property.²⁵⁷ The Committee also found that while Article 13²⁵⁸ of the Tanzanian Constitution guaranteed equality and non-discrimination against women, Tanzania neglected to revise or adopt legislation to eliminate the remaining discriminatory aspects of its codified customary law provisions regarding widows. The Committee found that Tanzania's discriminatory inheritance framework contravened Articles 2, 5, 15, and 16 of CEDAW.

The Court of Appeal of Botswana decided *Rameantele v. Mmusi*²⁵⁹ in 2013. The case concerned issues of customary law, equal protection of the law, and property inheritance. After the father in the family passed, the daughters maintained and developed the property and claimed they were entitled to inheritance. On the other hand, the father's nephew challenged the daughters' claim despite never previously asserting ownership over the property. The Court recognized women's right to property inheritance and held that "Ngwaketse Customary Law of inheritance does not prohibit the female or elder children from inhering as intestate heirs to their deceased parents' family homestead."²⁶⁰ The Court reasoned that the weight of the constitutional provisions requiring equality before the law coupled with changing power structures in Botswana that are increasingly affording women more authority within the public and private sphere warranted a legal opinion that allowed the women to retain ownership over the family homestead.²⁶¹

The High Court of Swaziland decided *Nombuyiselo Sihlongonyane v. Mholi Joseph Sihlongonyane*²⁶² in 2013. In the case a wife married to her husband under community of property challenged her husband's exercise of marital power²⁶³ when he sold their marital assets without her consent. The Court reasoned that the law states that all property "acquired during the tenancy of the marriage in community of property, becomes or forms part of the joint estate."²⁶⁴ The Court found

recognised, in violation of article 15(2) not afforded the same rights as men in the administration and inheritance of property upon the dissolution of marriage, in violation of articles 16(1)(c) and 16(1)(h); *See also* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 6 Oct. 1999) A/RES/54/4, entered into force 22 Dec. 2000 [hereinafter *CEDAW Optional Protocol*].

²⁵⁶ *CEDAW Communication 48*, *supra* note 255.

²⁵⁷ *Id.* at para 7.2.

²⁵⁸ CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, Article 13 ("All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law...No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect").

²⁵⁹ *Ramantele v Mmusi and Others* (CACGB-104-12) [2013] BWCA 1 [Bots.].

²⁶⁰ *Id.* at 68.

²⁶¹ *Id.* at 65.

²⁶² *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane & Another* (470/13) [2013].

²⁶³ Marital power originates from Roman-Dutch common law and prohibits women from bringing a case to court, selling property, signing contracts, taking out a loan, working as the director of a company, or standing as the trustee of a trust. Under marital power, husbands control all of the property of the marriage, whether it was jointly or separately owned prior to the marriage. Legal Assistance Centre Namibia, *Guide to the Married Persons Equality Act*, 1, 5 (2009).

²⁶⁴ *Id.* at 6.

that the marital property formed part of the joint estate and the husband could not lawfully deprive his wife of ownership under the doctrine of marital power.²⁶⁵

In 2010, the High Court of Swaziland decided *Aphane v Minister of Justice and Const. Affairs, Etc.*²⁶⁶ The issue before the court was whether Section 16(3)²⁶⁷ of the Deeds Registry Act was discriminatory towards women. The Section stated that property bonds and real rights are not to be transferred, ceded, or registered to women married in community of property. The husband and wife brought the case to dispute the Act as unconstitutional because it did not allow women married in community of property to hold “property either individually or jointly with their husbands.”²⁶⁸ The court found that the Section unfairly discriminated against women and ordered that the text of Section 16(3) be changed to allow women to co-own property with their husbands.

The Constitutional Court of South Africa decided the case of *Gumede (born Shange) v. President of the Republic of South Africa and Others*²⁶⁹ in 2009. The case was brought by a woman married under customary law who was in the process of divorcing her husband. The wife sought to “pre-empt the divorce court from relying on legislation she considers unfairly discriminatory to customary law wives on grounds of gender and race.”²⁷⁰ The Court found that section 7(1) of the Recognition of Customary Marriages Act (“Recognition Act”), section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code²⁷¹ recognized in KwaZulu-Natal customary law unfairly discriminated against

²⁶⁵ Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane & Another (470/13) [2013] at 8.

²⁶⁶ *Aphane v Registrar of Deeds and Others* ((383/09)) [2010] SZHC 29 (23 February 2010).

²⁶⁷ Section 16(3) of the Deeds Registry Act (stating “[i]mmovable property bonds and other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property, save where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.”).

²⁶⁸ *Aphane v Registrar of Deeds and Others* ((383/09)) [2010] SZHC 29 (23 February 2010).

²⁶⁹ *Gumede (born Shange) v. President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008).

²⁷⁰ *Id.* at 6.

²⁷¹ *Id.* at 3-4.; *See* Act 120 of 1998; *See* KwaZulu Act on the Code of Zulu Law 16 of 1985; *See* Natal Code of Zulu Law published in Proclamation R151 of 1987, GG No. 10966.

(a) Section 7(1) of the Recognition of Customary Marriages Act (Recognition Act). It provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

(b) The inclusion of the words “entered into after the commencement of this Act” in section 7(2) of the Recognition Act. The inclusion provides that a customary marriage entered into after the commencement of the Recognition Act is a marriage in community of property subject to a number of exceptions which are not, for present purposes, relevant.

(c) Section 20 of the KwaZulu Act on the Code of Zulu Law (KwaZulu Act). It provides that the family head is the owner of and has control over all family property in the family home.

(d) Section 20 of the Natal Code of Zulu Law (Natal Code). It provides that the family head is the owner of and has control over all family property in the family home.

(e) Section 22 of the Natal Code. It provides that “inmates” of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

wives in customary marriages.²⁷² Furthermore, the Court found provisions 167(5),²⁷³ 9(3),²⁷⁴ and (5)²⁷⁵ of the South African Constitution were discriminatory against wife and husband.²⁷⁶ Additionally, the Court stated that the customary law discriminates against a “woman who is a party to an ‘old’ or pre-recognition customary marriage as against a woman who is a party to a ‘new’ or post-recognition customary marriage.”²⁷⁷ The Court stated that existing customary law condones “patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property.”²⁷⁸ As such, the provisions were held to be discriminatory, unfair, and invalid.

The Kenya Court of Appeal decided *Rono v Rono & Another*²⁷⁹ in 2005. A family sought review of the discriminatory division of the deceased husband’s estate. The husband was married to two women and when the court divided the husband’s property among the beneficiaries, it allotted a larger share of acreage to the first wife. This disproportionate distribution occurred because the first wife had three sons while the second wife had only daughters. The Court of Appeal found that this distribution of property was discriminatory and the daughters were obligated to receive equal shares of land. The Court made its determination off international and regional human rights standards and stated that non-discriminatory conduct is required of all States under Article 1 of CEDAW²⁸⁰ and Article 18 of the Banjul Charter.²⁸¹ The Court ordered equal shares of acreage among the sons and daughters.

The Local Court in Zambia decided *Mwanamwalye v. Mwanamwalye*²⁸² in 2005. The issue before the court was whether a wife married under customary union was entitled to receive marital property from a divorce. The local court found that women married under customary law have the right to their share of marital property. The court stated that justice demands equal consideration to women in divorce cases.

²⁷² *Id.* at 22.

²⁷³ *Id.*; CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. “Section 167(5) provides:

“The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”

²⁷⁴ *Id.*; CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. “Section 9(3) provides:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

²⁷⁵ *Id.*; CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. “Section 9(5) provides:

“Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

²⁷⁶ *Id.* at 23.

²⁷⁷ *Id.* at 22.

²⁷⁸ *Id.* at 31.

²⁷⁹ *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

²⁸⁰ *CEDAW*, *supra* note 13, at art. 1 (“For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”).

²⁸¹ *Banjul Charter*, *supra* note 20, at art. 18 (stating “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”).

²⁸² See generally *Landmark judgment for women in customary marriages*, THE NEW HUMANITARIAN

<http://www.thenewhumanitarian.org/feature/2005/12/21/landmark-judgment-women-customary-marriages> (last visited July 18, 2019).

The Constitutional Court of South Africa decided *Bhe v. Magistrate Khayelitsha & Ors*²⁸³ in 2004, where two girls²⁸⁴ claimed their right to inherit their deceased father's estate. Upon the death of the girls' father, the grandfather acquired and sought to sell the estate in accordance with Section 23 of the Black Administration Act²⁸⁵ which excludes women and girls from inheriting the estate of a deceased family member and instead permits inheritance to only the eldest surviving male relative. The Court found that Section 23 of the Black Administration Act was unconstitutional and invalid. The Court held that the "principle of male primogeniture indeed unfairly discriminated against women and declared it unconstitutional."²⁸⁶ The Court determined that Section 23 was an anachronistic piece of legislation which legitimized problematic customary laws and caused egregious violations of the rights of black African persons.²⁸⁷ Section 23 additionally conflicted with section 9(3)²⁸⁸ and section 10²⁸⁹ of the South African Constitution. The rule of primogeniture under customary law was "declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property."²⁹⁰ The Court demanded that "African females, irrespective of age or social status, are entitled to inherit from their parents' intestate estate like any male person."²⁹¹ As such, the daughters were declared the sole heirs of their father's estate.

The case law above demonstrates the critical role played by judges in upholding women's equality in the context of property rights. Thematic topics addressed by judges in Southern and Eastern Africa include land grabbing, deprivation of property, rights of widows, women's property inheritance,

²⁸³ *Bhe v. Magistrate Khayelitsha & Ors*, 2005 (1) BCLR 1 (CC), 15 Oct. 2004.

²⁸⁴ *Id.* n. 15 (stating the expression "illegitimate children" has been used by lawyers in South Africa for many years, and was used by the Cape High Court in the *Bhe* case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married. I choose not to use the term, however. No child can in our constitutional order be considered "illegitimate," in the sense that the term is capable of bearing, that they are "unlawful" or "improper." As this Court has said on many occasions, "our Constitution values all human beings equally, whatever their birth status, whatever their background.").

²⁸⁵ Section 23 of the Black Administration Act states, "(1) All movable property belonging to a Native and allotted to him or accruing under native law or custom to any women with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom...(2) All land in a location held in individual tenure upon quitrent conditions by a Native shall devolve upon his death upon one male person...(10) The Governor-General may make regulations not inconsistent with this Act—

- (a) prescribing the manner in which the estates of deceased Natives shall be administered and distributed;
- (b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Natives;
- (c) Dealing with the disherison of natives;
- (d) Prescribing the powers and duties of Native commissioners or magistrates in carrying out the functions assigned to them by this section;
- (e) Prescribing tables of succession in regard to natives;

(f) Generally for the better carrying out of the provisions of this section.

²⁸⁶ Justice Yvonne Mokgoro, *The Impact of South Africa's Constitutional Court on Gender Equity: A Case Law Approach*, Presentation at Congressional Breakfast on the Impact of South Africa's Constitutional Court on Gender Equity (Apr. 12, 2005) at 18.

²⁸⁷ *Bhe*, BCLR 1 (CC), at para. 142.

²⁸⁸ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996 at § 9 ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.").

²⁸⁹ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996 at § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected.").

²⁹⁰ *Bhe*, BCLR 1 (CC), at para. 88.

²⁹¹ *Tools for Change*, OPEN SOCIETY FOUNDATION, <https://www.opensocietyfoundations.org/uploads/e00d6a25-0b7f-49e9-9ec8-1d0bde94a8d9/tools-for-change-20120416.pdf> (last visited Aug. 21, 2019).

customary marriage, marital power, community of property, gender discrimination, distribution of estate, and marital property. The judges reiterated in the above cases the obligation of African States under international and regional human rights law to uphold human rights standards of equality and non-discrimination in their judgements.

WORK RIGHTS

I. *International and Regional Instruments and Interpretations*

This section discusses women's right to work and freedom from discrimination in employment, which includes equality in access to employment and employment benefits, equal pay and just remuneration, equality in working conditions, adequate rest and leisure, maternity protection, social security, and specific protections for informal workers, rural workers, and older women. Rights unique to specific categories are also examined such as workers in the informal sector, domestic workers, night workers, rural women, and older women.

Right to Work and Freedom from Discrimination in Employment

International and regional human rights treaties provide women the opportunity to realize the right to work and freedom from discrimination in employment. The **ICESCR** defines the 'right to work' as the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts."²⁹² The **ILO Discrimination in Employment and Occupation Convention** defines 'discrimination' as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."²⁹³

International provisions require States to thoughtfully consider the systemic gender biases and stereotypes that have historically predominated the employment sector and in turn calls upon States to promote accessibility to and equality in the workplace. **CESCR General Comment No. 23** holds that women face disadvantages and unjust work condition in the workplace when "intersectional discrimination and the absence of a life-cycle approach regarding the needs of women" perpetuate gender inequality.²⁹⁴ For example, when assessing the value of work, employers must "avoid gender stereotypes that could undervalue work predominantly performed by women."²⁹⁵ States Parties must also "take measures to address traditional gender roles and other structural obstacles that perpetuate gender inequality."²⁹⁶

GBV occurs in all contexts including the workplace. **CEDAW General Recommendation No. 19**, notes that "[p]overty and unemployment increase opportunities for trafficking in women" and other forms of sexual exploitation such as sex tourism and the "recruitment of domestic labour from

²⁹² *ICESCR*, *supra* note 26, at art. 6; *See also CEDAW*, *supra* note 13, at art. 11 (stating that the "the right to work is an inalienable right of all human beings.").

²⁹³ INT'L LABOUR ORG. [ILO], *Discrimination (Employment and Occupation) Convention*, Convention No. 111, at para. 1 (1958).

²⁹⁴ Committee on Economic, Social and Cultural Rights, *General comment No. 23, Right to just and favourable conditions of work*, Art. 7, U.N. Doc. E/C.12/GC/23 at para. 47 (2016) (requiring that "all workers should be free from physical and mental harassment, including sexual harassment") [hereinafter *CESCR GC 23*].

²⁹⁵ *Id.* at para. 47.

²⁹⁶ *Id.*

developing countries to work in developed countries.”²⁹⁷ These “practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity.”²⁹⁸ Women subjected to GBV in the workplace, such as sexual harassment, are further deprived of equality in employment.

Equality in Access to Employment and Employment Benefits

States Parties are required to provide women with equality in access to employment and employment benefits. The **Maputo Protocol** in **Article 13** requires State parties to adopt “measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.”²⁹⁹ These obligations include “promot[ing] equality of access to employment” and “ensur[ing] transparency in recruitment, promotion and dismissal of women.”³⁰⁰

Equal Pay and Just Remuneration

Under human rights law, women must receive equal compensation in employment. As **Article 15** of the **Banjul Charter** set out, all individuals “shall receive equal pay for equal work.”³⁰¹ The **Maputo Protocol** requires State parties to “promote the right to equal remuneration”³⁰² for jobs of equal value for women and men” and to “recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children.”³⁰³ The **Declaration on Gender Equality in Africa** acknowledges that “wide disparities still persist between men and women in terms of access to employment and remuneration.”³⁰⁴ To address this issue, member States of the African Union agree to “strengthen measures to reduce women's workload, expand employment opportunities for women, and ensure equal pay for work of equal value.”³⁰⁵ Furthermore, states must “strengthen the gender machineries in [African] countries and provide them with enough human and financial resources to enable them to carry out their responsibility of promoting and tracking gender equality.”³⁰⁶ **CEDAW** requires in **Article 11** “the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”³⁰⁷ **CEDAW General Recommendation No. 13** demands adoption of “job evaluation systems” to monitor the value of jobs held by men and women to “ensure application of the principle of equal remuneration for work

²⁹⁷ *CEDAW GR 19*, *supra* note 7, at para. 14.

²⁹⁸ *Id.*

²⁹⁹ *Maputo Protocol*, *supra* note 21, at art. 13.

³⁰⁰ *Id.*

³⁰¹ *Banjul Charter*, *supra* note 20, at 15; *See generally ICESCR*, *supra* note 26, at art. 7; *See generally UDHR*, *supra* note 25, at art. 23.

³⁰² *See generally* INT'L LABOUR ORG. [ILO], Equal Remuneration Convention, No. 100, at art. 1 (1950) (defining the term ‘equal remuneration for men and women workers for work of equal value’ as “rates of remuneration established without discrimination based on sex.”); *See also CESCR GC 23*, *supra* note 307, at para. 7 (describing the term “remuneration” as going “beyond the more restricted notion of “wage” or “salary” to include additional direct or indirect allowances in cash or in kind paid by the employer to the employee that should be of a fair and reasonable amount, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities.”).

³⁰³ *Maputo Protocol*, *supra* note 21, at art. 13.

³⁰⁴ ASSEMBLY OF HEADS OF STATE & GOV'T OF MEMBER STATES OF THE AFRICAN UNION, Solemn Declaration on Gender Equality in Africa, Assembly/AU/Decl.12 (III) (2004).

³⁰⁵ *Id.* at para. 10.

³⁰⁶ *Id.* at para. 12.

³⁰⁷ *CEDAW*, *supra* note 13, at art. 11.

of equal value.”³⁰⁸ Furthermore, **The ILO Equal Remuneration Recommendation** highlights the importance of establishing “minimum or other wage rates in industries and services where such rates are determined under public authority,” operate under “public ownership or control,” or “work executed under the terms of public contracts.”³⁰⁹ The **Recommendation** also urges Members “decrease the differentials between rates of remuneration” for men and women.³¹⁰ Finally, States should take action to “raise the productive efficiency of women workers” by ensuring access to vocational guidance or employment counselling.³¹¹

Equality in Working Conditions

Women are further entitled to equality in working conditions under human rights law. The **Banjul Charter** mandates in **Article 15** that “every individual shall have the right to work under equitable and satisfactory conditions.”³¹² **CESCR General Comment No. 23** establishes that “a woman performing work of equal value to that of a male counterpart should not have fewer contractual protections or more arduous contractual requirements.”³¹³

Equality in working conditions further entails freedom from exploitation and sexual harassment. **The Maputo Protocol** in **Article 13** requires State parties to protect women from “exploitation by their employers”³¹⁴ and combat and punish acts of sexual harassment³¹⁵ in the workplace.³¹⁶ The ILO’s new 2019 Convention specially focuses on addressing “**Violence and Harassment**” in the workplace. Under **Article 6**, “Members shall ensure women receive “the right to equality and non-discrimination in employment and occupation.”³¹⁷ Furthermore, **Article 7** requires that Members “adopt laws and regulations to define and prohibit violence and harassment in the world of work, including gender-based violence and harassment.”³¹⁸

Adequate Rest and Leisure

³⁰⁸ CEDAW, General Recommendation 13 Equal remuneration for work of equal value (Eighth session, 1989), U.N. Doc. A/44/38 at 76 (1990), U.N. Doc. HRI/GEN/1/Rev.6 at para. 2 (2003).

³⁰⁹ INT’L LABOUR ORG. [ILO], Equal Remuneration Recommendation, No. 90, at para. 2 (1951).

³¹⁰ *Id.* at para. 4.

³¹¹ *Id.* at para. 6.

³¹² *Banjul Charter*, *supra* note 20, at 15; *See also ICESCR*, *supra* note 26, at art. 7 (describing the right of everyone to the enjoyment of just and favourable conditions of work to include “safe and healthy working conditions.”); *See also UDHR*, *supra* note 25, at art. 23 (stating that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”).

³¹³ Committee on Economic, Social and Cultural Rights, General comment No. 23, Right to just and favourable conditions of work, Art. 7, U.N. Doc. E/C.12/GC/23 at para. 17 (2016) (requiring that “all workers should be free from physical and mental harassment, including sexual harassment.”).

³¹⁴ *Maputo Protocol*, *supra* note 21, at art. 13; *See also* Committee on Economic, Social and Cultural Rights, General comment No. 23, Right to just and favourable conditions of work, Art. 7, U.N. Doc. E/C.12/GC/23 at para. 48 (2016) (requiring that “all workers should be free from physical and mental harassment, including sexual harassment.”).

³¹⁵ *See* INT’L LABOUR ORG. [ILO], Violence and Harassment Convention, No. 190, at art. 1 (2019) (defining the term ‘violence and harassment’ in the workplace as inclusive of a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.” The term ‘gender-based violence and harassment’ is defined as “violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment”).

³¹⁶ *Maputo Protocol*, *supra* note 21, at art. 13.

³¹⁷ INT’L LABOUR ORG. [ILO], Violence and Harassment Convention, No. 190, at art. 6 (2019).

³¹⁸ *Id.* at art. 7.

Workers in both the formal and informal sector must receive adequate rest and leisure. To ensure protection from being over-worked, **Article 24** of the **UDHR** provides that “everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”³¹⁹ Additionally, the **ICCPR** in **Article 8** requires that “no one shall be required to perform forced or compulsory labour.”³²⁰

Maternity Protection

International law requires providing women with maternity protection including freedom from discrimination in employment, protection from wrongful termination or demotion while pregnant or breastfeeding, adequate maternity leave, safe work conditions, and social benefits. The **ILO Maternity Protection Convention** requires that “maternity does not constitute a source of discrimination in employment” in **Article 9**.³²¹ **Article 8** acknowledges that it is “unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave” and she must be “guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.”³²² **CEDAW** mandates that State Parties “introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.”³²³ Additionally, maternity leave of at least 14 weeks should be provided under **Article 4** of the **ILO Maternity Protection Convention**.³²⁴ Furthermore, Members to the ILO must “ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child” under **Article 3**.³²⁵ Additionally, **Article 10** of **ICESCR** requires States Parties to recognize that “special protection should be accorded to mothers during a reasonable period before and after childbirth.”³²⁶ Night workers³²⁷ must also be provided with protection particularized to their areas of work.³²⁸ If requested, women night workers must be assigned to day work at any point during her

³¹⁹ *UDHR*, *supra* note 25, at art. 24.

³²⁰ *ICCPR*, *supra* note 27, at art. 8; *See also* INT'L LABOUR ORG. [ILO], Forced Labour Convention, No. 29, at para. 1 (1930) (defining ‘forced or compulsory labor’ as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”).

³²¹ INT'L LABOUR ORG. [ILO], Maternity Protection Convention, No. 183, at art. 9 (2000) [hereinafter *Maternity Convention*]; *See also* INT'L LABOUR ORG. [ILO], Workers with Family Responsibilities Convention, No. 156, at art. 3 (1981) (stating that each “each “member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.”).

³²² *Id.* at art. 8; *See also* INT'L LABOUR ORG. [ILO], Workers with Family Responsibilities Convention, No. 156, at para. 16 (1981) (stating “marital status, family situation or family responsibilities should not, as such, constitute valid reasons for refusal or termination of employment.”).

³²³ *CEDAW*, *supra* note 13, at art. 11; *See also* *ICESCR*, *supra* note 26, at art. 10 (stating that “working mothers should be accorded paid leave or leave with adequate social security benefits.”).

³²⁴ *Maternity Convention*, *supra* note 321, at art. 4.

³²⁵ *Id.* at art. 3; *See also* *CEDAW*, *supra* note 13, at art. 11 (stating that States shall “provide special protection to women during pregnancy in types of work proved to be harmful to them.”).

³²⁶ *ICESCR*, *supra* note 26, at art. 10.

³²⁷ *See generally* INT'L LABOUR ORG. [ILO], Night Work Recommendation, No. 178, at para. 1 (1990) (defining the term ‘night worker’ as “an employed person whose work requires the performance of a substantial number of hours of night work which exceeds a specified limit.”).

³²⁸ *CEDAW*, General Recommendation 34 on the rights of rural women (Sixty-third session, 2016), U.N. Doc. CEDAW/C/GC/34 at para. 15 (2016).

pregnancy under the ILO **Night Work Recommendation**.³²⁹ Furthermore, The **Protocol to the Night Work Convention** requires that a “woman worker shall not be dismissed or given notice of dismissal, except for justifiable reasons not connected with pregnancy or childbirth.”³³⁰ Finally, the income of a woman night-worker “shall be maintained at a level sufficient for the upkeep of herself and her child in accordance with a suitable standard of living.”³³¹

Social Security

Social security must be provided to women in the workforce and States must take into consideration the deleterious effect of disproportionate wages on women with family responsibilities. The **UDHR** obligates in **Article 22** that all members of society have “the right to social security” and are entitled “the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”³³² **CESCR General Comment No. 19** recognizes that the right to “social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.”³³³ States parties should “take steps to eliminate the factors that prevent women from making equal contributions” such as intermittent workforce participation due to “family responsibilities and unequal wage outcomes” and should take into consideration “child rearing periods or periods to take care of adult dependents.”³³⁴ Additionally, “non-contributory schemes must also take account of the fact that women are more likely to live in poverty than men and often have sole responsibility for the care of children.”³³⁵ The Comment emphasizes the role of the judiciary in facilitating the realization and implementation of the human right to social security. Finally, **General Comment 19** states that those “who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels.”³³⁶

Protections for Workers in the Informal Sector

States are required to provide protection for workers’ rights and safety in the informal sector and must acknowledge the essential contributions of women who perform household and unpaid work. The **Maputo Protocol** requires State parties to “establish a system of protection and social insurance for women working in the informal sector”³³⁷ and sensitise them to adhere to it.”³³⁸ Furthermore, States must “take the necessary measures to recognise the economic value of the work of women in the home.”³³⁹ In **General Comment No. 23, CESCR** recognizes that the “right of just and favorable conditions of work applies to everyone” including:

³²⁹ INT’L LABOUR ORG. [ILO], Night Work Recommendation, No. 178, at para. 19 (1990).

³³⁰ INT’L LABOUR ORG. [ILO], Protocol of 1990 to the Night Work (Women) Convention (Revised) at art. 2 (1948).

³³¹ *Id.*

³³² UDHR, *supra* note 25, at art. 22; *See also* ICESCR, *supra* note 26, at art. 9 (requiring States to “recognize the right of everyone to social security, including social insurance.”).

³³³ Committee on Economic, Social and Cultural Rights, General comment No. 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. DOC. E/C.12/GC/19 at para. 3 (2008).

³³⁴ *Id.* at para. 32.

³³⁵ *Id.*

³³⁶ *Id.* at para. 77.

³³⁷ *Id.* at para. 34 (using the definition from the ILO for the term ‘informal economy’ as inclusive of “all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements.”).

³³⁸ *Maputo Protocol*, *supra* note 21, at art. 13.

³³⁹ *Id.*

all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.³⁴⁰

Thus, national policies relating to equality of opportunity and treatment in employment “should cover all branches of economic activity, including the formal and informal sectors, and all categories of workers, including non-standard workers, apprentices and interns.”³⁴¹ States Parties are asked to establish a method of inspection on labor practices for workers “including workers in the informal economy, domestic workers and agricultural workers; to provide advice to workers and employers; and to raise any abuses with competent authorities.”³⁴² The ILO likewise calls for “regulatory mechanisms” to ensure “better working conditions.”³⁴³ The **CESCR Committee** further acknowledges that “[w]omen work in activities that are significant for their households and the national economy, and they spend twice as much time as men in unpaid work.”³⁴⁴

It is thus important to address structural constraints that drive women to work in the informal sector. These entails tackling discriminatory social and cultural norms which “constrain women’s mobility outside the home” and restrict them to “low-paid home-based jobs.”³⁴⁵ According to the ILO, women are provided with access to decent incomes, property, assets, financial services, social protection, education skills development, training, representation and collective action, then much of the structural constraints that inhibit women’s economic development would be alleviated.³⁴⁶

Protections for Rural Workers

International human rights provisions call on States to recognize the roles of rural women in the economy and ensure equal treatment and remuneration. **Article 14** of **CEDAW** asks States Parties to give special consideration to the “particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families” such as “their work in the non-monetized sectors of the economy.”³⁴⁷ Furthermore, rural women should be provided with access to health care facilities, counseling and services in family planning, social security programs, training and education, and community activities.³⁴⁸ **CEDAW General Recommendation No. 34** requires States to ensure “that rural women engaged in unpaid work or in the informal sector have access to non-contributory social protection.”³⁴⁹ According to **CEDAW General Recommendation No. 19**,

³⁴⁰ *CESCR GC 23*, *supra* note 294, at para. 5.

³⁴¹ *Id.* at para. 26.

³⁴² *Id.* at para. 54.

³⁴³ INT’L LABOUR ORG. [ILO], *Empowering women working in the informal economy*, ILO ISS. BRIEF 1, 2 (2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_618166.pdf.

³⁴⁴ *CESCR GC 23*, *supra* note 294, at para. 47.

³⁴⁵ INT’L LABOUR ORG. [ILO], *Empowering women working in the informal economy*, ILO ISS. BRIEF 1, 1 (2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_618166.pdf.

³⁴⁶ *Id.* at 4.

³⁴⁷ *CEDAW*, *supra* note 13, at art. 14.

³⁴⁸ *Id.*

³⁴⁹ CEDAW, General Recommendation 34 on the rights of rural women (Sixty-third session, 2016), U.N. Doc. CEDAW/C/GC/34 at para. 41 (2016) [hereinafter *CEDAW GR 34*]; *See also* CEDAW, General Recommendation 16 Unpaid women workers in rural and urban family enterprises (Tenth session, 1991), U.N. Doc. A/46/38 at 1 (1993), U.N. Doc. HRI/GEN/1/Rev.6 at para. C (2003) (requiring States to “take the necessary steps to guarantee payment,

“traditional attitudes regarding the subordinate role of women that persist in many rural communities” place rural women at risk of GBV.³⁵⁰ States should, therefore, pay particular attention to “the risks to rural women,” providing support and services.³⁵¹

Rights of Older Women

Regional and international human rights provisions urge specific protection of older women from discrimination in employment, considering their age, skills, and abilities. The **Protocol on Older Persons** mandates in **Article 6** that State Parties shall work to “eliminate work place discrimination against Older Persons with regard to access to employment.”³⁵² Furthermore, opportunities for work must be made available to accommodate a variety of “medical and physical abilities, skills and experience.”³⁵³ **Article 7** states that retired older persons should be “provided with adequate pensions and other forms of social security” and States parties shall “ensure that universal social protection mechanisms exist” for older persons who were not afforded the opportunity to contribute to social security during their working lives.³⁵⁴ Under **CEDAW General Recommendation No. 27**, States must monitor the impact of “gender pay gaps on older women,” “ensure pension policies do not discriminate against women,” and “provide adequate non-contributory pensions on an equal basis.”³⁵⁵

II. Case Analysis

A leading work- rights case dealing with women engaged in alleged sex-work is **Republic v. Pempho Banda and 18 others**³⁵⁶ was heard by the High Court of Malawi in 2016. Nineteen women were convicted by a Magistrate for “the offence of living on the earnings of prostitution contrary to section 146 of the Penal Code.”³⁵⁷ The Court held that the “offence of living on the earnings of prostitution in Malawi was not aimed at prostitutes or sex workers, but rather at those who exploited them.”³⁵⁸ The Court determined that there was not sufficient evidence “showing that the convicts lived off earnings from prostitution” and that the women were therefore “wrongly charged.”³⁵⁹ The Court held that the arrest and trial of the women was unconstitutional because it was “based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support” the charge.³⁶⁰ Such “an unlawful interference with a person’s right to personal freedom amounts to a violation of their right to liberty and can be an affront to their dignity.”³⁶¹

social security and social benefits for women who work without such benefits in enterprises owned by a family member.”).

³⁵⁰ CEDAW GR 19, *supra* note 7, at para. 21.

³⁵¹ *Id.* at 24(q).

³⁵² *Older Persons*, *supra* note 22, at art. 6.

³⁵³ *Id.*

³⁵⁴ *Id.* at art. 7

³⁵⁵ CEDAW GR 27, *supra* note 83, at para. 41-4.

³⁵⁶ Republic v Banda and Others (Review Order) (Review Case No. 58 of 2016) [2016] MWHC 589 (08 September 2016).

³⁵⁷ *Id.* at 1.

³⁵⁸ *Id.* at 17.

³⁵⁹ *Id.* at 19.

³⁶⁰ *Id.* at 20.

³⁶¹ *Id.* at 19-20.

The High Court of Lesotho heard the work-rights case of *Private Lekhetso Mokhele and Others v. Commander, Lesotho Defence Force and Others* in 2018.³⁶² In *Mokhele*, three female pregnant soldiers in the Lesotho Defence Force brought an action against the Commander of the Force because the soldiers were discharged “on the grounds that their pregnancy “contravened the army’s Standing Order No.2 of 2014” which states that female members of the Force “shall not be pregnant before the expiration of five (5) years of service...”³⁶³ The Court said that labor laws enshrined in international human rights treaties, including the 1967 Declaration on the Elimination of Discrimination against Women, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 2000 ILO Maternity Protection Convention no. 183. enjoin employers in public and private sectors “to gender-sensitize the workplace environment by prohibiting dismissals on the grounds of pregnancy, marital status and denial of maternity or paternity leave.”³⁶⁴ The Court held that the Standing Order was held to be “not legally authorized” and as a result, “unlawful and condemnable as an illegal trigger for the exercise of the power to discharge ...”³⁶⁵ The Court reasoned that “[in] the 21st century there is no justification to fire working women who fall pregnant.”³⁶⁶

The Labour Appeal Court of South Africa decided *Kylie v CCMA & Others* in 2010. The appellant sex-worker brought suit alleging unfair dismissal against her employer. The Court found that sex workers were entitled to the protection of fair labor practices enshrined in section 23 of the South African Constitution.³⁶⁷ The Court stated that the appellant’s “dignity is not to be exploited or abused” and public policy considerations regarding the constitutional protections of a person’s rights weighed heavily in the appellant’s favor.³⁶⁸ The Court also determined that the appellant is considered an employee and entitled to protection against unfair dismissal pursuant to Section 185(a) of the Labour Relations Act.³⁶⁹ The Court further held that sex workers are entitled to form and join trade unions as employees.³⁷⁰ Finally, the Court held that the Commission for Conciliation, Mediation and Arbitration has jurisdiction to make a determination regarding the parties dispute.

The judiciary has a particularly important role to play in addressing workplace discrimination. The above case law from Malawi and Lesotho courts condemn unlawful discrimination against women in employment as required by international human rights law. The subjects discussed in these cases demonstrate the effective role judges can have in shifting societal perception of pregnancy, maternity, marital status, sex work and earnings from sex work. **CESCR General Comment No. 23** underscores the importance of judicial redress for violations and mandates that a “person or group who is a victim

³⁶² *Mokhele and Others v Commander, Lesotho Defence Force and Others* (CIV/APN/442/16) [2018] LSHC 2 (14 February 2018). However, please note there are conflicting cases in South Africa regarding maternity rights protection; *See Call to End Abuses in Health Care Rings Louder*, SOUTHERN AFRICA LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/2013/03/04/call-to-end-abuses-in-health-care-rings-louder/> (last visited Nov. 20, 2020).

³⁶³ *Id.*

³⁶⁴ *Id.* at 18.

³⁶⁵ *Id.* at 20.

³⁶⁶ *Id.* at 24.

³⁶⁷ *Kylie v Commission for Conciliation, Mediation & Arbitration & Others* (2010) 31 ILJ 1600 (LAC) at para 54; CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. Section 23(1) (providing that “everyone has the right to fair labour practices”).

³⁶⁸ *Id.* at 54.

³⁶⁹ *Id.* at 58; Labour Relations Act 66 of 1995 s 1, s 185(a) (codifying “the right not to be unfairly dismissed or subjected to unfair labour practices” and stating “[e]very employee has the right not to be unfairly dismissed”).

³⁷⁰ *Id.* at 59.

of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level.”³⁷¹

CONCLUSION

International and regional human rights law obligates States to uphold the highest standards of equality for women in all aspects of life including issues pertaining to marriage, the family, property, and work. Judicial officers are in a critical position to ensure that women have access to justice to address violations and are treated with dignity and respect. Judges have an ethical and legal responsibility to strike down discrimination in both formal laws, as well as customs and practices used to justify the unfair treatment of women. The **Colombo Declaration** recognizes that “judicial officers have a responsibility to be gender-aware and gender-sensitive in the interpretation and application of the law and in the conduct of court proceedings.”³⁷² The Declaration underscores “the importance of judges, court officials and administrators, and those involved in the administration of justice adopting a gender sensitive approach to the administration of justice.”³⁷³ Accordingly, gender sensitivity by judicial officers can dismantle barriers to women’s realization of justice. The progressive judgements by Southern and Eastern African judicial offices illustrate the enormous progress made by the judiciary to support and advance women’s equality and economic rights through the legal system.

³⁷¹ *CESCR GC 23*, *supra* note 294, at para. 57 (requiring that “all workers should be free from physical and mental harassment, including sexual harassment”).

³⁷² *Colombo Declaration*, *supra* note 187, at 4.

³⁷³ *Id.*