

Advancing Protection for the Rights
of Women and Children in Mali: the
Ruling of the African Court of
Human and Peoples' Rights against
the provisions of the Family Code



Advancing Protection for the Rights of Women and Children in Mali: the Ruling of the African Court of Human and Peoples' Rights against the provisions of the Family Code^{*}

Nota a [ACtHPR judgement of 11 May 2018](#),

[Association pour le Progrès et la Défense des Droits des Femmes Maliennes & The Institute for Human Rights and Development in Africa v. Republic of Mali \(Application No. 046/2016\)](#)

1. Introduction

The present paper aims at highlighting the main contents and features of the decision *Association pour le Progrès et la Défense des Droits des Femmes Maliennes et al v. Republic of Mali* of the African Court on Human and Peoples' Rights. The two NGOs asked the Court on the basis of the non-compliance of the Family Code with international human rights standards, requesting the Court for eliminating those provisions which created prejudice towards women and children.

The alleged violation concerned the establishment of the minimum age for girls' marriage at 16, the right to consent to marriage, the right to inheritance for women and children born out of wedlock and the continuation of practices or traditions harmful towards women and children.

The Republic of Mali contested each allegation and raised a series of preliminary objections, which were discarded by the Court. The State, in order to justify the promulgation of the Family Code, claimed that it was forced to adopt this law due to 'force majeure'. It claimed that the adoption of the previous Family Code in 2009, which was considered more legally advanced, caused protests and social unrest of Islamic

* Nota valutata dalla direzione del Focus.

movements which did not agree with some provisions considered not aligned with their customary laws and traditions.

The Court ascertained that such violations constituted a serious breach of the international human rights law treaties ratified by the Republic of Mali and that the State had to amend its legislation respecting the obligation related to the respect of the rights of women, girls and children.

2. Summary of the Facts

The Application before the African Court on Human and Peoples' Rights (hereinafter 'the Court') was filed by the Association for the Advancement and Defence of Women's Rights, already Observer before the African Commission on Human and Peoples' Rights, and by the Institute for Human Rights and Development in Africa (hereinafter 'the Applicants'). The Republic of Mali (hereinafter 'the Respondent State') was already part to the African Charter on Human and Peoples' Rights (the 'Charter') from 1986; to the Protocol to the Charter from 2004, to the Protocol on the Rights of Women (the 'Maputo Protocol') from 2005 and to the African Charter on the Rights and Welfare of the Child (the 'Children's Charter') from 1999.

The new Family Code, adopted in December 2011 by the Mali National Assembly, was denounced by the Applicants as it violated in several provisions a series of human rights protected by the above-mentioned international instruments. The adoption of this law, the Applicants argued, came as the outcome of a vast operation started by the Respondent State in 1998 aimed at codifying the rights of individuals and families. A first Family Code was adopted in 2009, but it was widely criticized by Islamic organizations. The widespread protest movements led to the drafting of the 2011 Family Code and to its promulgation by the Head of State. According to the Applicants, the provisions contained in this law were in wide contrast with the international human rights standards prescribed by the instruments ratified by the Respondent State.

Therefore, the Applicants alleged a series of relevant breaches of international human rights law:

- Violation of the minimum age of marriage for girls established in Article 6(b) of the Maputo Protocol and Articles 1(3), 2 and 21 of the Children's Charter whereas in the Family Code the minimum age for girls' marriage was set as young as 16 years old without parental consent;
- Violation of the right to consent to marriage enshrined in Article 6(a) of the Maputo Protocol and Article 16(a) and (b) of the Convention on the Elimination of All Forms of Discrimination Against Women

(CEDAW), whereas the Family Code has no provision dedicated to the verification of the parties' consent to contract marriage by the religious ministers or to establish a sanction when they fail in do so;

- Violation of the right to inherit provided in Article 21(2) of the Maputo Protocol and Articles 3 and 4 of the Children's Charter, whereas the Family Code established religious and customary law as an applicable regime: in Islamic law women are entitled to half what a man receives and children born outside the wedlock have no right to inheritance as long as their parents decide differently;
- Violation of the obligation to eliminate traditional practices and conduct harmful to the rights of women and children recognized in Article 2(2) of the Maputo Protocol, 5(a) of the CEDAW and 1(3) of the Children's Charter, as the Respondent State has demonstrated a lack of willingness to eliminate the traditional practices that undermine the rights of women, girls and children born out of wedlock.

The Applicants pleaded the Court to ask the Respondent State to modify the Family Code harmonizing its provisions with those of the international human rights instruments, giving remedy to the ongoing breaches of the law. Also, they called for the institution of sensitisation and educational programmes for the population, together with the development of a strategy to eradicate unequal share of inheritance between men and women.

3. Respondent States' Objections

In response to the Application, the Respondent State made several preliminary objections on the material jurisdiction of the Court and on the admissibility of the case, namely on the failure to exhaust local remedies and on the failure to file the Application within a reasonable time frame. Also, it contested all the alleged violations claimed by the Applicants.

As for the material jurisdiction of the Court, the Respondent State argued that the Court had no jurisdiction on the matter since there had been no violation of human rights in the country and the Application referred only to issues of sensitisation and popularisation rather than issues of interpretation and effectiveness of the Charter's provisions in the national jurisdiction. The Court noted that, as established by Article 3(1) of the Protocol, its objective is to promote the protection of human rights guaranteed by the Charter and the other instruments ratified by Mali. The Court is indeed vested with the power to interpret and apply such treaties. Consequently, the Court declared itself competent and dismissed the objection.

The preliminary objection on the admissibility of the Application concerned the failure to exhaust local remedies. The Respondent State argued that the Applicants should have brought the matter before the national judicial authorities, but they made no effort to submit their alleged violations to the national courts. The Court dismissed this objection, stating that “human rights NGOs are not entitled to seize the Constitutional Court with applications concerning the unconstitutionality of laws¹” and “no remedy was available to the Applicants²”.

Secondly, the Respondent State objected that the Applicants had failed to respect a reasonable time frame in seizing the Court. The impugned law was indeed enacted on 30 December 2011 and the Applicants brought the matter before the Court only on 26 July 2016. But the Court argued that the concept of “reasonable” depends on the “particular circumstances of each matter and must be examined on a case-by-case basis³” and in this case it was necessary to take into account that “the Applicants needed time to properly study the compatibility of the law with the many relevant international human rights instruments [...] given the climate of fear, intimidation and threats that characterised the period following the adoption of the law on 3 August 2009, it is reasonable to expect the Applicants to have been affected by that situation as well⁴”. The Court accordingly dismissed the objection.

Regarding the alleged violation on the minimum age of marriage, the Respondent State claimed that it could not promulgate the 2009 Family Code given a ‘force majeure’ that affected the process: the State was faced with a huge threat of social disruption and it was obliged to submit the text for a second reading, involving Islamic organisation in the draft of the law. The 2011 Family Code has then to be considered as “a provision that is more in line with the realities in Mali; that it would serve no purpose to enact a legislation which would never been implemented [...] especially as a the age of fifteen (15), the biological and psychological conditions of marriage are in place⁵”.

¹ Title VI, ‘Admissibility of the Application’, Objection to admissibility of the Application on grounds of failure to exhaust local remedies, para. 43

² *Idem*, para. 44

³ Title VI, ‘Admissibility of the Application’, Objection to admissibility of the Application for failure to file the Application within a reasonable time, para. 53

⁴ *Idem*, para. 54

⁵ Title VII, ‘Merits’, Alleged violation relating to the minimum age of marriage, para. 66

As for the alleged violation of the right to consent to marriage, the Respondent State refuted the allegation, arguing that the Family Code in Article 283 and 300 made it clear that consent is required and marriage is publicly celebrated.

Concerning the right to inheritance, the Respondent State argued that the 2009 Family Code had to be rewritten, by the reasons previously adduced, with the advantage “of being flexible in the sense that it allows for reconciliation of entrenched positions, offering each citizen the possibility of determining his mode of inheritance [...] the legislator has simplified the mode of expression of this choice which can be made even by testimony⁶”. In the State’s views, citizens who are not willing to apply the customary law on inheritance, are free to choose the application of the other provisions prescribed by the law. The Respondent State also admitted that the 2009 Family Code envisaged the equal sharing for men and women with the participation of the children born out of wedlock but that, given the high social pressure, it “had to consent to a re-drafting of the text⁷”.

Finally, the Respondent State objected to the alleged violation of the obligation to eliminate practices or traditions harmful towards women and children. In its views, it was “excessive to assert that Mali does not deploy efforts to eliminate the said practices⁸” and that it had launched several programmes of sensitisation and promotion of the rights of women and children and had enacted “various laws”.

4. Ruling of the Court

The Court, after having dismissed the preliminary objections *ratione materiae* and *ratione temporis*, analysed and confuted the single assertions of the Respondent State.

As for the first alleged violation, the Court recalled Art 2, 4(1) and 21 of the Children’s Charter⁹, and Article 6(b)¹⁰ of the Maputo Protocol, as the provisions contained in these international human rights instruments

⁶ Title VII, ‘Merits’, Alleged violation of the right to inheritance for women and natural children’, para. 104

⁷ Idem, para. 103

⁸ Title VII, ‘Merits’, Alleged violation of the obligation to eliminate practices or traditions harmful towards women and children, para. 119

⁹ “Child” is defined as “every human being below the age of 18 years”, and its best interests “shall be the primary consideration”, while “State parties [...] shall take all appropriate measures to eliminate harmful social and cultural practices [...] and those customs and practices discriminatory to the child on the grounds of sex or other status” African Charter on the Rights and Welfare of the Child, Art. 2, 4(1) and 21

¹⁰ “State parties shall ensure that men and women enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: [...] b) the minimum age of marriage for women is 18 years”, Art 6(b), Protocol on the Rights of Women to the African Charter on Human and Peoples’ Rights

“focus on the obligation for States to take all the appropriate measures to abolish negative practices or customs [...] especially measures to guarantee the minimum age of marriage at 18 years¹¹”. The Court noted that the Respondent State, in its objection, had implicitly admitted that the Family Code is not consistent with international human rights standards by setting the marriage for girls at 16, including also the possibility to grant exemption for girls aged 15 for “compelling reasons”. The Court held in conclusion that the State had failed to guarantee compliance with the minimum age of marriage and the right to non-discrimination and in doing so, it had committed a breach of the provision enshrined in all the above-mentioned Articles.

The Court also noted that the Maputo Protocol in Articles 2(1) and 6 and the CEDAW in Articles 10 and 16 set down the principle of free consent in marriage, but “the extant Family Code envisages the application of Islamic law (Article 751) and entitles religious ministers to celebrate marriages, but does not require them to verify the free consent of the parties¹²” and also that “no sanction is provided against a religious minister who does not comply with this obligation¹³”. The Court was of the view that the way religious marriages are conducted in Mali may lead to serious risks such as forced marriages and the perpetuations of practices in contrast with international human rights law.

As for the alleged violation of the right to inheritance, the Court asserted that the Family Code substantially provided for the equality between its provisions and Islamic customary law, which may result in an application of the latter in the absence of any other legal regime or a document authenticated by a notary. The Islamic law in Mali creates a great prejudice in the enjoyment of rights for women and children born out of marriage. According to the Court the superior interests of the child “were not taken into account by the Mali legislator¹⁴” and “the Islamic law currently applicable in Mali in matters of inheritance and the customary practices are not in conformity with the instruments ratified by the Respondent State¹⁵”.

¹¹ Title VII, ‘Merits’, Alleged violation relating to the minimum age of marriage, para. 75

¹² Title VII, ‘Merits’, Alleged violation of the right to consent to marriage, para. 91

¹³ *Idem*, para. 92

¹⁴ Title VII, ‘Merits’, Alleged violation of the right to inheritance for women and natural children, para 113

¹⁵ *Idem*, para. 114

Therefore, the State had violated Article 21(2) of the Maputo Protocol¹⁶ and Articles 3 and 4 of the Children's Charter¹⁷.

Finally, the Court asserted that, "by adopting the Family Code and maintaining therein discriminatory practices which undermine the rights of women and children the Respondent State has violated its international commitments¹⁸", namely those enshrined in Article 2 of the Maputo Protocol, Articles 3 and 4 of the Children's Charter, Article 16(1) of the CEDAW. The Court was of the view that, given these important breaches, the State "has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments", complying with the commitments established under Article 25 of the Charter¹⁹.

5. Conclusions

The here presented jurisprudence of the African Court on Human and Peoples' Rights has demonstrated how the ratification of international human rights instruments by a State is not a guarantee in itself of the actual respect of the highest human rights standards, whereas the promulgation of domestic law is openly in contrast with such provisions.

The Republic of Mali, although has ratified imperative treaties such as the Maputo Protocol and the Children's Charter, had not enforced their provisions by adopting a national law that was in open contrast with human rights standards fundamental for the welfare of women and children. What is even more

¹⁶ "A widow shall have the right to an equitable share in the inheritance of the property of her husband [...] Women and men shall have the right to inherit, in equitable shares, their parents' properties", Article 21 of the Protocol on the Rights of Women to the African Charter on Human and Peoples' Rights

¹⁷ "Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" and "1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration; 2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law", Articles 3 and 4 of the African Charter on the Rights and Welfare of the Child

¹⁸ Title VII, 'Merits', Alleged violation of the obligation to eliminate practices or traditions harmful towards women and children, para. 124

¹⁹ "State Parties to the present Charter shall have 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", Article 25 of the African Charter on Human and Peoples' Rights.

worrying is the State's admission of its impotence facing the protest and requests of the Islamic movements, which led to the re-draft of the 2009 Family Code and the adoption of provision highly discriminating for young girls and children. The very fact that the Republic of Mali was not able to cope with the mass protest movements against the first code and it felt obliged to submit the text for a second reading with the involvement of Islamic organizations, is a symptom of a society where normally the rights of women and children are at stake. The State should, in theory, protect the most disadvantaged categories by enacting legislation in harmonization with the international human rights law framework, and not adapting its national law to the will of organizations which disagree with the application of the highest human rights standards.

However, many points and questions should be addressed to better understand the complex reality in Mali, such as its history, the consequences of colonialism, an appropriate study on the condition of women and children, the role of Islamic culture and Islamic customary law and its influence in the society. For the purposes of this paper, we have limited in the analysis of this important ruling of the Court, which has established that the State has committed serious violation of human rights through the promulgation of the Family Code. The Court has indeed prescribed to the State the harmonization of its national law with the provisions contained in the international human rights instrument ratified, in contrast with the continued use of Islamic customary law in the society.

This case-law also brings to our attention that the Court has an important role in the interpretation and application of the ratified treaties and it has jurisdiction even if there are no specific victims of human rights violation. In promulgating the Family Code, the Respondent State has committed a breach of the treaties that have been ratified and the Court should be legitimately seized to elucidate the implications for domestic laws. In the Court's views, the threats generated by the protest of the Islamic movements are not sufficient to justify derogation to such important international norms aimed at protecting the right of girls and children born out of wedlock.

The very existence of the 2011 Family Code in Mali is representative of a reality where marriage without consent of girls under 18 years old, discrimination against children born out of wedlock and violation to the right of inheritance are all practices rooted in the society and fostered by the application of customary law and practices. The Ruling of the African Court on Human and Peoples' Rights can be considered a first step in the resolution of these issues – at least from the legislative point of view.

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