Law, Religion and the Family in Africa

Edited by
M. Christian Green
Faith Kabata

5 FAMILY AS THE LEADING FIGURE OF DEVELOPMENT: A COMPARATIVE APPROACH TO AFRICAN AND EUROPEAN POLICIES ON THE FAMILY

Carmen Garcimartin¹

INTRODUCTION

Consensus on the consideration of the family as the cell of society seems to be universal. All cultures around the world view the family as the basic unit of social organisation and therefore worthy of protection. The family is referred to in these terms in a number of international treaties,² most notably in the Universal Declaration of Human Rights (UDHR).³ However, analysing the legal systems of the signatory States, we find considerable differences in relation to the concept of the family, its role in society, and the principles behind its regulation.

Regional treaties usually reflect the more specific values of the society in which they are signed and act as a complement to the general provisions of universally agreed instruments. Regional systems of guarantee also often protect fundamental rights better, as the authorities responsible for interpreting and enforcing them share a common heritage and the same social and economic values.⁴ An analysis of regional treaties on human rights can therefore offer insight into the nature and role of the family in each region.

1 Full Professor, Faculty of Law, University of A Coruña, Spain.

2 For a survey of the most relevant international instruments on this matter, see Office of the High Commissioner for Human Rights, "United Nations Human Rights Instruments". Online at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> [Accessed 18 May 2021]. Amongst those which acknowledge the essential role of the family are: the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art 23; the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, art 10; the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, arts 9 and 10); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003, art 44.

3 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art 16(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

4 Bermejo R. 2012. "Los derechos humanos en África" [African human rights], *Anuario Español de Derecho Internacional* [Spanish Yearbook of International Law] 28:10.

The aim of this chapter is to examine the idea of the family embodied in the main regional conventions on human rights in Africa and Europe: the African Charter on Human and Peoples' Rights (African Charter, or ACHPR) and the European Convention on Human Rights (European Convention, or ECHR).⁵ Strictly speaking, this is not a study in comparative law, as it makes little sense to compare two documents, even of a similar kind, in isolation of other defining features of their respective societies, such as history, culture, traditions, and so on. The goal of this analysis is more limited: to study how the family is depicted and protected in these conventions, and to gain a better understanding of some of the family policies in the regions where they apply.

The examination of Africa and Europe as single regions obscures the diverse realities of each continent. Both are home to an array of different cultures and traditions, and a corresponding multitude of distinct, though neighbouring legal systems. Nevertheless, these regional declarations of rights are designed to reflect the shared values of the community of States where they apply.⁶ The analysis offers the perspective of a European outsider looking in, in the hope that this external viewpoint may offer fresh insight into the distinctive features of both instruments.

THE AFRICAN AND EUROPEAN CONVENTIONS ON HUMAN RIGHTS

The African Charter and the European Convention are not the only regional instruments that refer to the family; there are other conventions that relate to the family or, better, to some of its members, such as women, children or elders. For example, we can mention the African Charter on the Rights and Welfare of the Child (ACWRC), adopted by the African Union (then the Organisation of African Unity) in 1990 and entered into force in 1999,⁷ and, on the European side, the Charter of the Fundamental Rights of the European Union, adopted in 2000 and in force, in

5 African [Banjul] Charter on Human and Peoples' Rights (ACHPR), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953. The latter instrument is commonly known as the European Convention on Human Rights.

6 Okere BO. 1984. "The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems", *Human Rights Quarterly* 6(2):141. Okere observes that "in many important respects, the African Charter has some specific characteristics whose inspiration is derivable solely from Africa's colonial history, philosophy of law, and conception of man".

7 See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999. According to South African legal scholar Trynie Davel (now Boezaart), "In line with the rationale behind the Charter, [the African Charter on the Rights and Welfare of the Children] goes further than the United Nations Convention in that it addresses uniquely African issues, for example: 1. Duties are placed on children in line with a general concept, which is also one of the main features of the Banjul Charter, of the community's responsibilities; 2. the role of the family as basis of society and the natural unit within which children are reared, is acknowledged." Davel T. 2002. "The

its new version, since 2009.⁸ Those instruments, useful as they are, go beyond the aim of this chapter, which will focus on the most general regional conventions on human rights. Those other treaties are eventually considered, whenever they can help to better understand the assertions about the family.

Doubtless, taking Africa and Europe as a whole entails a generalisation that fades away the particularities of each territory. Moreover, all countries have encapsulated their culture and traditions in a juridical system that makes it different even from those with a similar background. Nevertheless, these regional declarations of rights try to gather the common values of the area where they apply. From this point of view, these instruments are valuable to uncover the main properties of the family that all signatory countries recognise as part of their heritage.⁹

It is worth noting at the outset that there is a widespread idea that international instruments on human rights are Western-biased and reflect only the liberal, individualistic tradition of Western Europe and North America, and that they do not apply to Africa because they are blind to its particular circumstances and cultures and do not deal with specifically African human rights issues.¹⁰ Certainly, the UDHR and other international treaties owe much to Western legal and political philosophy and ideology.¹¹ Nevertheless, despite this Western bias and the instruments' failure to address important African realities, they are entirely relevant to Africa. The African Charter, in particular, as a regional human rights instrument, is an attempt to

African Charter on the Rights and Welfare of the Child, Family Law and Children's Rights", *De Jure* 35:283.

- 8 See Charter of the Fundamental Rights of the European Union, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which *entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. This Charter does not apply to all State Members of the European Council, only those of the European Union. It brings together all the personal, civic, political, economic, and social rights enjoyed by people within the European Union in a single text. It covers all the rights found in the case law of the Court of Justice of the European Union, the rights and freedoms enshrined in the European Convention on Human Rights, and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments. See European Commission, "Why Do We Need the Charter?" Online at: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_es [Accessed 18 May 2021].
- 9 Okere, "The Protection of Human Rights in Africa and the African Charter", 141. Okere argues that "in many important respects, the African Charter has some specific characteristics whose inspiration is derivable solely from Africa's colonial history, philosophy of law, and conception of man".
- 10 See Nhlapo RT. 1989. "International protection of human rights and the family: African variations on a common theme", *International Journal of Law & the Family* 3:2. I follow the author's interesting reflections on this issue. See also Allsobrook CJ. 2018. "Universal Human Rights from an African Social Contract", *Perspectives in Social Contract Theory*, 265-306.
- 11 According to Nhlapo, this is particularly visible in the area of family law. See Nhlapo, "International protection of human rights and the family".

establish a framework for the understanding and interpretation of human rights in an African context.

The African Charter on Human and Peoples' Rights, also referred to as the "Banjul Charter" due to the historical role of The Gambia in its drafting, was adopted by the Assembly of the Organisation of African Unity (OAU)¹² on 28 June 1981, in Nairobi, Kenya. After ratifications by an absolute majority of member states of the OAU, the Charter came into force on 21 October 1986. By 1999, the African Charter had been ratified by all African countries except Morocco.¹³ Since then, the only change has been the addition of the Republic of South Sudan in 2013, following its constitution as an independent country in 2011.

The African Charter is a distinctively African instrument in many respects.¹⁴ Firstly, the African Charter places significant emphasis on African values and morals. While retaining the Western human rights embodied in the UDHR, it takes into account problems unique to Africa.¹⁵ It departs from other regional models, such as the European and American Conventions, by recognising the equal obligations of the State with regard to all categories of rights: civil, political, social, economic and cultural. Secondly, non-discrimination is the first and most prominent principle enshrined in the African Charter, and it pervades the whole document. Thirdly, the African Charter considers the individual both as a single person and as a member of the community, and it declares that individual rights find their fullest expression within the community.¹⁶ It therefore covers both the individual rights of the person and the collective rights of peoples, and correlates individuals' rights with their duties towards the community, the family and the State.

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights or, hereinafter, the European Convention, was opened for signature in Rome on 4 November 1950 and came into force in 1953. It was the first instrument to give effect to most of the rights stated in the UDHR and to make them binding. Since its adoption in 1950,

12 The Organisation of African Unity (OAU) was replaced by the African Union (AU) by the Constitutive Act of the African Union CAB/LEG/23.15, 26 May 2001.

13 Information retrieved from the website of the African Commission on Human and Peoples' Rights, <https://bit.ly/3J8thDg> [Accessed 18 May 2021]. For an account of the history of the Charter, see 1982. "Organisation of African Unity: Banjul Charter on Human and Peoples' Rights", *International Legal Materials* 21(1):58-68. <https://www.jstor.org/stable/20692392>

14 Okere, "The protection of human rights in Africa", 145.

15 Nhlapo, "International protection of human rights and the family", 7.

16 See Allsobrook, "Universal Human Rights from an African Social Contract". ("Africans conceive of persons in communal, relational terms. Rather than judging the legitimacy of government in terms of its success in securing negative rights, or freedoms from interference, as Westerners commonly do, Africans are more likely to assess the legitimacy of government behaviour in terms of the fulfilment of social duties. Economic and social rights are consequently more highly regarded in Africa than political rights.").

the European Convention has been amended several times and supplemented with additional rights to those set out in the original text.¹⁷

The rights covered by the European Convention are mainly civil and political, not social and economic. Its aim was to protect fundamental rights as the minimum standard that must be recognised and accepted by all signatory States. Provided these minimum standards are respected, case law accepts a degree of discretion in the enforcement of the rights of the European Convention, the so-called margin of appreciation (or margin of State discretion) doctrine. The interpretation of the European Convention is also dynamic: the European Court of Human Rights (ECtHR) views the European Convention as a living instrument and, as such, it must be interpreted in accordance with the socially accepted patterns in Europe. The scope of the rights enshrined in the European Convention may vary, therefore, as in the case of certain issues related to the family. In contrast to the African Charter, in the European Convention, the individual is at the centre of human rights: a single person, dissociated from society, whose privacy is the supreme value.¹⁸

THE FAMILY IN THE AFRICAN AND EUROPEAN CONVENTIONS

The definition of the family

The family is a pre-legal concept, easy to grasp but difficult to define. The composition of the family, as well as its role and function, changes over time and between cultures.¹⁹ Beyond the different forms and patterns it may adopt, however, the

17 Information retrieved from the website of the Council of Europe, <https://bit.ly/3mnH4MB> [Accessed 18 May 2021].

18 See Viljoen V. 2019. "Africa's contribution to the development of international human rights and humanitarian law", in Sahle EN (ed.) *Human Rights in Africa: Contemporary Debates and Struggles*. Berlin: Springer, 205. ("Western-dominated discourse privileges the individual. Human rights instruments postulate an autonomous, independent individual (complainant), who is prepared, ultimately, to dissociate from other and enter into legal battle with the collectivity (the state). The African Charter treats a human being both as an individual and as a member to a collective (the 'people'). Generally, 'every individual' is a bearer of rights under the African Charter. The communal aspect is emphasized in the rights guaranteed to 'peoples' and in the recognition of the family as the 'natural unit and basis of society'.") See also Okere, "The protection of human rights in Africa", 148 ("The African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity. This contrasts with the European conception of human rights. The European conception of human rights, that is to say, a set of principles whose essential purpose is to be invoked by the individual against the group with which he is in conflict, is not met with in traditional Africa. In Africa, the individual, completely taken over by the archetype of the totem, the common ancestor or the protective genius, merges into the group.").

19 Okon E. 2012. "Towards defining the 'right to a family' for the African child", *African Human Rights Law Journal* 12:376. See the definitions of the family that the author mentions in note 20, and the challenges this concept poses.

family is commonly regarded as a community of people with bonds of blood, adoption or marriage that constitutes the basic unit of society.

The prevailing model of the family is different in Europe and Africa. In Europe, the function of the family as an economic unit mostly disappeared as a consequence of the Industrial Revolution. The new lifestyles and behaviours introduced at this time brought with them significant changes in the model of the family: its size was reduced and a nuclear family of parents and offspring, often isolated from other kin, became the norm. The structure and scope of the family in Africa is different. The traditional model of the family remained mostly intact through the colonial and post-colonial periods,²⁰ and while more recent developments have affected the configuration of family life, the essential characteristics of African community and kinship are still very much in evidence. Its scope, therefore, is broader than the European model, and the prevalent pattern is that of the extended family.²¹

Both the African Charter and the European Convention contain numerous references to the family. In contrast to the European Convention, however, the African Charter contains two articles, 18 and 27, that refer to the role of the family and the duties it commands. Article 18 specifies:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.
3. The 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.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.²²

Article 27 states:

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.²³

20 Cfr. Van Hoecke M. 2012. "Family law transfers from Europe to Africa: Lessons for the methodology of comparative legal research", in Gillespie J and Nicholson P (eds). *Re-interpreting global family and religious norms* Cambridge: Cambridge University Press, 279-302.

21 Cfr. Cobbah JAM. 1987. "African values and the human rights debate: An African perspective", *Human Rights Quarterly* 9(3):320.

22 ACHPR, art 18.

23 ACHPR, art 27.

What these articles reveal is the African Charter's emphasis on the principle of community,²⁴ with interdependence and cooperation between family members depicted as key to the institution's success and survival. In Article 18(1), the family is explicitly named as the cell of society and the guardian of traditional African values.²⁵ The importance of the community does not mean that individuals as such are forgotten. On the contrary, everybody matters in this conception of the family. Older people and people with disabilities are specifically mentioned in the ACFPR, which provides for their right to special measures to meet their needs. Children are attributed an active role in the family's well-being as well: they must be cared for and educated, certainly, but they also have an obligation to respect their older relatives and help them when needed. The Protocol to the Charter on the Rights of the Women in Africa (Maputo Protocol), which contains an article about marriage, where it specifies all measures that must be guaranteed by the State legislation, will be considered later on in this chapter.²⁶

The European Convention takes a different approach and does not refer directly to the role of the family in society. In two short sentences, in which family as such is not the focus, the European Convention provides for the right to establish a family and the family's right to privacy. The only issue that concerns the European Convention in this regard is that people should be able to create and conduct their family life without any kind of intrusion. Article 8, on the right to respect for private and family life provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with

24 Cobbah, "African values and the human rights debate", 320-321.

25 ACHPR, art 18.

26 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005, 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: a) no marriage shall take place without the free and full consent of both parties; b) the minimum age of marriage for women shall be 18 years; c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected; d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised; e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence; f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname; g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband; h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests; i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children; j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.")

the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²⁷

Article 12 on the right to marry further specifies: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”²⁸

Judgments issued by the European Court defining the scope of the family for the purposes of the right to privacy tend to limit it to the nuclear unit. Although the Court views the nuclear family based on marriage (the “core family”, as it is occasionally labelled) as the basic structure of society, it has also called for a more functional approach to the concept, considering the ethical and social dimensions of the institution.²⁹

The State’s role regarding the family

The different conceptions of the family in the two conventions also affect their definition of the role of the State: to safeguard the family and help it to fulfil its role within society, in the case of the African Charter, and to safeguard family privacy, in the case of the European Convention. The African Charter recognises the role of the family in the development of society,³⁰ and it imposes a positive duty on the State to “assist the family which is the custodian of morals and traditional values recognised by the community”.³¹ It is not made clear, however, how the State should provide this assistance, or whether this statement is anything more than a declaration of good intentions.

²⁷ ECHR, art 8.

²⁸ ECHR, art 12.

²⁹ See the partly concurring and partly dissenting opinion of Judge Kovler in *Slivenko v Latvia*, [GC] no. 48321/99, ECHR Reports of Judgments and Decisions 2003-X.

³⁰ Okon “Towards defining the ‘right to a family’ for the African child”, 388 (“The family, in terms of the African Charter, can therefore be defined as that unit which founds the existence of, firstly, an individual, and secondly, any society.”).

³¹ African Union. 2014. *Plan of Action on the Family in Africa*. Addis Ababa: African Union. Online at: <https://bettercarenetwork.org/sites/default/files/plan%20of%20action%20on%20the%20family-16july4%20African%20Union261.pdf> [Accessed 18 May 2021]. (“As the core of the society, the Family can be seen in three dimensions: firstly, as a psychological unit where members are linked together by blood ties – kinship relationship, personal feelings and emotional bonds of its members; secondly, as a social unit where members live together in the same household and share tasks and social functions; and thirdly as the basic economic production unit. It is, therefore, imperative to provide sustained support and encourage cohesion of the family to enable it to play its role. In this regard, it is necessary to develop and implement social policies to address the various concerns of families.”)

Article 18(3) affirms that “the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions”.³² This section addresses a delicate issue in the family field: the reconciliation of customary laws and practices with women’s equality and the protection of children according to international standards. The application of customary laws rests on the right to culture;³³ however, none of the international instruments on human rights – including the African Charter – mention the culture as a basis for limiting the protection of human rights. The State should therefore intervene to prevent cultural practices that violate human rights. Nevertheless, despite the need of this State intervention, customary laws should be seen not as opposed to human rights, but as a standard for shaping the content and scope of those rights.³⁴ Culture is protected so that it may enhance human rights, not undermine them.³⁵

In contrast to the African Charter, the European Convention defines the State’s role in the protection of the family in essentially passive or negative terms, as the duty not to interfere in or intrude on family life.³⁶ The provisions of the European Convention contemplate, essentially, the absence of interference, for example, the negative duty of forbearance from encroachment through secret surveillance. We might say that this Convention takes a passive approach to the protection of the families while the African Convention takes an active one.

Duties of the members of the family

One of the most significant differences between the two conventions relates to the duties of the individual. No reference to the duties of the family or its members is made in the European Convention. As in most international human rights instruments, duties are owed by the State towards its citizens, not the other way round. The African Charter, on the other hand, declares it the duty of all individuals

32 ACHPR, art 18(3).

33 Moore E and Himonga C. 2018. “Living Customary Law and Families in South Africa”, in Hall K, Richter L, Mokomane Z and Lake L (eds). *South African Child Gauge*, 2018. Cape Town: Children’s Institute, University of Cape Town, 61.

34 Nhlapo, “International protection of human rights and the family: African variations on a common theme”, 17; Moore and Himonga, “Living Customary Law and Families in South Africa”, 63. An example of the potential of the international treaties on human rights to protect women and children will be provided below regarding a specific case of the African Court of Justice and Human Rights that deals with this issue.

35 See Mwambene L. 2010. “Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi”, *African Human Rights Law Journal* 10:82.

36 See, for example, *Marckx v Belgium*, Application No. 6833/74, ECtHR, 13 June 1979, sec 31 (“the right to respect for family life, Article 8 (art 8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2”; s 45: it also “implies an obligation for the State to act in a manner calculated to allow these ties to develop normally”).

to contribute to the development of the family and the well-being of its members. References to the duties of the individual to other individuals towards their community are also found in the preamble to the International Covenant on Civil and Political Rights³⁷ and, more briefly, in the American Convention on Human Rights.³⁸ In contrast to these brief allusions elsewhere, the African Charter devotes the whole second chapter to the individual duties.

Article 29 of the African Charter lists the wide-ranging duties of the individual towards the family, society, the State and the national community, some of which seem more moral than legal. In fact, in many instances, they should probably be regarded as a code of good conduct for all African citizens, rather than a set of strictly enforceable obligations.³⁹ Legal enforcement is closely linked to the environment of application: it is one thing to proclaim the right to public health or education, for example, but it is quite another to possess the means to make those rights effective.⁴⁰ The same applies in relation to the duties of family members provided in the Charter.

The individual's duties towards the family reinforce the communal nature of the institution. It should be noted that family in the context of the African Charter refers to the extended family, not the nuclear family, meaning that the number and variety of duties is extensive.⁴¹ The duties of the individual must also be interpreted within the context of belonging. A person in Africa usually has a close relationship with their family and the surrounding community, both of which play an important role in the development of the individual and, on the other side, rely for their success and survival on the collective contribution of all of their members.⁴²

Marriage

Marriage is the universal foundation of the family, despite differences in how the relationship is regulated in law and its coexistence with other kinds of unions.

37 ICCPR, preamble ("Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant").

38 American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art 32(1) ("Every person has responsibilities to his family, his community, and mankind.")

39 ACHPR, art 29. See also D'Sa RM. 1985. "Human and peoples' rights: Distinctive features of the African Charter", *Journal of African Law* 29(1):77.

40 Okere, "The protection of human rights in Africa", 148.

41 Nhlapo, "International protection of human rights and the family", 9-10.

42 Cobbah, "African values and the human rights debate", 322. ("Responsibility is a much broader concept for African families than Western families, given their larger size. For the African this offers a network of security, but it also imposes the burden of obligations.") See also on this regard Heyns C. 2004. "The African regional human rights system: The African Charter", *Penn State Law Review* 108(3):693.

Understandably, therefore, the right to marry is recognised in Article 16 of the Universal Declaration of Human Rights, which deals nominally with the “right to marriage and family”, but also covers other questions, such as marriage age, equality between spouses and free will.⁴³

The regional conventions largely do not develop the right to marry in their territories. Actually, the African Charter does not even mention marriage, although the African Commission recognised that the right to the protection of the family implies the right to marry.⁴⁴ The European Convention refers to the right to marry but just to recognise it and to assert the power of the States on this matter. However, both conventions have protocols that deal with equality of spouses, very detailed in the African one, and less in the European. It is worth looking closer at each convention to figure out why the right to marry deserved so little attention in the regional instruments, and how they consider this union.

The European Convention recognises “the right to marry and to found a family”. Though originally conceived as a unitary right, since 2002, the second aspect of this provision has been regarded as divisible and independent from the first, in accordance with a series of judgments by the European Court. While marriage enjoys special protection under the European Convention, the Court ruled that is not the only way to create a family.⁴⁵ The Court also stated that the regulation of same-sex marriage is permitted by the Convention, but it is not compulsory if homosexual couples have alternative means of accessing similar benefits to those of marriage.⁴⁶

Despite their recognition of the principle of subsidiarity in matters of marriage and family, these rulings illustrate the alignment of the European Court with general trends in Europe regarding marriage. As mentioned, the Court regards the European Convention as a living instrument that must be interpreted in accordance with developments in society. In relation to marriage, this development has been quite clear: once varying conceptions of marriage amongst the different States are

43 UDHR, art 16. (“1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”)

44 African Commission on Human and Peoples’ Rights, “Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights”, October 24, 2011, para 93.

45 *Christine v The United Kingdom*, [GC] no. 28957/95, 11 July 2002, ECHR 2002-VI, s 98. (“Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.”).

46 See *Schalk and Kopf v Austria*, no. 30141/04, 24 June 2010, ECHR 2010-IV; see also *Chapin and Charpentier v France*, no. 40183/07, 9 September 2016.

slowly merging into a single idea of marriage as the freely undertaken legal union of two people who wish to establish a community of life together. It has thus become more and more identified as a personal, emotional relationship, and dissociated from the task of raising the next generation.

Traditional marriage in Africa had a strong social significance in the past, involving not just the couple, but also their extended families. Today, the traditional model of marriage coexists with State laws that regulate marriage according to Western values and Islamic religious law and culture.⁴⁷ The reasons for the persistence of traditional marriage are partly socio-economic (large rural population, families as the basis of the economy, etc.), but also cultural (communitarianism). The diversity of customs, religions and legal systems across the different signatory States also required a compromise solution to achieve the widest consensus possible on the Charter.⁴⁸ All of these factors may help to explain why, in contrast to the European Convention, the African Charter does not deal specifically with marriage.

Although the African Charter does not refer to marriage, the African Commission considered that the minimum core obligations of the right to family include the State's obligation to "guarantee in law and practice the rights of all persons to enter into marriage with their full and free and personal consent; abolish such customs, customary laws and practices as may affect the freedom of choice of a spouse; ensure that no marriage is entered into by parties less than 18 years old".⁴⁹

With respect to women's rights in the family, the Maputo Protocol also provides that States will enact appropriate national legislative measures to ensure, amongst other circumstances: that no marriage will take place without the consent of both parties, that the minimum age of marriage for women will be eighteen, and that monogamy is encouraged as the preferred form of marriage.⁵⁰ While marriage seems to clash with women's rights in Europe, in Africa it is seen as a way to protect them.⁵¹ The challenge of reconciling the African Charter with certain African traditions remains, however, as in the case of polygamy. Debates around the practice continue, but the wording of Article 6(c) of the Protocol – "monogamy is encouraged as the preferred form of marriage" and "the rights of women in marriage and family, including in

47 Van Hoecke, "Family law transfers from Europe to Africa", 8.

48 See Nhlapo, "International protection of human rights and the family: African variations on a common theme", 14. The author highlights three aspects of marriage where the traditional African notion of marriage may clash with the African Charter: consent, marital power, and grounds for divorce.

49 African Commission on Human and Peoples' Rights, "Principles and guidelines on the implementation of economic, social and cultural *rights*", para 95.

50 See ACHPR, art 6.

51 It has been argued that the African Charter protects women inside the family, but outside this context, little protection is offered to women. See Nsibirwa MS. 2001. "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women", *African Human Rights Law Journal* 1(1):41. This topic, important as it is, lies beyond the scope of this chapter.

the polygamous marital relationships are promoted and protected” – seems to be an attempt to find a balance between human rights and the cultural reality of life in Africa.⁵²

LEGAL PROTECTION OF THE RIGHTS OF THE FAMILY

The recognition of rights in a convention can have no effect if a system of protection is not established. One of the most important instruments to that aim is establishing a legal body to investigate the violation of the rights embodied in the document and to issue binding decisions to restore them. The creation of appropriate enforcement and protection institutions is a necessary first step, therefore, but it must be accompanied by proper funding, qualified judges, and recognition of cultural, geographical and historical particularities.⁵³

Both the European Convention and the African Charter have established a Commission and a Court for the protection of the rights enshrined in the conventions. The courts are at different stages of development, however, with the African Charter appearing to follow the European Convention's lead. This is by no means to say that the courts are mirror images of one another, as each has a distinct cultural and historical background and must deal with different issues and problems.⁵⁴ Any similarities between them should therefore be understood as an effort on the part of the African Charter to raise the protection of human rights in Africa to universal standards.⁵⁵

The enforcement of the European Convention is currently supervised by the European Court of Human Rights. It represents an additional layer of human rights protection, over and above the national instruments of each Member State.⁵⁶ However, it also poses challenges in relation to the family. The European Court interprets the European Convention dynamically, in the light of its present context, and has even extended the rights it establishes.⁵⁷ The signatory countries of the European Convention have different traditions and cultures, differences accommodated by the European Court in its acceptance of a “margin of appreciation” (or State discretion) in the enforcement of protected human rights. Notwithstanding

52 Maputo Protocol, art 6(c). See also Mwambene, “Marriage under African customary law”, 93.

53 Murray R. 2002. “A comparison between the African and European Courts of Human Rights”, *African Human Rights Law Journal* 2(2):195.

54 Murray “A comparison between the African and European Courts of Human Rights”, 195.

55 Eno RW. 2002. “The jurisdiction of the African Court of Human and Peoples’ Rights”, *African Human Rights Law Journal* 2(2):233.

56 The European Court has become a “de facto” Supreme Court on human rights in Europe, aiming to establish common standards in this matter over the more than 800 million people living across the 47 Member States of the Council of Europe. Cfr. Fokkas E. 2017. “The European Court of Human Rights at the grassroots level: Who knows what about religion at the ECtHR and to what effects?”, *Religion, State and Society* 45(3-4):249.

57 Cfr. European Court of Human Rights. 2021. The European Convention on Human Rights: A Living Instrument. Strassbourg: European Court of Rights/Council of Europe.

this discretionary margin, a State may find itself bound by a European Court ruling that interprets a certain human right in a way that does not coincide with its own legislation and tradition, and thus be forced to repeal or modify the law (or laws) affected. It can, therefore, be said that the European Court now dictates the framework of human rights in Europe.

The African Charter established the African Commission on Human and Peoples' Rights as the main regional forum for the protection of human rights in Africa.⁵⁸ It did not establish a court at that time, however, although the proposal of a court with the power to issue binding rulings was considered.⁵⁹ At the time of drafting, the reasons given for this decision included the long-established African tradition of solving disputes amicably and the Member States' defence of the principle of non-intervention in internal affairs.⁶⁰

Despite these reasons, in the decade of the nineties, other factors eased the path towards the establishment of a court; amongst them, it can be mentioned the emergence and consolidation of the rule of law in Africa, the relative weakness of the African Commission in its role of protecting human rights,⁶¹ the evolution of the attitude of the African States towards an international jurisdiction, as well as the creation of the International Criminal Court for the genocide in Rwanda.⁶²

58 ACHPR, art 30. ("An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission', shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.")

59 See Bermejo, "African human rights", 46.

60 Viljoen, "Africa's contribution to the development of international human rights and humanitarian law", 206. Viljoen explains that "despite the fact that many quasi-judicial monitoring bodies have been established, the discourse (at least at the regional and domestic levels) privileges enforceable judicial means. At the time the African Charter was drafted, the two other existing regional systems each provided for a court as the final arbiter for resolving disputes. The African Charter and the African Commission emphasized amicable settlements between parties. The argument that the preference for a commission above a court reflects an inherently 'African' concept of dispute resolution may be countered by an examination of the political context at the time of drafting. Weakening the implementation mechanism was most likely a compromise necessary to ensure the support of rulers not yet completely committed to human rights, democracy and the rule of law.")

61 This was due, amongst other reasons, to the low budget, its lack of real independence, and the lack of power to issue binding decisions. See International Federation for Human Rights. 2010. *Practical Guide: The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights*. Paris: IDFH, 23-24, 27. Online at: <https://bit.ly/3efMQeM>

62 See San Martín Sanchez de Muniain L. 1999. "Comentarios acerca de la creación de un Tribunal Africano de Derechos Humanos y de los Pueblos" [Comments on the creation of the African Court of Human Rights], in *Anuario de Derecho Internacional* [Yearbook of International Law], 15:513. Cited also in Cartes Rodríguez JB 2017. *African Court on Human and Peoples: Towards an Africa in Peace?* Anuario Mexicano Derecho Internacional [Mexican Yearbook of International Law] 17:254 n 3 and Bermejo, *African Human Rights*, 44.

The Protocol establishing the African Court on Human and Peoples' Rights (ACHPR) was adopted on 9 June 1998 in Burkina Faso and came into force on 25 January 2004.⁶³ As of 2021, 31 countries have ratified the Protocol.⁶⁴ The mandate of the African Court is to complement and reinforce the functions of the African Commission,⁶⁵ in order to enhance the protective mandate of the African Commission by strengthening the protection of human rights and ensuring respect for and compliance with the African Charter.⁶⁶ The African Commission is therefore exclusively responsible for the promotion of human rights and shares its protective function with the African Court.⁶⁷

The most significant differences between the two courts in relation to the protection of the family are as follows:⁶⁸

Applications

In the European system individuals can apply directly to the European Court of Human Rights.⁶⁹ However, it is not the same in Africa. The Protocol for creating the African Court establishes that the Court will only allow applications from individuals from Member States of the African Union that have made a declaration accepting the jurisdiction of the Court to receive applications from individuals in accordance with Article 34(6).⁷⁰ This declaration is currently in force in only six of

⁶³ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). The Court began its activity years later, after the election of the judges in 2006 and the establishment of its seat, which was initially in Addis Ababa and has been in Arusha since 2007. Its first judgment was rendered on 15 December 2009.

⁶⁴ See African Court on Human Rights, "Basic Information". Online at: <https://www.african-court.org/wpafc/basic-information/>

⁶⁵ Protocol to the ACHPR on the Establishment of an ACtHPR, preamble.

⁶⁶ See African Court on Human Rights, "Basic Information".

⁶⁷ Murray, "A comparison between the African and European Courts of Human Rights", 197. For further information on the relationship between the Commission and the Court, see this article and Elsheikh IA. 2002. "The future relationship between the African Court and the African Commission", *African Human Rights Law Journal* 2(2):252.

⁶⁸ For other differences in relation to the composition, operation and procedures of the Courts, see International Federation for Human Rights. *Practical Guide: The African Court on Human and Peoples' Rights*, 131ff.

⁶⁹ See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, (ETS No.155), Strasbourg, 11.V.1994, art 34(6). ("The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.")

⁷⁰ In January 2016, the AU Assembly decided to empower individuals to petition the Court directly, provided they come from a Member State that is a party to the Protocol establishing the Court and has accepted the jurisdiction of the Court to receive such

the State parties to the Protocol.⁷¹ In the absence of recognition of the jurisdiction of the Court, applications must be submitted to the Banjul Commission first, which may, after a preliminary examination, decide to refer the case to the Court.⁷²

Jurisdiction

The European Court only has jurisdiction over cases involving the violation of the rights stated in the European Convention. In Africa, however, Article 3 of the Protocol to the African Charter states that the African Court will apply the provisions of not just the African Charter establishing the African Court but also “any other relevant Human Rights instrument ratified by the States concerned”.⁷³ Although the article raises the problem of concurrent jurisdiction, most commentators interpret the provision to mean that the application of the Declarations on Human Rights of the United Nations and sub-regional human rights instruments falls within the jurisdiction of the African Court, provided the treaties have been ratified by the States concerned. It has been common practice for applicants to allege violations of the African Charter and in addition other international human rights instruments; besides, the African Court only decided on cases where a violation of the African Charter was found.⁷⁴ However, as we will see, in a recent case, the African Court applied the Maputo Protocol, without an explicit reference to the African Charter,

cases in accordance with Article 34(6) of the Protocol (Assembly/AU/Dec.597(XXVI)). See <https://au.int/en/legal-organs> [Accessed 18 May 2021]. See on this regard San Martino K. 2018. “Toward a better union: addressing child marriage through individual and NGO petitions in the African Court on Human and Peoples’ Rights, in *The George Washington International Law Review*, 50:668. The author examines the role that the individuals access to the Court could play in the development of human rights, as, for example, using “pilot judgments” for repetitive cases.

71 Four others (Rwanda, Tanzania, Côte d’Ivoire and Benin) also deposited the declaration, but have since withdrawn it.

72 See African Court on Human Rights, “Basic Information”. According to Article 5 of the Protocol regarding access to the Court: “1. The following are entitled to submit cases to the Court: a. The Commission; b. The State Party which has lodged a complaint to the Commission; c. The State Party against which the complaint has been lodged at the Commission; d. The State Party whose citizen is a victim of human rights violation; e. African Intergovernmental Organizations.”

73 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), art 3. (“1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned. 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.”)

74 See Windridge O. 2017. “Not a Charter Article in Sight: the Case of APDH and IHRDA v Mali”, *The ACtHR Monitor*, 7 June Davi T. 2018. “African Court on Human and Peoples’ Rights Delivers Landmark Ruling on Women’s Rights and the Rights of the Child in Mali”, *EJIL: TALK*, 27 July.

confirming this broad interpretation.⁷⁵ This new approach of the African Court, broadening its jurisdiction in practice and not only in the text, have a potential of better protecting the human rights in the future.

Binding decisions

Both the European Convention and the Protocol to the African Charter establishing the African Court recognise the right to a remedy for victims of violations of human rights and the binding force of the judgments of each court. With regard to remedy, the Protocol to the African Charter states that “if the Court finds that there has been violation of a human or people’s right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation”,⁷⁶ which makes it “broader than all the current mandates to afford remedies to victims of human rights abuse”.⁷⁷ The European Convention, on the other hand, contains a subsidiarity provision to ensure the effective reparation of any violation, which may include costs and measures of satisfaction,⁷⁸ stating that if the internal law of the State concerned allows only partial reparation to be made, the European Court will “afford just satisfaction to the injured party”.⁷⁹

Family case law

The European Court has a significant body of family case law. This is due, firstly, to the European Court’s much longer existence, and, secondly, to the greater ability of individuals to access the Court. By contrast, the African Court is less well-known, and it will take time for it to become consolidated as a high authority for the protection of human rights within the African continent. The complex relationship between the African Court and the other organs of the African Union is also an important factor, given the challenge of communicating and coordinating legal matters between them.⁸⁰

75 See Banens A. 2018. “African Courts issues its first judgment on women’s rights”, *INTLAWGRRLS. Voices on International Law, Policy, Practice* 13 September.

76 Protocol to the African Charter, art 27.

77 Murray, “A comparison between the African and European Courts of Human Rights”, 215.

78 Murray, “A comparison between the African and European Courts of Human Rights”, 216.

79 ECHR, art 41.

80 On the future of the African Court, see Murray, “A comparison between the African and European Courts of Human Rights”, 218. See also the report of the round table on the strategic plan for 2021-2025, held on 3 July 2020. Online at: <https://bit.ly/32jesgp> [Accessed 18 May 2021].

A PARTICULAR CASE FROM THE AFRICAN COURT

The African Court for Human and Peoples' Rights issued a judgment, as recently as 2018, that constitutes a milestone in the field of family law. Several reasons support its importance. To begin with, it is the first time that the African Court has applied the Maputo Protocol, which is a big step in the path of better protecting children and women's rights. The plaintiffs were not the aggrieved persons themselves, but entities that pursue the protection and development of the human rights in the region. Another important feature is that the State was required to modify its laws to comply with the statements of the ruling, thus reasserting the authority of the Court. Besides, and even more relevant, the case deals with one of the main problems in family law in Africa: the clash between the protection of the human rights, as set by the international instruments, and customary and religious traditions. A closer examination of the case will reveal its groundbreaking character.

In July 2016, the Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) filed an application before the African Court against the Republic of Mali. The applicants considered that the Persons and Family Code,⁸¹ enacted in 2011, infringed several provisions of the Maputo Protocol and other international treaties ratified by Mali.⁸² The complaint referred to four issues.

The first issue was the minimum age for marriage. The Malian Persons and Family Code requires eighteen years for boys and sixteen for girls,⁸³ whereas the Maputo Protocol establishes eighteen for all persons.⁸⁴ Also, the code allows special exemptions for marriage as from fifteen years, with the father's or mother's consent for the boys, and only the father's consent, for the girls. The second issue had to do with marriage consent. The code entitles religious ministers to perform marriages, alongside civil registry officials.⁸⁵ However, religious marriages have lower standards

81 In 1998, the Government of Mali decided to revise the Marriage and Guardianship Code of 1962, to update it and align the laws on marriage and family with the international standards of protection of human rights. To this aim, it drafted a Persons and Family Code, Law No. 2011-087, adopted by the National Assembly on August 3, 2009. This Code was praised by the human rights organisations and a broad part of the population. However, it was rejected by Islamic groups, that fueled strong protests. Consequently, the Draft was sent back to the Parliament for a new review, to get a wider consensus. The revised Draft of the Persons and Family Code was adopted on 2 December 2011 by the National Assembly and promulgated on December 30.

82 See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999; Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

83 Mali, Persons and Family Code, s 281.

84 See Maputo Protocol, art 6(b). See also ACRWC, arts 1(3), 2 and 21.

85 Mali, Persons and Family Code, s 300. Mali has a predominantly Muslim population: thus, the issues related to religious marriages refer to Islamic marriages. See The Association of Religion Data Archives. 2015. "Mali – Major World Religions".

of protection against the lack of marital consent.⁸⁶ Unlike civil registry officials, no sanction is prescribed for religious ministers who fail to verify the parties' consent.⁸⁷ This is especially problematic, as the way Islamic marriages are celebrated does not require the bride's presence at the wedding; besides, the tradition encourages marriage at puberty. These two circumstances combined pose a high risk of lack of content in these marriages, mainly for girls, against the provisions of the Maputo Protocol.⁸⁸

The applicants also understood that the Persons and Family Code violated the rights of women and children born out of wedlock to equitable inheritance.⁸⁹ Islamic law and customary practice are the applicable regime by default. This means that women only receive half of what men receive and children born out of wedlock receive inheritance only when their parents so decide.⁹⁰ Further, according to the applicants, by adopting the provisions about the minimum age, consent for marriage and the unequal inheritance regime, the State did not comply with the obligation to eliminate traditional practices and attitudes that undermine the rights of women and children.⁹¹

The Republic of Mali opposed several reasonings against these indictments. Regarding the minimum age, it alleged that the Persons and Family Code should be regarded as an intent to harmonise the legislation with the reality, recognising that marriage below the full age is a common practice in most Islamic communities. It considered, as well, that girls are mature enough at fifteen to marry. It does not mean, said the State, despising human rights protected by the treaties, but being flexible to adapt the international obligations to the practices and customs of the country. The State also pleaded that the reason to modify this section of the draft was the threat to the social peace and harmonious living posed by the protest and strong opposition of the Islamic groups.

With regard to the required consent to marriage, the State affirmed that the Persons and Family Code clearly provides that there is not marriage without consent, and that religious marriages must comply with the conditions for marriage enshrined

⁸⁶ It is noteworthy that most Africans marry under customary law or combine customary unions with marriages under general law or received laws. They and their children are, therefore, governed by customary family and personal law or are, in one way or another, affected by this system of law even when they have married under the received laws. Chuma H. 2001. "Implementing the Rights of the Child in African Legal Systems: The Mthembu Journey in Search of Justice", *International Journal of Children's Rights* 9(2):103, n 78.

⁸⁷ Mali, Persons and Family Code, s 287.

⁸⁸ See Maputo Protocol, art 6 (a). See also CEDAW, art 16 (a) and (b).

⁸⁹ Article 21(2) of the Maputo Protocol and Articles 3 and 4 of ACRWC. Issues related to inheritance are out of the scope of this work. See, in this regard, the summary of the allegations International Justice Resource Center. 2018. "African Court Finds Mali's Family Law Violates Human Rights Obligations", 29 May.

⁹⁰ See Banens, "African Court issues its first judgment on women's rights".

⁹¹ See Maputo Protocol, art 2(2); CEDAW, art 5(a); ACRWC, art 1(3).

in the code, including the public celebration. This assumed, the State asserted, that it is up to the parties to determine the “organisation” of marriage as they prefer, within the limits of public order. Finally, the State answered that it was excessive to assert that Mali did not attempt to eliminate harmful practices, citing the differences between the earlier version of the code, which had since been revoked, as a demonstration of the State’s effort to promote the rights of women and children, as far as the new code was much more protective of human rights.⁹²

The African Court did not accept the Mali’s arguments. It declared that the protests could not justify a derogation of the international commitments by the State, even more in matters of fundamental rights. With regard to the controversial issues raised by the applicants, the Court noted that the Maputo Protocol does not allow exceptions to the minimum age of marriage;⁹³ however, the new Persons and Family Code made marriage of minors even easier than the previous one.⁹⁴ Concerning marriage consent, the Court highlighted that the code envisaged the application of the Islamic law on marriage without the necessary precautions to guarantee free consent of the parties, as required by the Maputo Protocol.

A procedural aspect of this ruling should also be mentioned, as it may contribute to enhance the protection of the fundamental rights. According to the African Charter, applications must be submitted to the African Court within a reasonable period of time.⁹⁵ The five-year period of time between the enactment of the Persons and Family Code and its application may be regarded as excessive; in fact, it was so considered by the State. However, the Court took a liberal approach to the time requirement and applied a high degree of flexibility, understanding that the period was reasonable in order to study the law and due to the climate of fear, intimidation and threats that pervaded the country.⁹⁶ Therefore, the Court delivered the judgment upholding all claims made by the applicants, as it considered that the Republic of Mali violated the Maputo Protocol and the other Treaties.⁹⁷ The State was, thus, required to amend the impugned Persons and Family Code, to harmonise its laws with the international instruments and take appropriate measures to end the violations of the Treaties.⁹⁸

92 See the summary of the allegations in International Justice Resource Center, “African Court Finds Mali’s Family Law Violates Human Rights Obligations”.

93 See Sloth-Nielsen J. 2021. “The African Children’s Charter at 30. What Implications for Child and Family Law?”, *International Survey of Family Law* 2021:11. The author estimates that the incidence of child marriage has risen during the Covid-19 pandemic; this fact will disrupt efforts to end child marriage, potentially adding 13 million child marriages between 2020 and 2030 that could otherwise have been averted.

94 The new code allows the marriage of a 15-year-old girl with only the father’s consent, while the two parent’s consent were required in the 1962 version.

95 ACHPR, art 56.

96 Banens “African Courts issues its first judgment on women’s rights”.

97 *APDF & IHRDA v Republic of Mali*, App. No. 046/2016, decision of May 11, 2018.

98 Notably, the State must bring the minimum age of marriage for girls to 18; eliminate the age exemptions for marriage; create a plan to eradicate unequal inheritance between

This case can be considered a landmark for several reasons. Since it relies on the Maputo Protocol, and not the African Charter, it may contribute to make the Maputo Protocol visible, as it has been underutilised despite its strong protection of children and women's rights. It may also serve as a guidance to other countries who have ratified the Maputo Protocol, but whose laws and customs are not consistent with its provisions. Also, it reinforces the usefulness of the NGOs and other entities that watch over the status of human rights in African countries.⁹⁹ Certainly, the Court did not deeply into all of the reasoning, accepting the allegations of the applicants without further comments, but this does not negate the importance of the judgment in the context of eliminating the impingement of human rights in Africa.

Secondly, the African Court affirmed that customary or religious norms in the family field that violate human rights cannot prevail over the provisions of the international treaties that set a clear standard of protection of those fundamental rights.¹⁰⁰ This creates an important precedent. Until the 1990s, national laws often declared that the constitutional provisions related to equality and non-discrimination did not apply to customary law, marriage, and other personal matters; therefore, discrimination in those areas could not be challenged on constitutional grounds.¹⁰¹ Since that decade, a new way of protecting customary law appeared, embodied in the right to participate in the culture of one's own choice. When this cultural right collides with children's or women's rights, the courts try to reconcile them; however, in the absence of norms that establish a hierarchy, children and women's rights may be compromised.¹⁰² This judgment of the African Court may help to find the proper balance in that complex process.

The African Court also stressed that the State must take an active role in the development of women's and children's rights. Certainly, it will be a challenge for the Republic of Mali. The Islamic opposition, uttered before the enactment of the Persons and Family Code, and the unsteady political situation will be some of the problems the State should face. Actually, the code has yet not been modified as the Court required. Some authors expressed their concern for the real outcomes or

men and women; provide people in rural areas access to notaries; and impose the same requirements, sanctions, and standards for consent to marriage on religious ministers as exist for civil officials who perform marriages. The State also has an obligation to promote and educate people on their rights under international human rights law. To that end, the Court ordered the State to train religious ministers on the procedure of marriage ceremonies and to translate and disseminate the codes and to undertake other measures to educate and sensitise the public. See International Justice Resource Center, "African Court Finds Mali's Family Law Violates Human Rights Obligations".

99 Asumadu GS. 2019. "Comment on the case *APDF & IHRDA v Republic of Mali*", Faculty of Law, Centre for Human Rights, University of Pretoria, 6.

100 Sumadu, "Comment on the case *APDF & IHRDA v Republic of Mali*", 5.

101 Chuma, "Implementing the Rights of the Child in African Legal Systems", 104.

102 Chuma, "Implementing the Rights of the Child in African Legal Systems", 104.

consequences of this judgment, as there is no way to enforce it.¹⁰³ Still, the importance of the judgment cannot be diminished for the difficulties in its implementation.

CONCLUSION

The idea of family is evolving all over the world. While differences between countries and cultures are fading as a result of globalisation, family remains a focus of contrasting views and values. The regional conventions on human rights can be a key element to protect human rights on that area, although they face major challenges.

In Europe, the purpose and conception of the family is changing, as the pattern of parents and their offspring as the main model of family is giving way to a new definition that takes into account all kinds of unions. Increasingly, the only defining element of a family is the fact of living together.¹⁰⁴ In Africa, the rapidly changing social, political and economic situation has had a big impact on the family.¹⁰⁵ Recent decades have seen significant migration from rural to urban areas,¹⁰⁶ which has, in turn, affected the size of families. The growing prevalence of smaller, nuclear families in urban areas and the increasing influence of Western cultural values have transformed the whole pattern of family life in Africa, undermining its traditional kinship structure.¹⁰⁷

Almost everybody agrees that the interpretation and implementation of human rights must be informed by the local cultures to be accepted. The international standard of protection of human rights should be interpreted according to the different contexts. However, it can never be a reason to violate human rights. The right to live according to one's own culture must be reconciled with the criticism of practices that are not respectful with human rights.¹⁰⁸ This approach is especially important in the family field, where customary and religious norms often regulate family relationships and institutions.

¹⁰³ See Davi, "African Court on Human and Peoples' Rights Delivers Landmark Ruling on Women's Rights and the Rights of the Child in Mali".

¹⁰⁴ "The essential ingredient of family life is the right to live together so that family relationships may develop normally (*Marckx v Belgium*, s 31) and members of the family may enjoy each other's company (*Olsson v Sweden* (no. 1), s 59)." European Court on Human Rights 2020. *Guide on Article 8 of the European Convention on Human Rights*, August 2020, 65.

¹⁰⁵ African Union, *Plan of Action on the Family in Africa*, 3.

¹⁰⁶ In 2019, the rural population accounted for 59% of the total population of sub-Saharan Africa. There is, however, considerable variation between the 10% rural population in Gabon or 30% in Botswana and the 87% who live in Burundi. Data from the World Bank. 2018. "Rural Population (% of total population) – Sub-Saharan Africa".

¹⁰⁷ As the African population grows, other problems that have an impact on the family arise, such as the growing number of older people. The extended family used to care for the elderly, but the reorganisation of the population into smaller, nuclear units has made this more difficult. See Izarali MR, Maskure O and Ibhawoh B (eds). 2019. *Expanding Perspectives on Human Rights in Africa*. London: Routledge, 3.

¹⁰⁸ Allsobrook, *Universal Human Rights from an African Social Contract*, 271.