8 Litigating gender discrimination cases before the ECOWAS Community Court of Justice and the African Court on Human and Peoples' Rights

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Introduction

The African regional courts have decided on hundreds of human rights claims, but very few cases on women's human rights and gender discrimination have been litigated before the courts. The courts may only adjudicate on matters brought before them. If persons who have faced gender discrimination do not bring cases, the court will be limited in its ability to decide on them. This chapter examines the few cases before the ECOWAS Community Court of Justice (CCJ) and the African Court on Human and Peoples' Rights (African Court) initiated by women or brought on their behalf. The goal is to critically evaluate how both courts¹ have interpreted the rights of women enshrined in human rights laws and the facts presented before them.

The chapter examines five cases. The first four are from the CCJ, while the fifth case analyzed is from the African Court. By December 2019, *Aminata Diantou Diane (represented by APDF & IHRDA) v Mali*;² *Hadijatou Mani v Niger*;³ *Dorothy Njemanze & 3 Ors. v. Nigeria*⁴; and *Mary Sunday v Nigeria*⁵ were the only cases decided by the CCJ where women alleged violations of their rights and discrimination based on their gender. The chapter interrogates the reasoning supporting the decisions of the CCJ, which found violations of several human rights in all four cases but failed to recognize gender discrimination in all the situations under review except in one case, *Dorothy Njemanze & 3 Ors v Nigeria*. In comparison, the African Court in its first women's human rights case, *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*,⁶ found a violation of gender discrimination against the state.

This chapter analyzes the extent to which legal, socio-political, or cultural norms influence how African regional courts judge gender and in particular, how this limits the impact of the decisions for the greater good of women in the society. In light of this discussion, the chapter concludes with the opportunities within the regional human rights system to strengthen the protection of women's human rights in Africa. The decisions in these cases may yet have an

impact in encouraging other complainants to come forward or in the interim, provide knowledge for complainants, lawyers, and advocacy groups to improve approaches, litigation strategies, and tactics when seeking justice before the regional courts.

Background: Economic Community of West African States (ECOWAS) Community Court of Justice

ECOWAS, established in 1975,⁷ currently comprises 15 countries in West Africa: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.⁸ From the beginning, ECOWAS envisaged a court or tribunal,⁹ but none was created. It was only in 1991 that a protocol¹⁰ establishing the CCJ was adopted by the ECOWAS Authority of Heads of State and Government. The CCJ's primary function is to observe law and justice in the interpretation and application of the provisions of the treaty and other legal instruments. It is also responsible for settling disputes among member states.¹¹ ECOWAS retained the scope of the CCJ in the ECOWAS Revised Treaty of 1993,¹² when the ECOWAS member states revised the 1975 treaty to strengthen their processes to benefit from international and regional developments. The Revised Treaty also identified the CCJ as the final arbiter for settling disputes under the treaty.¹³

The CCJ has the competence to ensure respect for law and equity in the interpretation and application of the ECOWAS Treaty.¹⁴ The CCJ could deal with matters referred to it by member states or the Authority of Heads of State and Government in ECOWAS concerning disputes between member states or by one or more member states and an ECOWAS institution on the interpretation and application of the ECOWAS treaty.¹⁵ In situations involving nationals of member states, the 1991 Protocol envisaged that after attempts at amicable settlements have failed, a member state of the concerned nationals may institute proceedings against another member state or ECOWAS institution.¹⁶ The 1991 Protocol, therefore, did not grant non-state actors direct access to the CCJ. Although ECOWAS set up the CCJ in 1991, it only became operational in 2001 on the swearing-in of the first set of judges on January 30, 2001, in Bamako, Mali.¹⁷

In 2005, ECOWAS adopted the Supplementary Protocol,¹⁸ which effectively granted access to individuals to bring cases, including on human rights matters, before the CCJ. ECOWAS amended Article 9 of the 1991 Protocol to expand the jurisdiction and competence of the court to accommodate such human rights claims,¹⁹ and a new Article 10 on access to the court²⁰ was inserted that expressly provided for ECOWAS member states, its Executive Secretary, its Council of Ministers, individuals, and corporate bodies to bring disputes before the court, as relevant. Individuals may bring human rights applications to the court provided that they are not anonymous and not before another international court.²¹ Moreover, there is no need for applicants to exhaust local remedies before approaching the CCJ.²²

The expansion of the human rights mandate of the CCJ was welcomed and opened possibilities for victims of human rights violations to plead any human rights treaty ratified by the state concerned (Ebobrah, 2010). As of October 2017, the CCJ had delivered 249 verdicts.²³ In the 2018/2019 legal year, the court delivered 28 judgments and 8 rulings,²⁴ and currently, over 130 decisions are published on its website.²⁵ Of the total number of cases heard and rulings delivered, only five decisions have ruled on gender.²⁶

Background: African Court on Human and Peoples' Rights

The Organisation of African Unity (OAU), the predecessor of the African Union (AU), created the African Court in 1998 when it adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.²⁷ The African Court's mandate was to protect human rights as provided for in the African Charter on Human and Peoples' Rights (African Charter) and other human rights treaties ratified by the state concerned.²⁸ In carrying out its role, it complements the protective mandate of the African Commission on Human and Peoples' Rights (ACHPR).²⁹ The ACHPR suffers weak enforcement of its recommendations by member states (Udombana, 2000).

The African Court's reach potentially covers all the 55 member states of the AU that are parties to the African Charter.³⁰ However, it may only adjudicate cases involving states that have ratified the African Court's constitutive Protocol.³¹ The African Court may receive petitions from the ACHPR, States Parties, or African inter-governmental organizations.³² Individuals and non-governmental organizations (NGOs) cannot directly bring cases before it except where ratifying states have made a declaration accepting the competence of the African Court to receive such cases from these kinds of actors.³³ At the time of writing, nine countries, Burkina Faso, Benin, Ghana, The Gambia, Côte d'Ivoire, Mali, Malawi, Tanzania, and Tunisia, have made this declaration.³⁴

The African Court shared similar set-up challenges with the CCJ. It became operational in 2006 when the first judges were elected.³⁵ It also took some time before it received cases.³⁶ However, by July 2020, the African Court had received 285 cases and finalized 100,³⁷ of which only 1 case is on gender discrimination. As long as cases in this area are not filed, there will be fewer decisions.

Analyses of five cases before the CCJ and the African Court

The following analysis focuses on four cases from the CCJ and one from the African Court where the complaints alleged gender discrimination.

Gender discrimination and the Dorothy Njemanze case

Dorothy Njemanze and 3 Others v Nigeria (2017) was the first time a regional court interpreted women's rights contained in the Protocol to the African

Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), and this was lauded as a ground-breaking judgment (Ojigho, 2017). Dorothy Njemanze and three other women, Edu Oroko, Justina Etim, and Amarachi Jessyford, had separately been picked up by the Nigerian security agents (including the police) and agents of the Abuja Environmental Protection Board (AEPB) in Abuja, the federal capital city in Nigeria. These state agents would carry out raids claiming that in keeping the Abuja environment clean, they also had to remove prostitutes. They forcibly took any woman they saw on the streets at night, labeling them prostitutes and putting them in buses to convey them to detention centers. Many women, including the petitioners, experienced beatings, verbal abuse, sexual assault, and threats during the raids and subsequently, in detention. Some made complaints to the police and other state institutions. However, none of the Nigerian authorities investigated the allegations or held anyone responsible for the violations the women had experienced.

The petitioners in *Dorothy Njemanze's case* argued that the raids were discriminatory, as they targeted women. No men were abducted or harassed during the raids by the state agents. The CCJ analyzed the evidence before it and concluded that the

whole hug [sic] of the operation was targeted against women. This systematic sting operation directed against only the female gender furnishes evidence of discrimination. There is an obligation placed on State Parties to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) to adopt laws, administrative, and Policy measures to prevent gender-based discrimination. Prostitution is claimed to be a crime in the laws of the Defendant [Nigeria]. However, it takes two persons to engage in such criminal activity. There is no law that suggest that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex.³⁸

The CCJ held, therefore, that the treatment the petitioners experienced by agents of the AEPB and the security forces constituted gender-based discriminatory treatment contrary to Articles 2, 3, and 18(3) of the African Charter, Articles 2 and 8 of the Maputo Protocol, Articles 2, 3, and 15 (1) of CEDAW, Articles 2 (1), 3, and 26 of the International Covenant on Civil and Political Rights, and Articles 2 and 7 of the Universal Declaration of Human Rights.

The defendant state, Nigeria, did not dispute that the perpetrators of these violations against the women were its agents. It followed, therefore, that Nigeria was responsible for the actions of its agents under international law.³⁹ Moreover, the failure and refusal of the Nigerian authorities to investigate allegations of violations against its agents, despite the formal complaints made, constituted a breach of the defendant states' duty under international law. Nigeria had failed to recognize, promote, and protect the rights of the women in the case. Furthermore, failure by Nigeria to take measures to give effect to their rights amounted to

multiple violations of Articles 2, 3, 4 (1) and (2), 5, 8, and 25 of the Maputo Protocol, Articles 1, 2, 3, 5, and 18(3) of the African Charter, Articles 2, 3, 5(a) and 15 (1) of CEDAW, and other relevant international treaties. The CCJ held that the women experienced cruel, inhumane, and degrading treatment, which violated Articles 3 and 4 (1) of the Maputo Protocol on the dignity of person and rights to life, integrity, and security of person.

The CCJ awarded six million Naira (approximately US\$16,500) as damages to each complainant except one, Edu Orokó. Under Article 9 (3) of the Supplementary Protocol, an alleged violation must be brought to the CCJ within three years. However, Edu Orokó's violation had occurred much earlier, and the CCJ dismissed it as outside the time limit and barred by the statute.

In many respects, the decision in *Dorothy Njemanze's case* reflects a challenge posed by traditional perceptions about women's behavior and gender stereotypes. The state's defense rested on the notion that women found at night are "prostitutes"; therefore, they are immoral, and violence against them is justified.

The CCJ did not interrogate intensely the cultural and social beliefs and practices that contribute to gender discrimination or how this contravenes international human rights laws. But the case did give an opening to challenge so-called vagrancy laws and archaic prostitution laws that discriminate against marginalized and vulnerable groups and sex workers (Chakaya, 2017). A rule that marks and victimizes one gender over another and labels persons based on social status or perceptions creates a dangerous tool that enables an environment where human rights violations can persist.

O'Connell criticized the CCJ for missing an opportunity to analyze the impact of such discriminatory laws and their application on sex workers (O'Connell, 2019). The CCJ did not provide a thorough analysis of each of the rights claimed by the women, e.g., rights to dignity, life, integrity, and security of the person, and to access justice and equal protection before the law. If it had done so, then the logical conclusion would be that every person, regardless of their social status, is entitled to these rights (O'Connell, 2019). Moreover, the fact that the violence the applicants faced was linked to their alleged "business of commercial sex work" leaves the issue open for abuse by creating the impression that violence against sex workers is permissible (O'Connell, 2019).

Dorothy and the other women were not sex workers, and the thrust of their case was to address gender-based violence and gender discrimination exacerbated by cultural, religious, and traditional views about the role of women in society. While the case would have benefited from a comprehensive interpretation of the rights in the Maputo Protocol and other international human rights instruments, particularly within the African context, it remains, for now, the lone case at the CCJ that has pronounced against gender discrimination.

Slavery and equality in the Hadijatou Mani Koraou case

In *Hadijatou Mani Koraou v Niger*,⁴⁰ a woman named Hadijatou, who had been sold as a slave for 240,000 CFA in 1996 when she was a 12-year-old girl, brought

a suit against the Republic of Niger, alleging violations of her human rights and seeking compensation. She endured many years of hard labor, sexual harassment, and rape by her master, El Hadj Souleymane Naroua. On August 18, 2005, her master gave her a freedom certificate, stamped by a village chief, which meant she was no longer a slave. However, the master denied Hadijatou the right to leave and insisted that she remained in his household as a wife. When she got the opportunity to visit her mother, Hadijatou left and did not return. In February 2006, Hadijatou filed a suit in the local courts for a declaration that a marriage had never happened between Naroua and herself. The court at the first instance held that they were never properly married. Naroua contested the suit, and it was overturned on appeal at the High Court. On further appeal to the Supreme Court, Hadijatou invoked a violation of Niger's law on "slavery and slavery-related practices" in her suit. While the Supreme Court quashed the High Court decision, it only referred for the issue of slavery re-examination.

While waiting for the final decision, Hadijatou moved on with her life and met Ladan Rabo, whom she married. Naroua was displeased and accused Hadijatou of bigamy, leading to the police arresting her, her husband, and her brother, Koraou Mani. The High Court found them guilty and sentenced them to six months' imprisonment and a fine. While in detention, Hadijatou, through her lawyers, filed a complaint, which led the state prosecutor to bring a criminal charge of slavery against Naroua at the High Court's criminal division. The same High Court in its civil division held that Hadijatou was "divorced" from Naroua. He challenged this by seeking an annulment of the decision. Eventually, the Court of Appeal provisionally released Hadijatou and her brother on appeal. The Court of Appeal also revoked the arrest warrant of Ladan Rabo.

On September 14, 2007, Hadijatou filed a case against Niger at the CCJ, alleging that her experience of slavery violated her human rights and was discriminatory, in contravention of Articles 1, 2, 3, 5, 6, and 18 (3) of the African Charter. She argued that Niger failed to take appropriate measures to protect and enforce human rights, and violated its laws and the constitution, which ensures equal protection before the law without distinction and punishes torture and cruel, inhuman, or degrading treatment. She further demanded that the court direct Niger to enact laws that protect women against discriminatory customs relating to marriage and divorce as well as abolish harmful customs and practices that discriminate against women.

The CCJ stated that its core mandate was hearing human rights violation cases and declined to review the laws of Niger, suggesting, rather, that there are many monitoring bodies, such as the ACHPR, which play this role.⁴¹ The court found that it was undeniable that Hadijatou was a victim of slavery. Despite the legal prohibition of the practice in Niger, she had not been able to get justice in the legal system. Therefore, the Republic of Niger was liable for the inaction of its administrative and judicial authorities. In compensation for the harms she had suffered, the CCJ ordered the state to pay her 10 million CFA francs (approximately US\$20,000).

On whether Hadijatou had suffered gender discrimination, the CCJ curiously declared that the discrimination she suffered is not attributable to the Republic of Niger. Hadijatou was sold under the practice of *Wahiya*, where a girl slave works as a servant and a concubine. Such female slaves are referred to as *Sadaka*, or fifth wife, denoting a concubine, since they are not part of the four legal wives recognized under Islam. Hadijatou had argued that because only females were affected by the kind of slavery she endured; this was gender discrimination. The CCJ held that Hadijatou was discriminated only in relation to the other wives of her former master, and that the Republic of Niger did not cause the discrimination but, rather, her former master, who was not a party to the case before it.⁴² It is hard to understand the court's rationale for taking this position. States have international obligations to protect, respect, and fulfill human rights. The CCJ should have probed the state's actions or inaction (in this case) and reviewed how this contributed to the continued discrimination faced by women due to the institution of customary practices like the *Wahiya*. The court, therefore, missed an opportunity to pronounce strongly on gender discrimination and in the process, leaves us with a judgment that is in certain aspects inconsistent with international law and practice (Duffy, 2008).

Domestic violence in the Mary Sunday case

In *Mary Sunday v Nigeria*,⁴³ the CCJ was presented with facts of a violent incident on August 24, 2012, between the applicant, Mary Sunday, and her fiancé Corporal Isaac Gbanwuan, which resulted in Mary sustaining severe burns all over her body. Mary's fiancé allegedly kicked and dragged her on the floor, and to escape him, Mary ran to a neighbor's kitchen. It is reported that he was so angry he broke the kitchen door and then carried the neighbor's cooking stove with hot oil on it and poured the contents on Mary. In the process, the stove exploded and set her body on fire. Mary's family reported the incident to the police. The police claimed that they investigated the matter but concluded that it was Mary who accidentally burned herself while attempting to pour the contents on her fiancé. While following up on her complaint, a Ministry of Justice official informed Mary that the police had referred the matter to a court. Unfortunately, the police prosecutor handling the case died, and her case file was missing.

Mary, with the support of two NGOs, applied to the CCJ for justice in August 2015. In her application, she claimed that the failure of the state to conduct an independent and diligent investigation and prosecution of the perpetrator (her fiancé) was a violation of her human rights to an effective remedy and freedom from gender-based violence and discrimination against women. She also argued that Nigeria violated her right to health by the state's failure to provide adequate medical services and to protect her from domestic violence, and that the inability of the state to treat her injuries inhibited her rehabilitation, thereby violating her right to work.

The CCJ, as in *Hadijatou's case*, found no difficulty in holding the Nigerian government in the *Mary Sunday case* responsible for failing to provide an

effective remedy for the applicant, thereby violating her right to access to justice. It was clear to the judges that the fact that the Nigerian police did not carry out an investigation observing minimum standards to establish the truth or to facilitate an independent prosecution, especially in this case where the allegations of violence involved a police officer, was a failure on the part of the state. The fact that the applicant's case file went missing at the state judiciary was held to constitute a "blatant disregard for the right of access of a litigant to a judge in a court of law."⁴⁴ The CCJ awarded Mary 15 million Naira (approximately US\$41,500), in compensation for all the harms she had suffered against the Federal Republic of Nigeria.

The CCJ established the state's failure to provide an effective remedy by linking the steps taken and the seriousness of Mary's injuries. The CCJ concluded that it was safe to infer that running to a neighbor's kitchen meant that Mary feared for her life as a result of the violence she experienced. As Mary was present in court during the hearings, the judges saw the extent of her wounds. They reprimanded the state agents for failing to consider them grave enough to warrant a proper investigation. The CCJ rejected the state's position that the incident between Mary and her fiancé was a private matter, stating that the issue is not the incident or perpetrators at stake but whether the steps available to a complainant lead to access to justice. The court also firmly reasoned that if states could use the defense that they would not meddle in private matters, then impunity could arise in the case of certain violations committed in families. The CCJ further reasoned that the progressive view is for the state to find ways to combat violence, including in homes, and the influence of the law does not stop on the "doorsteps of the homes of married couples."⁴⁵

However, in examining whether Mary suffered gender discrimination, the CCJ restricted itself to a definition of exclusion that affects a "generality" of the gender in question, and those acts must show a "systematic" feature to determine that discrimination is at stake. It found that Mary's situation fell within the private domain, in the family, and did not show a "general" or "systematic" feature, and that the facts applied only to one person and not to all persons of the female gender. The court further noted that intimate partner violence does not directly or indirectly implicate the state. The fact that Mary's fiancé was a police officer and therefore, an agent of the state is irrelevant, as the violence occurred in the home, and even if he were acting in the performance of his duties, any acts committed would be considered assault. In all cases, the actions which Mary complained about are the acts of an individual who can be brought before a national court for justice. The CCJ, therefore, dismissed the allegation of gender-based discrimination. The CCJ did not see the link between the failure of the state to investigate Mary's wounds and the endemic tolerance of violence against women in society, which leads to such complaints being treated as a less severe violation by the state.

According to the World Bank, gender-based violence is a global pandemic affecting one in three women in their lifetime. About 35% of women worldwide have experienced either physical or sexual intimate partner violence or

non-partner sexual violence, and globally, 38% of murders of women are committed by an intimate partner (World Bank, 2019). In Nigeria, an analysis of the 2013 Demographic and Health Survey showed that about one-fourth of Nigerian women had experienced some form of intimate partner violence (Benebo et al., 2018).

The shocking statistic is the reality faced by many women, and the resistance of the courts against holding states responsible for failing to protect victims of domestic violence under the pretext that it is in the private sphere is a crushing blow to women everywhere who run to the courts for protection.

Women and family life in the Aminata Diantou Diane case

In *Aminata Diantou Diane v Mali*,⁴⁶ the applicant was in dispute with her sick husband's brothers over the management of his property. Aminata was married to Mahamadou Samassa, and they had five children together. He became very ill, leading to him being bed-ridden even though the family took him abroad for medical treatment. As his illness persisted, his brothers sought to hold his property in trust, excluding the wife and putting her and her children at risk. One of Aminata's brothers-in-law, Cheickna Hamalla Samassa, presented a document allegedly giving him power of attorney to administer the properties. Aminata contested this and the takeover of her husband's properties in the Malian court. At the time of writing, no hearing had taken place in the Malian courts on the contested power of attorney. Similarly, another brother-in-law, Sekou Samassa, a judge, filed an application in court for the trusteeship of his brother's properties, which the court granted. Aminata appealed this decision. The Malian Court of Appeal, ruling in her favor, relied on the Malian Code on Persons and Families, which provides that where a man's wife is alive and of sound mind, the trusteeship of a married man shall not be granted to another person.⁴⁷ The Supreme Court dismissed Sekou Samassa's subsequent appeal. Despite the court's decision, the brothers-in-law continued to contest access to the properties and accused Aminata of attempting to kidnap their brother. Aminata decided to file a separate suit before the Malian court accusing them of forgery, assault and battery, illegal confinement, and abetment. Eventually, in June 2015, the brothers took Mahamadou Samassa to an unknown place. Aminata brought a case seeking redress against her brothers-in-law and the police officers for violence against her and kidnapping her husband. As the cases stalled, Aminata decided to approach the CCJ in August 2017.

The CCJ, in examining the facts before it, took into cognizance several relevant provisions of international treaties, such as Article 18 of the African Charter, Articles 2 and 26 of CEDAW, Articles 4, 5, and 18 of African Charter on the Rights and Welfare of the Child (ACERWC), and Articles 2, 3, 4, 6, and 8 of the Maputo Protocol. These provisions collectively address rights to dignity and freedom from discrimination, and urge States Parties to combat all forms of violence against women and children and eliminate harmful practices. Aminata argued that the state failed to protect her against the violations by her in-laws,

and that the customs her in-laws used to dispossess her of her husband's properties legitimized discrimination against women. She also decried the long delays in getting the Malian courts to investigate and prosecute and alleged that this violated the enjoyment of her rights. The Mali government reiterated the position of the applicant's brothers-in-law by claiming that the applicant was on a mission to hasten the death of her husband so that together with her children, she could enjoy his properties as an inheritance exclusively. They admitted, though, that the applicant had filed four complaints, which were still pending.

The CCJ in interpreting Article 18 of the African Charter stated that the obligation to protect the family, particularly women and children, is binding on the state and it is the state's responsibility to ensure that women and children are not exposed to threats and prosecution as a result of their vulnerability. The CCJ held, therefore, that Mali had violated Aminata's and her children's right to protection. The CCJ also found that her right to fair hearing in a reasonable time had been violated and ordered the government of Mali to pay her 15 million CFA francs (approximately \$US27,000) in reparation for the suffering she had endured. The court also ordered Mali to take all necessary steps to find Mahamadou Samassa but dismissed all the applicant's other requests.

Once more, the CCJ avoided a clear pronouncement on gender discrimination, preferring to rely only on Article 18 of the African Charter without delving into the applicant's complaints that her rights under the relevant provisions of the Maputo Protocol, which Mali had ratified,⁴⁸ had been violated. Strangely, the court did not avail itself of the progressive provisions in the Maputo Protocol, which directed states to eliminate harmful cultural practices and take steps to enforce equal rights in marriage and women's freedom from discrimination and violence. But like the national courts, it appears that the CCJ is avoiding this Pan-African women's treaty. While resistance is expected, it is disheartening that the CCJ appears to favor a narrow and strict focus in interpreting gender discrimination even where the applicants plead violations of the Maputo Protocol.

Equal rights in marriage and inheritance in the APDF and IHRDA V Mali case

So far, only one case has been decided on gender discrimination at the African Court. In *APDF and IHRDA v Mali*,⁴⁹ two NGOs, a Malian women's rights organization and a Pan-African human rights organization based in The Gambia, alleged that the Republic of Mali's Family Code of 2011 violated some provisions of key human rights treaties. The Family Code reduced the minimum age of marriage for girls, limited the rights to consent to a marriage and inheritance for women and natural children, and the state's obligation to eliminate practices or traditions against women and children. Mali had ratified many human rights treaties, including the African Charter, the Maputo Protocol, the ACERWC, and CEDAW.

In 2009, the Malian authorities concluded a reform process to update Mali's marriage and family laws by proposing a new Family Code. While this law offered

much promise, it faced opposition by many religious bodies, which protested strongly that the law conflicted with some Islamic practices. Mali, a predominantly Muslim country, was keen to have broad acceptance of the draft law and proceeded to amend it. On December 30, 2011, the government enacted the Family Code, which in many aspects, imposed differences in treatment for girls compared with boys. While the minimum age of marriage for boys was set at 18 years old, in conformity with international human rights minimum standards, the minimum age of marriage for girls was set at 16 years old. The law further provides for approvals through a special exemption for marriage at 15 years old, provided for a boy, his mother's or father's consent is obtained, while for a girl, only the father's consent is required. The African Court found that the obligation to guarantee compliance with the minimum age of marriage and the right to non-discrimination lies with the state, and it had failed to do so in this instance, in violation of Article 6(b) of the Maputo Protocol and Articles 2, 4 (1), and 21 of ACERWC.

The African Court also found that the Family Code statutorily made Islamic law applicable as one of the options for determining inheritance. Islamic law does not give women equal inheritance rights, and children born out of wedlock are not accorded an inheritance by right but only as a discretionary favor. Therefore, the African Court decided that these practices were not in conformity with international human rights standards. Overall, the African Court found that by including discriminatory practices against women and children in the Family Code, Mali had violated its international commitments.⁵⁰

The African Court granted all the prayers of the applicants, holding Mali in violation of several provisions of international treaties. Besides, it held that Mali had violated the right to non-discrimination of women and children as guaranteed by Article 2 of the Maputo Protocol, Articles 3 and 4 of ACERWC, and Article 16 (1) of CEDAW. This decision clarifies that acts or inactions of a state that affect women can lead to or condone gender-based discrimination. By being ordered to amend the Family Code and harmonize its laws, the state needed to ensure that its laws and customary practices do not constitute discrimination against the principles of equality and freedom from discrimination, which it is obligated to promote, respect, and fulfill.

While there are challenges in lumping women and children together, which can feed into stereotypes about women's capacity and agency (Davis, 2017), it is significant in this judgment because it focused on the rights of women and the girl-child, who are most affected by negative or harmful traditional and religious practices regarding rights in marriage and family life (Goonesekere & De Silva-De Alwis, 2005). However, regarding the rights of inheritance for children born out of wedlock, all children, regardless of gender, are affected. It was important to the court that discrimination on social status and the circumstances of one's birth needed to be addressed.

It is worth noting that during the proceedings, Mali recognized that the Family Code it enacted was not perfect. The state raised the huge threat and pushback it had faced from religious bodies, which had led to the passing of the compromised

law. The state had argued that it had to balance social-cultural realities in Mali to prevent a situation where it could not implement the law.⁵¹ In the same proceedings, the state argued that, fully aware of the resistance, it had embarked on raising public awareness and sensitization on the rights of women and children.⁵² Therefore, Mali should not have much difficulty in complying with the African Court's decision to inform and educate its people on freedoms and rights as provided in Article 25 of the African Charter. The state was also ordered to submit a report on measures it had taken to comply with the decisions of the African Court within two years from the date of the judgment.⁵³ The judgment was delivered on May 11, 2018.

Mali is one of the countries where child marriage, often girls married to much older men, is rampant.⁵⁴ Several studies exist on the health risks to child brides and the impact of child marriage on girls' education, sexual and reproductive health of women and girls, women's economic empowerment, and poverty alleviation (Girls Not Brides, 2015). The state, therefore, in compliance with international human rights laws, can amend the Family Code to eliminate harmful practices to improve the lives of all girls and women.

Conclusion

Across Africa, women face challenges in enforcing their human rights. Conservative social attitudes, gender norms, customary law, and cultural practices are some of the difficulties encountered in implementing women's rights (IPPF Africa Region, 2018). In analyzing the five cases so far on women's rights, it appears that regional courts are willing to find a case of gender discrimination against a state if state agents are involved and if the issues in the case affect more than one woman. It can be inferred that the number of applicants in *Dorothy Njemanze's case* may have helped to show a pattern of human rights violations. In that case, one of the women had her case struck out for being out of time, but there was a high likelihood that their chances of success were higher because this was a joint petition. Each woman's case helped to strengthen the others. There is no doubt that the involvement of state agents shows that the state can be held responsible for the actions of its agents, provided they are working in their professional capacity. In *Mary Sunday*, the alleged perpetrator, the survivor's fiancé, was a policeman—an agent of the state. Yet, the court did not think it was key, because this was a personal matter, and he was not working when the violent incident happened.

In all cases, the state in question must have ratified the relevant international treaties. In *Hadijatou's case*, Niger had ratified CEDAW but not ratified the Maputo Protocol at that time. Perhaps the claimant could have benefited from provisions of the Maputo Protocol on the elimination of harmful practices against women in Africa if it had been ratified by Niger. And the decision, in that case, could have been different, since she would have claimed that the slavery she experienced was a harmful traditional practice against women and girls. The CCJ has also made it clear in *SERAP v Nigeria*⁵⁵ and several cases since that it will

give precedence to international treaties over a state's national laws. Therefore, a practice of studying international treaties and applying them to local contexts would be a strong tool in the hands of an advocate for gender equality. Similarly, affected communities and groups must act as of necessity, working with advocacy groups and the relevant United Nations and AU bodies to ensure that African states ratify treaties to ensure access of the population in the continent to justice based on international standards and norms.

However, the CCJ appears to hesitate in linking violations committed in the family to failings of the state. Unlike the *Dorothy Njemanze case*, the three other cases before the CCJ analyzed in this chapter were decided differently. While the CCJ in each of these cases found that the women had suffered various human rights violations, the CCJ refrained from declaring any of the violations as constituting gender discrimination. In *Aminata's case*, the brothers of her husband were abusive and had used their influence in public life to harass and attack her. Yet, the court felt this was a family matter. Similarly, in the cases of *Mary Sunday* and *Hadijatou*, the participation of family members or close relatives in the commission of the acts seem to give the court leeway to distinguish the discriminatory acts the women experienced as social vices rather than gender discrimination. The CCJ chose to narrow the state's obligation to respect, protect, and fulfill the rights of women and missed the chance to impose stronger state interventions for preventing and punishing gender discrimination.

The African Court, in its first case on gender discrimination, was quite progressive. The time for the Malian government to report on the implementation of the decision against it lapsed in May 2020. At the time of writing, information was not available to confirm whether a report had been submitted. The implementation report would have offered an opportunity to evaluate the effectiveness of the court and for the Malian government to show, at the minimum, steps taken to educate the populace about gender equality and any progress made since the judgment. Such a review would contribute to advancing the status of women in the continent.

The CCJ offers tremendous opportunities for human rights litigation in West Africa. The unique characteristic of dispensing with the requirement that litigants first exhaust domestic remedies makes it a court of the first instance and increases access for individuals and NGOs. It continues to strengthen its jurisprudence. In February 2018, the CCJ finally put to rest the issue of the time limit for bringing actions before the court, which had previously affected one of the women in *Dorothy Njemanze's case*, by holding in *FAJ v The Gambia*⁵⁶ that there are no time limits for bringing human rights cases before it and overruled its previous decisions stating otherwise.

Both the CCJ and the African Court will, of course, need to update their understanding and evolution of women's human rights jurisprudence. The court will benefit from the expertise of African gender experts and experiences from other international jurisdictions and the United Nations Treaty bodies in taking a progressive and comprehensive approach to addressing historical gender discrimination cases in Africa.

Notes

- 1 There are other African regional courts, such as the East African Court of Justice (EACJ) and the Southern African Development Community (SADC) Tribunal, which are not examined because the focus is on courts that have received cases on gender discrimination. There are also challenges with the human rights jurisdiction of the EACJ, and the SADC Tribunal remains suspended. More information on the status of these courts is available at Luambano, T.R. (2018). Litigating human rights through the East African Court of Justice: Overview and challenges. *Journal of Law, Policy, and Globalization*, (71), 76–90; Swart, M. (2018, April). *A house of justice for Africa: Resurrecting the SADC Tribunal* [Weblog post]. Retrieved from <https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/>
- 2 (2018) ECW/CCJ/JUD/14/18.
- 3 (2008) ECW/CCJ/JUD/06/08.
- 4 (2017) ECW/CCJ/JUD/08/17.
- 5 (2018) ECW/CCJ/JUD/11/18.
- 6 (2018) Application No. 046/2016.
- 7 Treaty of the Economic Community of West African States (ECOWAS) 1975. Reproduced in the United Nations Treaty Series (1976), 1010(14843), 17. Hereafter referred to as the 1975 Treaty: <https://treaties.un.org/doc/Publication/UNTS/Volume%201010/v1010.pdf>
- 8 The original members were 16 until Mauritania withdrew its membership in 2000. News24 Archives (2000, December 28). *Mauritania out of ECOWAS*. Retrieved from <https://www.news24.com/xArchive/Archive/Mauritania-out-of-ECOWAS-20001228>
- 9 Arts. 4, 11 of the 1975 Treaty.
- 10 Protocol A/P.I./7/91 on the Community Court of Justice. Hereafter the 1991 Protocol.
- 11 Arts. 11, 56 1975 Treaty; Preamble to 1991 Protocol.
- 12 Economic Community of West African States (ECOWAS) Revised Treaty 1993. Adopted in Cotonou on July 24, 1993. Hereafter referred to as the Revised Treaty. <https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>
- 13 Art. 76, 6 (1)(e), 15 ECOWAS Revised Treaty 1993.
- 14 Art 9 (1) 1991 Protocol.
- 15 Art 9 (2) 1991 Protocol.
- 16 Art 9 (3) 1991 Protocol.
- 17 ECOWAS CCJ Annual Report (2002) para 9. Retrieved from <http://prod.courtecowas.org/annual-reports-2/>
- 18 Supplementary Protocol A/SP.1/01/05. Hereafter the 2005 Protocol.
- 19 Art. 3, 2005 Protocol
- 20 Art. 4, 2005 Protocol
- 21 Art. 10(d) in Art. 4, 2005 Protocol.
- 22 Valentine Ayika v. Republic of Liberia (2012) ECW/CCJ/AAP/07/11.
- 23 See Agency report (2017, October 9). ECOWAS Court delivers 249 verdicts in 16 years. *Premium Times*. Retrieved from <https://www.premiumtimesng.com/foreign/west-africa-foreign/245545-ecowas-court-delivers-249-verdicts-16-years.html>
- 24 See NAN (2019, July 12). ECOWAS court records highest number of judgment, ruling in 2018/19. *The Guardian*. Retrieved from <https://guardian.ng/news/ecowas-court-records-highest-number-of-judgment-ruling-in-2018-2019/>
- 25 <http://prod.courtecowas.org/decisions-3/>
- 26 Four of the cases are analyzed in this chapter. The fifth gender ruling is the case of Women Against Violence and Exploitation in Society (WAVES) v Sierra Leone (2019) ECW/CCJ/APP/22/18, which was decided after the selection of the cases for this chapter.
- 27 Hereafter, African Court Protocol. It was adopted at the 34th ordinary session of the OAU Assembly, held June 8–10, 1998 in Ouagadougou, Burkina Faso, and entered

into force on January 25, 2004 upon deposit of 15 ratification instruments. Full text available at the African Union website: <https://au.int/en/treaties/1164>

28 Article 3, African Court Protocol.

29 (ACHPR). Article 2, African Court Protocol.

30 Art 3, African Court Protocol. Note that all member states of the AU except Morocco have ratified the African Charter. For status of ratification: <https://au.int/en/treaties/1164>

31 Art 34, African Court Protocol.

32 Art 5 (1), African Court Protocol.

33 Arts 5 (3), 34 (6), African Court Protocol.

34 Tanzania, in November 2019, wrote to the African Union of its intention to withdraw its declaration; if all advocacy fails, it will become the second country to do so following Rwanda's withdrawal in 2016. See Afrimechanisms hub (2019, Dec 2) [Tweet]. Retrieved from <https://twitter.com/AfrimechsHub/status/1201572103176302592>. Rwanda Ministry of Justice Press Release. Retrieved from https://minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf; Benin and Côte d'Ivoire, in reaction to judgments of the court in March and April, 2020, respectively, have now indicated their intention to withdraw their declaration. See International Justice Resource Centre (2020, May 6). Retrieved from <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/>. See also Adjolohoun, S. (2020). A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights. *African Human Rights Law Journal*, (20)(1), 1–40. Retrieved from <https://www.ahrlj.up.ac.za/adjolohoun-s-h>. This means that direct access to the African Court will be greatly reduced going forward.

35 The decision on the election of judges of the African Court on Human and Peoples' Rights (2006) EX.CL/Dec.261 (VIII), Eighth Ordinary Session of the Executive Council of the African Union, Retrieved from https://au.int/sites/default/files/decisions/9639-ex_cl_dec_236_-_277_viii_e.pdf

36 Its first case, *Yogogombaye v Senegal* (2008) Application No. 001/2008, was dismissed for lack of jurisdiction.

37 African Court statistical information. Retrieved from <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21>

38 Per Justice Friday Chijoke Nwoke, at 38 *Dorothy Njemanze's case*.

39 See *Velasquez Rodrigues v. Honduras* (1988), Series C, No. 4, paras. 170 referred to in *Dorothy Njemanze's case* at 39.

40 (2008) ECW/CCJ/JUD/06/08.

41 Paragraphs 60 and 61, *Hadijatou's case*.

42 Paragraphs 70 and 71 of *Hadijatou's case*.

43 Women Advocates Research and Documentation Center and Institute for Human Rights and Development in Africa (On behalf of Mary Sunday) v The Federal Republic of Nigeria. (2018). ECW/CCJ/JUD/11/18. Retrieved from http://prod.courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUG_11_18.pdf. After this, referred to as *Mary Sunday's case*.

44 *Mary Sunday's case*, the official English translation of the case [Translator: Emmanuel Nkansah] at 10.

45 Ibid at 8, 9.

46 ECW/CCJ/JUD/14/18. After this, *Aminata's case*. http://prod.courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUG_14_18.pdf

47 Paragraph 6, at 4 in *Aminata's case*, official English translation from the court's registry.

48 Mali ratified the Maputo Protocol in January, 2005. See Status of Maputo Protocol on African Union's website. <https://au.int/en/treaties>

49 Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v Republic

of Mali (2018). Retrieved from <http://www.african-court.org/en/index.php/56-pending-cases-details/942-app-no-046-2016-apdf-ihrda-v-republic-of-mali-details>

50 Paragraphs 124, APDF v Mali case.

51 Paragraphs 63–66, APDF v Mali case.

52 Paragraph 119, APDF v Mali.

53 Paragraph 135 (xiii), APDF v Mali .

54 See Paragraph 61, APDF v Mali, where applicants in their petition presented World Bank statistics showing that between 2012 and 2013, 59.9% of Malian women 18–22 years old were married before their 18th birthday.

55 SERAP v. the Federal Republic of Nigeria and the Universal Basic Education Commission (2010). ECW/CCJ/JUD/07/10.

56 Federation of African Journalists & 4 Ors v The Republic of The Gambia (2018). ECW/CCJ/JUD/04/18. http://prod.courtcowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUD_04_18.pdf

Constitutions and legislation

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child (ACERWC)

Convention on Elimination of All Forms of Discrimination against Women (CEDAW)

ECOWAS Revised Treaty 1993

Protocol A/P.I./7/91 on the Community Court of Justice of ECOWAS

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Supplementary Protocol A/SP.1/01/05 of ECOWAS

Treaty of the ECOWAS 1975

Case law

Aminata Diantou Diane (represented by APDF & IHRDA) v Mali (2018) ECW/CCJ/JUD/14/18

Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali (2018) Application No. 046/2016

Yogogombaye v Senegal (2008) Application No. 001/2008

SERAP v. the Federal Republic of Nigeria and the Universal Basic Education Commission (2010) ECW/CCJ/JUD/07/10

Federation of African Journalists & 4 Ors v The Republic of The Gambia (2018) ECW/CCJ/JUD/04/18

Hadijatou Mani v Niger (2008) ECW/CCJ/JUD/06/08

Dorothy Njemanze & 3 Ors. v Nigeria (2017) ECW/CCJ/JUD/08/17

Mary Sunday v Nigeria (2018) ECW/CCJ/JUD/11/18

Valentine Ayika v Republic of Liberia (2012) ECW/CCJ/AAP/07/11

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