

The jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR) has widely provided further interpretation on the property rights of women in marriage, particularly, at times of separation, divorce or annulment of a marriage. The Commission adopted General Comment No. 6 during its 27th Extra Ordinary Session held in Banjul, The Gambia in February, 2020. This General Comment provides guidance on the interpretation of the rights to property during separation, divorce or annulment of marriage, and the extent to which men and women shall have the right to an equitable sharing of the joint property deriving from marriage as per article 7(d) of the Protocol to the African Charter on Human and Peoples Right on the Rights of Women in Africa (Maputo Protocol). Specifically, the ACHPR has provided guidance on how marital property should be shared fairly and in a manner consistent with the notion of substantive equality between women and men. It also outlines the overall and specific obligations of States Parties towards promoting the effective domestication and implementation of Article 7(d) of the Maputo Protocol. The text is also available, in the four official languages of the African Union, on the African Commission's website: [www.achpr.org](http://www.achpr.org)

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## African Commission on Human and Peoples' Rights



**GENERAL COMMENT NO. 6 ON THE PROTOCOL TO THE  
AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHT  
ON THE RIGHTS OF WOMEN IN AFRICA  
(MAPUTO PROTOCOL): THE RIGHT TO PROPERTY DURING  
SEPARATION, DIVORCE OR  
ANNULMENT OF MARRIAGE (ARTICLE 7(D))**

**General Comment No 6 on Article 7(d) of the  
Protocol to the African Charter on Human and  
Peoples' Rights on the Rights of  
Women in Africa**

**Adopted at the 27th Extra Ordinary Session of  
the African Commission on Human and  
Peoples' Rights, held from 19 February to  
4 March, 2020 in Banjul, Gambia**



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## Preface

The African Commission on Human and Peoples' Rights (the African Commission) is pleased to adopt this General Comment on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol).

The Maputo Protocol, adopted in 2003 and entered into force in 2005, complements the African Charter on Human and Peoples' Rights (African Charter) by expanding the substantive protection of women's rights in Africa. It does so by explicitly providing for women's equal rights to land and property, as well as their equal rights in marriage.

Under Article 7(d) of the Maputo Protocol, States Parties are called upon to enact appropriate legislation to ensure that women and men enjoy the same rights in cases of separation, divorce or annulment of marriage. In this regard, they shall ensure that "... in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage."

This General Comment provides guidance on the interpretation of the rights of women during separation, divorce or annulment of marriage, to ascertain that men and women shall have the right to an equitable sharing of the joint property deriving from the marriage as per Article 7(d) of the Maputo Protocol as well as outlines the overall and specific obligations of States Parties towards promoting the effective domestication and implementation of Article 7(d) of the Maputo Protocol.

The African Commission established different Special Mechanisms to advance specific human rights issues. One of such mechanisms is the Special Rapporteur on the Rights of Women in Africa (SRRWA). The SRRWA took leadership in the development of this General Comment pursuant to the adoption of Resolution 262 on Women's Right to Land and Productive Resources in 2013 and Resolution 401 on the development of General Comments on Article 7(d) of the Maputo Protocol.

The SRRWA thus worked in consultation with government institutions and other relevant stakeholders who provided invaluable feedback in face-to-face meetings and through electronic contributions.

The African Commission wishes to express its gratitude to all its partners and other stakeholders who participated so whole-heartedly in the development of this General Comment.

**Commissioner Lucy Asuagbor**  
Special Rapporteur on the Rights of Women in Africa

## **I. OBJECTIVE AND SCOPE OF THIS GENERAL COMMENT**

- (1) Women on the continent find themselves in a vulnerable status in terms of the enjoyment of their socio-economic rights on an equal basis as men. They have limited access to and enjoyment of property rights. Unequal power dynamics in the relations between the sexes, discriminatory social and cultural structures and practices and women's lack of economic empowerment, among others, are key factors that affect women's rights to property in Africa.
- (2) Women suffer from unequal rights to property both in time of marriage and of divorce or separation. While in marriage, they exercise limited or no economic decision-making power in the household. Where much of their contribution comes from their household and reproductive roles, neither these roles are taken as having economic value nor any account is given to the economic values of these roles.
- (3) The vulnerable position of women increases at the point of the breakup of marriage. Women in Africa, as in other parts of the world, are the most adversely affected by acute discrimination and inequality in matters of property rights after marriage and suffer disproportionately from the effects of discriminatory and oppressive laws, customs, and traditions, especially regarding access to and control of property such as housing and land. Traditionally, property rights institutions have favored men over women. Moreover, property laws in many countries, treat men as household heads who enjoy complete control of family property.
- (4) In particular, the prevalence of discriminatory laws and legal processes resulting in property rights violation during separation, divorce or annulment of marriage in Africa and the impacts thereof on women are a major concern on the African continent. Although a number of legislations in different African States guarantee the right to equality, non-discrimination and property, other legislations and customary norms as well as patriarchal practices entrench gender inequality in this regard.



- (5) In many parts of Africa, women’s contribution in the acquisition of marital property has been consistently undermined through, among others:
  - (a) Gender discriminatory registration laws and practices, which in effect prohibit or discourage women from owning housing, land and property jointly with their spouse, or which give preference for registration of housing, land and property in the name of the male spouse only;
  - (b) The application of the concept of marital power, which grants power to only the husband to administer his wife’s property and/or their jointly owned property;
  - (c) Gendered responsibilities dictating that women use their resources for the upkeep of the family and maintaining the home while men use theirs for the acquisition of properties; and
  - (d) The application of negative customary norms and religious practices.
- (6) Meanwhile, State parties to the African Charter on Human and Peoples’ Rights (The African Charter) are obliged under Article 2 and 3 to ensure equality of all persons – men and women and to guarantee equal protection of their rights. Article 18 of the African Charter specifically guarantees the elimination of all forms of discrimination against women and enjoins State Parties to ensure their protection.
- (7) In a similar vein, Articles 2 and 3 of the Maputo Protocol also provide protection for women against discrimination. Article 2 establishes that States Parties shall “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”. Article 3 establishes that “every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”
- (8) Additionally, Articles 6, 7 and 21 of the Maputo Protocol contain a comprehensive regime of rights to be enjoyed by women in marriage, including polygamous marriages. The African Charter also guarantees the right to property, through Article 14.
- (9) Whereas, Article 6 states that States Parties shall ensure that “women and men enjoy equal rights and are regarded as equal

partners in marriage, **Article 7 obliges States Parties** to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. It further states under Sub-article (d) that they shall ensure that, *In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.*”

- (10) Despite these legal advancements protecting women’s rights, particularly, the rights during marriage or upon separation, divorce or annulment of marriage, systematic discrimination and inequality still prevail against women both in law and practice.
- (11) The aim of this General Comment is to give further interpretation on the property rights of women in marriage, particularly at times of separation, divorce or annulment of a marriage. As such, it provides guidance on the interpretation of the rights of women during separation, divorce or annulment of marriage. It in particular seeks to provide content to the novel protection to the right to an equitable sharing of the joint property deriving from the marriage as per Article 7(d) of the Maputo Protocol. It provides guidance on how marital property should be shared fairly and in a manner consistent with the notion of substantive equality between women and men.
- (12) The General Comment also provides clarity and elaborates on the legal obligations of States so as to establish a continent-wide standard based on human rights principles that describes legislative, institutional and other measures that should be taken by States Parties to give effect to equitable sharing of marital property during separation, divorce and annulment of marriage. State Parties are obliged to effect transformative changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which encourage discrimination, patriarchy and structural inequality impeding the equitable sharing of marital property to the disadvantage of women.

## Legal basis for the elaboration of this General Comment

- (13) Further, the task of interpreting the scope and meaning of provisions in the Maputo Protocol and the African Children's Charter lies, respectively, with the African Commission on Human and Peoples' Rights (Commission).<sup>1</sup>

### Definition of key terms

- (14) For purposes of the General comment:

***“Annulment”*** of marriage is the invalidation of a marriage to the date of its formation by a judicial order.

***“Divorce”*** is the termination of a marriage by judicial order under the state laws.

***“Equitable Distribution”*** is the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.

***“Full community of property”*** refers to a marital property regime under which all assets and income brought into the marriage and acquired during the marriage, become the joint property of the couple.

***“Joint property deriving from the marriage”*** (“marital assets”) includes all property acquired during the course of the marriage, regardless of who holds the title to it. The interpretation of “joint property deriving from the marriage” should be viewed through the lens of marriage in community of property marital regime.

***“Marriage”*** means formal and informal unions between men and women of 18 years and above, recognized under any system of law,

1. Article 45(1)(b) of the African Charter, authorises the Commission to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.

custom, societal practice or religion.

**“Non-monetary contributions”** refer to the contributions made to and during the subsistence of the marriage through non-remunerated efforts and unpaid care work including but not limited to caring for minor children, taking care of the family home, cultivation and improvement of land, or any other non-monetized contribution.

**“Separation”** is setting apart spouses which does not involve the dissolution of the marriage, but in which certain arrangements (for example, for spousal maintenance or custody of children) are ordered by the court.

**“Substantive Equality”** refers to the form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and socio-cultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law.

## **II. MARRIAGES AND PROPERTY RIGHTS REGIMES IN AFRICA**

- (15) There are various factors that create challenges to the full enjoyment by women of property rights during marriage and at its dissolution. These include diversity of legal regimes on marriage and the divergent standards that the different legal regimes of marriage envisage with respect to the treatment of women in marriage and at the dissolution of marriage, social attitudes on the equality of men and women in marriages that shape institutions that regulate marriage including at the time of its dissolution and lack of recognition of the material contribution of the reproductive work women.
- (16) Across Africa, different forms of marriages are recognized. These are marriages under civil law, customary law, marriages under the Ordinance or the Codes and religious marriages, mostly under Islamic law. In addition to these, there are couples who though did not perform marriage rites, cohabit for years and hold themselves out as husband and wife. Here, some jurisdictions do not recognize such unions as marriage and therefore do not offer any form of protection to the extent of any property rights accruing to them during and after that union. There are also procedures to be followed for divorce to be given the legal and formal recognition it deserves.
- (17) In most cases, under Ordinance marriages, both parties must at the time of the marriage have the capacity to be married to each other. In the event of a divorce, grounds for the divorce and property sharing arrangements must be in accordance with the laid down legal procedures. Marriages under Islamic law are also common on the continent and such marriages can be potentially polygamous. The social attitudes towards marriage and particularly the role of women in marriage on which these civil or religious marriages are founded directly affects the property rights of women during and at divorce, separation or annulment of marriage.
- (18) In customary marriages, the parties must agree to live together as man and wife, both families of the parties should consent to the marriage and the marriage must be consummated.

Customary marriages can potentially be polygamous as well. However customary marriages can be transformed into Ordinance marriages thereby converting the potentially polygamous marriage into a monogamous one. When it comes to divorce, grounds for the divorce may vary depending on the custom in a particular group and this would entail serious consequences on the distribution of marital property at the time of separation, divorce or annulment of the marriage.

- (19) Although Article 6(d) of the Maputo Protocol recognises marriages that are recorded in law, the practice in most African States shows that predominantly only civil marriages and religious marriages are registered, yet majority of marriages in Africa are customary marriages that are not registered. This presents challenges for regulating and implementing equitable processes for the distribution of matrimonial property during separation, divorce, or annulment.
- (20) The forms of property regimes in Africa generally appear to be gender neutral (in the sense that both spouses can own property). However, implementation within the social and marital context, against the background of gender roles and relations within the home, tends to place wives at a greater disadvantage compared to their husbands. Also, despite the recognition of a woman's right to own property in her name, often at customary law the wife is a dependent of her husband, is required to work with or for her husband, and property acquired with such assistance is his individual property. Despite the change in economic circumstances, existing legal or customary practices still fail to protect women's property rights. Often upon divorce, distribution of marital property is left at the discretion of the courts or the institutions responsible for the dissolution of the marriage in a particular country. With these institutions still steeped in traditional conceptions of marriage and the role and contribution of women during marriage, they tend to apply distribution regimes that in most cases disadvantage women.
- (21) Marital property rights cover a vast multitude of rights or interests conferred by law on persons who occupy the status of spouse. It refers to the rights spouses enjoy in property accumulated for the purpose of marriage or during the marriage

including for acquiring, using, disposing off, investing, mortgaging, transferring property. Hence, property acquired even before marriage by a couple for the purposes of enhancing their marriage could be considered as marital property. So is also property acquired during marriage for the use and benefit of the union.

- (22) For women, marital property rights and marital property regimes are of particular importance during the course of the marriage and become even more important in the context of divorce. They are critical for the economic and social wellbeing of women.
- (23) The equitable entitlement to property rights of women are critical for women not only because of their importance for the socio-economic wellbeing of women but also because women deserve them. This has become of great concern now in the discourse on women's rights because there is growing awareness of the need to appreciate women's contributions in the house as equivalent to monetary contribution. There is also an increasing trend whereby women are in the position to earn a living and contribute substantially to the acquisition of property and to the economic welfare of the family while still bearing responsibilities for non-monetary reproductive contribution they make at the household. It is submitted that as women have gained the capacity to contribute to the acquisition of property, what they are entitled to at the time of divorce has become more relevant.
- (24) How property rights are dealt with at the time of divorce, separation or annulment of marriage is critical. Violations of property rights of women that result from discriminatory laws and practices upon separation, divorce or annulment of marriage can be a precursor to poverty and destitution for many women. Without adequate legal protections, and clarity on Article 7(d) of the Maputo Protocol, women's contributions to marriage will continuously be rendered invisible, and their legitimate claims to marital property will continue to be undermined due to gender-biased norms and practices which favor males in property allocation decisions.
- (25) In the absence of national legislation that is accessible,

enforceable and justiciable in order to ensure effective enjoyment of women's equal rights under Article 7(d) of the Maputo Protocol irrespective of the form of marriage and consistent with the provisions of this General Comment, State Parties cannot meet their regional and international obligations to fulfil the rights of women to equality and non-discrimination. The duties of states under Article 7(d) of the Maputo Protocol to respect, protect, promote and fulfill require States Parties to take positive and deliberate action to ensure that women, in times of separation, divorce or annulment of marriage, enjoy their right to equitable sharing of the joint property.



### III. THE NORMATIVE FRAMEWORK

(26) Article 7(d) of the Maputo Protocol is an extension of the various fundamental rights enunciated in the Maputo Protocol. These various rights that form the normative foundation of Article 7(d) of the Maputo Protocol are discussed below.

#### ***(a) The right to equality and non-discrimination***

- (27) The right to equality is provided both in the African Charter and in the Maputo Protocol. Articles 3 and 18 form the equality protection provisions of the African Charter. Article 3 of the African Charter in essence captures equality as its foundation: it provides for equality of all persons before the law and equal protection by the law.
- (28) The Commission has adopted the view that equal protection of the law under Article 3 of the African Charter consists of the right of all persons to have equal access to the law and courts and to be accorded equal treatment by the law and courts both procedurally and substantively. While it is akin to the right to due process of law, Article 3 applies particularly to equal treatment as an element of fundamental fairness. It is a guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property.<sup>2</sup>
- (29) Article 18 of the African Charter further provides equal protection by focusing on the protection of the right of the woman within the family. In particular, Article 18(3) requires that the State ensures 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.
- (30) The Maputo Protocol elaborates the catalogue of rights that seek to ensure not only formal equality but also importantly

2. Communication 277/2003 – *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*.

substantive equality of women. Accordingly, the Protocol prescribes wide range of entitlements and protection measures that states are legally required to guarantee for women for purposes of both eliminating the conditions that impede the enjoyment by women of their human rights on an equal basis with others. The Maputo Protocol under Article 2(1) places an obligation on State Parties to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures.” In this regard they shall “(a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between men and women and ensure its effective application. (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those 5 harmful practices which endanger the health and general well-being of women; (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist”.

- (31) Further, Article 2(2) of the Maputo Protocol obligates State Parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and calls for the elimination of cultural practices and stereotypes based on the superiority or inferiority of the different sexes. In addition, other provisions such as Article 9 providing for participative governance and women’s governance in national politics, Article 12 and Article 13 obliging states to guarantee equal opportunities in education and employment resonate with the objectives of substantive equality.
- (32) The Maputo Protocol in Article 2 establishes the right to non-discrimination and obliges State Parties to take measures to protect women from discrimination.<sup>3</sup> The Commission has

3. The Maputo Protocol defines discrimination against women under Article 1(f) as “any distinction, exclusion or restriction of any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, human rights and fundamental freedoms in all spheres of life”.

further expounded discrimination as any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.”<sup>4</sup>

**(b) *The right to property***

- (33) The African Charter guarantees without discrimination the right to property, through Article 2 and 14, and mandates State Parties to eliminate all forms of discrimination against women and to protect women’s rights including to property. Article 19 (c) of the Maputo Protocol obliges all State Parties to promote women’s access to and control over productive resources and guarantees their right to property.<sup>5</sup>
- (34) The right to property incorporates not only the right to ownership but also the right to “access one’s property and freedom from violation of the enjoyment of such property or injury to it, but also the free possession and utilization and control of such property, in a manner the owner deems adequate”.<sup>6</sup> As noted above, this right entails that women are in a position to exercise decision-making over the use, disposal off, mortgage or transfer of the property.

**(c) *The right to equality in marriage***

- (35) Article 6 of the Maputo Protocol requires State Parties to

4. *Supra* note 3.

5. International human right law guarantees women’s right to own and administer property without discrimination (UDHR; Arts. 2 and 17, CEDAW, Art. 15). The CEDAW Committee emphasizes that in marriage, both spouses have equal rights to “own, acquire, manage, administer, enjoy and dispose of property.” Article 15(l) of CEDAW guarantees women equality with men before the law. The rights provided in this Article overlap with and complement those in Article 15(2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property.

6. *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* par 46.

ensure that women and men enjoy equal rights and are regarded as equal partners in marriage by enacting appropriate laws to guarantee, among other things, that the matrimonial regime is chosen by mutual agreement (Article 6(e)) and that during the course of the marriage, a woman shall have the right to acquire her own property and to administer and manage it freely (Article 6(j)).<sup>7</sup>

- (36) Article 7 of the Maputo Protocol requires States parties to ensure the enactment of legislation that allows women and men to enjoy the same rights and therefore equal rights in case of separation, divorce or annulment.
- (37) The African Commission notes that the legal systems of many countries provide for the rights and responsibilities of married partners on the basis of the application of legal principles, religious or customary norms which are informed by discriminatory social and cultural attitudes on the role of women. In cases where domestic laws do not promote equality in marriage for women, there are wide-ranging consequences which invariably restrict their rights to equal status and responsibility within marriage. Such limitations often result in women having no domestic legal remedies to redress the situation.
- (38) The Maputo Protocol and the principles and rights enshrined in it are meant to transform the laws, practices and institutions that govern marriages before, during and after the formation of the marriages.

***(d) Equitable sharing***

- (39) Article 7(d) provides that in case of separation, divorce or

7. CEDAW upholds the equality of women and men in society and in the family. The Convention offers a wide-ranging standard of equality for women and men in marriage and family relations, specifically in Articles 9 and 16. In 1994, the CEDAW Committee further affirmed this right in its General Recommendation No. 21 on Equality in Marriage and Family relations. Here, the CEDAW Committee recognized the significance of culture and tradition in shaping the thinking and behavior of men and women and the significant role they play in limiting the full realization of basic rights by women.

annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage. Article 7(d) should not be read in isolation but in conjunction with the earlier part of Article 7 which enjoins State Parties to ensure that men and women enjoy the same rights in case of separation, divorce or annulment of marriage and should therefore be interpreted in a manner which is consistent with this principle.

- (40) The notion of “equitable sharing” as provided in Article 7(d) should be seen through the lens of substantive equality. The notion of substantive equality recognizes that equality can only be achieved if the relevant government interventions respond to the historical, social, religious, political and economic conditions that affect the exercise and enjoyment of rights by individuals as part of communities to which they belong. A substantive equality approach in this regard requires States to recognize that women are in an unequal position and implement special measures aim at ensuring their property rights during separation, divorce or annulment of marriage. Substantive equality accordingly entails the provision of entitlements and protections to disadvantaged members of society additional to the entitlements and protections available to all on an equal basis. Such additional entitlements and protections that substantive equality requires are meant to rectify the conditions that impeded equal enjoyment of rights and enable disadvantaged members of society (women in the context of the Maputo Protocol) to enjoy their rights fully and on an equal basis with others.
- (41) The forgoing makes a distinction between two forms of equality. First is nominal or formal equality which advocates that men and women be treated alike because the sexes are the same in law. The other is substantive equality which focuses on the nature of the impact of particular laws or their application on women’s lives and their ability to access and enjoy their human rights fully and on an equal basis.
- (42) In the African context, because of political, cultural, and historical factors mentioned above, treating men and women alike may not necessarily lead to equality between the sexes because the playing ground is not level. The formulation of

equality as substantive equality is one of these. At its most basic level substantive equality recognizes that equal treatment in itself does not and indeed did not guarantee equal outcomes or equality of opportunities; as a result, the law should consider relevant differences that pose disadvantage to an individual or a particular group. As opposed to the form of laws, its concern is with the actual enjoyment of a right and unmasking the factors that hinder attainment of equality in fact.

- (43) In this vein, this General Comment therefore provides an opportunity for equitable sharing under Article 7(d) of the Maputo Protocol to be interpreted as the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family within the context of substantive equality. The objective of this is to avoid injustice and ensure equality between men and women taking into consideration all forms of contribution made towards the acquisition of the marital property.

***(e) Content on equitable sharing of the “joint property deriving from the marriage”***

- (44) The implication of equitable sharing as expounded in this General Comment entails giving due recognition to the reproductive role of women involving the contributions that they make through the time, labor and care giving that they invest in the household. In determining the scope of equitable sharing, account should be given to the duration of the marriage, whether couple produced children, the cause of the separation, divorce or annulment of marriage and the responsibility that each spouse bears.
- (45) Joint property deriving from marriage for the purposes of this General Comment comprises of all property acquired including inherited family land by the spouses during the subsistence of the marriage unless expressly exempted by state legislation or by contract.

- (46) Property acquired before the marriage, as well as gifts, inheritances, and tort settlements in favor of one spouse, may not be divided at divorce and may be considered as exempt unless such assets have been treated by the spouses during the subsistence of marriage as joint property.

***(f) Contribution of women to marital property***

- (47) Therefore, to ensure substantive equality, States Parties must fully acknowledge and recognize the many forms of women's contribution to the economic well-being of their families and ensure that this contribution is fully recognized in cases of separation, divorce or annulment of marriage. This includes wives' contribution to the development of land and property through their unpaid labor as well as child care. The application by States of the community of property regime must align to give effect to the requirements of Article 7(d).

***(g) Protecting women's rights in divorce within plural legal systems***

- (48) Many countries in Africa have situations of dual or multiple legal systems, which include both statutory and customary legal systems. Customary, traditional and religious practices must not go against the equality of women and men, particularly substantive equality in its application to women.
- (49) The implications of plural family law systems suggest the need for a unified and harmonized legal standard consistent with the provisions of the Maputo Protocol vis-à-vis marital property regime and the abolition of marital power. In order to protect all women in various unions, it is important that States Parties extend the same rights to customary unions (including polygamous and *de facto* monogamous marriages), as is consistent with Article 6(c) of the Maputo Protocol.
- (50) This is in line with Article 2(2) of the Maputo Protocol which provides that States Parties shall "commit themselves to modify the social and cultural patterns of the conduct of women and men through public education, information, and

communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”



## IV. STATE OBLIGATIONS

### *(a) Legislative Measures*

- (51) States Parties should ensure that their domestic legal framework is harmonized and give full effect to women's equal rights to marital property, including via law reform, which must have a clear and egalitarian codification of matrimonial property regimes; repeal of discriminatory laws; the elimination of the co-existence of multiple standards of marriage that cause disadvantage to women; and harmonization of family and civil codes with the Maputo Protocol, particularly around issues of marriage, divorce, separation or annulment of marriage. States should also ensure that threat of dispossession in case of divorce or separation is punishable by the law.
- (52) States Parties should enact and implement clear, accessible, enforceable and justiciable legislation in order to ensure effective enjoyment of women's rights under Article 7(d), consistent with the provisions of this General Comment. As part of such legislation, States should also provide and make budgetary provisions for effective implementation and legal reform in line with the provisions of the General Comment.
- (53) States Parties should define marital property as referring to any land or personal property which is acquired during the marriage by the direct or indirect efforts of one or both spouses. Marital property is to be divided equitably between spouses at divorce, separation or annulment.
- (54) States Parties should recognize the value of indirect and nonfinancial contributions to marriage and to the acquisition of marital property, such that these contributions entitle a spouse to receive an equal interest in property acquired during the marriage. States Parties should ensure that women without children, women with disabilities, older women, widows and other women who may be vulnerable to having their non-financial contributions to marriage discounted or disregarded are not discriminated against and are able to enjoy their right to equal sharing of joint property deriving from marriage.
- (55) States Parties should ensure that clear consent requirements are

in place for the transfer or sale of marital property by requiring the free, prior, and informed written consent of spouses.

***(b) Access to justice and remedies***

- (56) States Parties are required to establish judicial, quasi-judicial, administrative, traditional and other processes to enable women to access and obtain redress. State Parties should provide effective access to justice for women during divorce proceedings, including for women without children, women with disabilities, older women, widows, women living in rural areas and other women who may be vulnerable to having their non-financial contributions to marriage discounted. Free legal aid should be provided to women who do not have the means to pay for court costs and attorney fees, and should be accessible to women living in rural areas, so as to ensure that no woman is forced to forego her economic rights to obtain a divorce and protect her right to property. Legal aid should be broadly understood as encompassing legal representation, legal assistance, legal advice, legal education and information, mechanisms for alternative dispute resolution, and restorative justice processes. In this regard, alternative dispute resolution should be encouraged and provide women with accessible information and legal guidance to the courts.
- (57) States Parties should also ensure the training of judicial and administrative officers on women's marital property rights as well as women's equal rights within the context of marriage, divorce, separation and annulment of marriage. Such institutions should have adequate financial, human, technical and other resources to effectively provide redress and be equipped with knowledge on gender equality and its application in judicial or other remedial processes.

***(c) Awareness raising***

- (58) States Parties should engage in awareness-raising, and actively encourage transformation of discriminatory practices and customs related to marriage, divorce, separation and annulment of marriage, particularly as it relates to discriminatory treatment

of women and dispossession from their marital property.

***(d) Capacity Building and Training***

- (59) States should also ensure that the capacity of relevant stakeholders are built to understand the need to ensure that women's contribution form part of the property derived from marriage upon divorce or separation. They should also be trained on the principle of substantive equality. As espoused in this General Comment.
- (60) Under all of the above, States should create the conditions and provide support for non-state actors including Civil Society Organizations to engage in advocacy, awareness raising, and capacity building activities among others, that will support the removal of the conditions and practices that impede the equal enjoyment of rights by women during marriage and at the time of divorce, separation and annulment.

***(e) Provision of adequate financial resources***

- (61) States Parties should allocate sufficient budgetary resources for information campaigns on laws on matrimonial property regimes, including in rural areas, women's equal rights in marriage and upon separation divorce and annulment.

***(f) Compliance with the submission of periodic reports by State parties***

- (62) State Parties have an obligation, in accordance with Article 26(1) of the Maputo Protocol to submit, in a timely manner, their periodic reports on the legislative and other measures they have taken towards the full realization of the rights recognized in the said instrument. The reports must consider this General Comment and comply with the guidelines adopted by the African Commission for that purpose.
- (63) States Parties shall include in their periodic reports to the Commission information on the measures taken to implement their obligations under Article 3 of the African Charter to

provide equal protection for women in cases of separation, divorce or annulment in accordance with this General Comment. State Parties shall provide information, including qualitative and quantitative data disaggregated by age, gender, nationality, disability and other key factors on the following:

- (a) The domestic legislation providing for women's rights to marital property, including relevant measures of implementation of such legislation.
- (b) The complaints mechanisms available for women in case of separation, divorce or annulment of marriage and the number of complaints received and the outcomes of those complaints;
- (c) The protection available to women in cases of separation divorce or annulment of marriage; and
- (d) The steps taken to implement judgments by national, regional or international courts and human rights mechanisms.