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General Comment No. 6 on the Maputo Protocol:

A Crucial Tool for Women's Marriage and Property Rights in Africa



The Global Initiative
for Economic, Social and Cultural Rights



Preamble

The African Charter on Human and Peoples' Rights (ACHPR)

The African Charter is the regional human rights treaty of the African continent. It is the result of the Organisation of African Unity (OAU, later the African Union (AU)) and outlines the human rights in the v. Compared to other international human rights instruments, the ACHPR has a very strong focus on peoples' rights, does not allow for derogations and imposes duties on both States and individuals. Socio-economic rights are justiciable. In addition to the Charter, the AU has adopted several protocols which are often linked to the Charter, such as the Maputo Protocol.

To learn more about the African Charter visit the website of the African Commission by following [this link](#).

You may check the list of legal instruments, including the General Comments adopted by the African Commission in this [link](#).

For a more comprehensive resource on the African Human Rights system click [here](#).

The African Commission on Human and Peoples' Rights (African Commission)

The ACHPR calls into life the African Commission which is the control mechanism of the ACHPR. Its mission is the promotion, protection, and interpretation of human and peoples' rights in Africa. The commission also has the duty to cooperate with other African and international institutions working on human rights, including civil society organizations, which have been drawing the attention of the Commission on human rights violations, bring communications of individuals and monitor States' compliance with the Charter.

Do you know what a "General Comment" is?

General Comments are used to interpret the provisions of relevant international legal instruments, with a view to assisting States to fulfill their obligations under such instruments. They are non-binding but have considerable legal weight. The competence of the African Commission to adopt General Comments is derived from Article 45(1)(b) of the African Charter on Human and Peoples' Rights (African Charter).



1. Introduction

In March 2020 the African Commission on Human and Peoples' Rights (African Commission) took a major step forward regarding women's rights to property in cases of separation, divorce, or annulment of marriage by adopting General Comment No. 6 on art. 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol. This new General Comment is fleshing out the regional legal standards applicable to women's equal property rights in and out of marriage. It is thus quintessential in elaborating on women's right to an equitable sharing of the joint property deriving from marriage. A key underlying factor which continues to systematically place women at a disadvantaged position across the African continent.

The establishment of General Comment No. 6 was a lengthy process which started off in 2012 with a conversation between the Special Rapporteur on the Rights of Women in Africa (SRRWA) and civil society organizations on strengthening women's land and property rights in Africa in relation to the Maputo Protocol. Eight years later, this non-binding instrument stands as a cornerstone for the realization of women's property rights in separation, divorce, and annulment of marriage providing guidance to States on how to implement its international human rights obligations and advance substantive gender equality.



2. Marital Property in Africa: The Context

The factors that gave rise to the need to have a General Comment on women's right to equitable share of marital property are rooted on the patriarchal power dynamics which still undermine women's rights and empowerment across the world. Women in Africa face significant hurdles when trying to access their rightful marital property, during as well as after marriage. A common saying on the continent is that "land belongs to the man, the produce in it to the woman", highlighting the predominant attitude on women's property rights. This is also visible in land ownership since only 13% of agricultural title holders are women. Moreover, 39% of African countries have discriminatory customary, religious or traditional laws and practices enforced which do not guarantee women the same rights over non-land assets.¹

In many parts of Africa, women's contribution in the acquisition of marital property has been consistently undermined through various means including the following:²

1. Gender discriminatory registration laws and practices, which in effect prohibit or discourage women from owning housing, land and prop-

¹ OECD, Social Institutions and Gender Index (SIGI) 2019 Global Report: Transforming Challenges into Opportunities. Paris: OECD.

² 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)) (2020), §5a-d

erty jointly with their spouse, or which give preference for registration of housing, land and property in the name of the male spouse only.

2. 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.
3. Gendered responsibilities dictating that women use their resources for the upkeep of the family home (maintaining the home) while men use theirs for the acquisition of properties.

The ongoing application archaic laws, customary norms, and religious practices.

The limited economic decision-making power also roots in the fact that women's unpaid care work is often not considered as adding economic value and thus weakens their leverage in property decisions. A study of 43 African countries found that 22 formally recognized males as the head of the household, giving them sole discretion to represent the household and make household decisions³. According to the OECD, 30% of African countries have discriminatory customary, religious or traditional laws or practices that hinder women's decision-making power in the household.⁴

In addition to the above, most marriages which are concluded in Africa are customary marriages and are therefore not registered. Consequently, it remains a challenge to regulate and implement an equitable distribution of property during separation, divorce, or annulment.

³ Hallward-Driemeier, M. and T. Hasan. 2012. Empowering Women: Legal Rights and Economic Opportunities in Africa. Africa Development Forum Series. Washington, D.C.: World Bank.

⁴ OECD, *supra* 1



3. Legal Foundations of General Comment No. 6

On a regional level the African Charter envisages several rights that forms the normative foundation of General Comment No. 6. The treaty highlights in several articles States' obligation to non-discrimination.⁵ Specifically, art. 18 of the African Charter focuses on the protection of women within the family. Furthermore, the right to property is ascertained in art. 14 of the ACHPR and mandates State Parties to protect and fulfil women's rights to property.

With the adoption of the Maputo Protocol in 2003, the first ever legally binding regional women's right treaty of Africa came into effect and has so far been ratified by 42 countries. Since the Maputo Protocol is so far the only regional human rights treaty focusing on women's rights, it has up to today been one of the key tools to promote women's rights in the African region.⁶ It brings to light the importance of women's equitable rights in marriage, including regarding marital property in case of separation, divorce, or annulment of marriage as envisaged in art. 7(d). Under this sub-article, the protocol recognizes that "women and men shall have the right to an equitable sharing of the joint property deriving from the marriage."

⁵ Art. 2 and 3 of The African Charter obliges State parties to ensure equality of all persons – men and women and to guarantee equal protection of their rights.

⁶ Other important tools are for example the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and its optional protocols.



4. The Content of General Comment No. 6

The Maputo protocol did not clearly define the meaning of several terms and expressions within the protocol relevant to women's property rights, thus weakening the instrument. The role of the General Comment No. 6 is to flesh out the exact meaning of these terms and obligations to strengthen the protocol once more. In this line, the General Comment is structured in two main substantive sections. One key section on the normative framework that aims to clarify key legal terms and further develop legal standards underpinning women's equal property rights in the context of marriage, and the final section which establishes a series of State obligations to ensure these rights are protected and realized.

In relation to the normative framework, the African Commission contributed to clarify the meaning of the terms "equitable sharing" and "joint property deriving from marriage" envisaged in art. 7(d) of the Maputo Protocol. The instrument also recognizes the different cultural contexts in the region and further expands human rights standards to protect women's property rights within plural legal systems and marriage arrangements.

The term "equitable sharing" highlights the equality between men and women in divorce, separation, and annulment of marriage. It pushes States to acknowledge women's historical and systemic discrimination and thus the need for substantive equal-



ity, which has already been confirmed by several human rights bodies such as the Committee on the Elimination of all Discrimination Against Women⁷ and the Human Rights Committee.⁸ This term is based on this understanding of substantive and formal equality and thus defined as an “apportionment of marital property in excess of half of the property”. This distribution of marital property awards 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.”⁹

The element of “non-monetary contribution” envisaged in this legal definition is paradigmatic as it highlights the unpaid care and household work that women often conduct in marital arrangements, and which should be taken into consideration when determining the “joint property deriving from marriage”. Therefore, the General Comment emphasizes the importance of taking into consideration the different ways of women’s contribution to the economic well-being of their families and the critical need to ensure that this contribution is fully recognized in cases of separation, divorce, or annulment of marriage.

⁷ See CEDAW, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004), §8 & §10

⁸ See Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) (2000), UN Doc CCPR/C/21/Rev.1/Add.10, §3

⁹ 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)) (2020), §43

The General Comment No. 6 thus includes wives' contribution to the development of land and property through their unpaid labor as well as child-care.¹⁰

Unpaid care work in marital property

According to the International Labour Organisation, in the African region women spend 3.4 more time in unpaid care work than men.

General Comment No. 6 pioneered the recognition of women's unpaid care work for the acquisition of marital property and establishes key guidelines for States to take these contributions into account to ensure a fair distribution and awarding of property after divorce or separation.

Across Africa, different forms of marriages are recognized. 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. Therefore, General Comment No. 6 also acknowledges that States with plural family law also have an obligation to ensure that the same rights are extended to all forms of marital agreements recognized.¹¹

On the section related to State obligations, General Comment No. 6 outlines the overall and specific obligations of States towards promoting the effective adaptation and implementation of art. 7(d) of the Maputo Protocol. These obligations are enlisted on the General Comment as follows:

- **Legislative measures:** Legally, States should align and, if need be, modify their domestic legal frameworks with their international obligations. These legal standards should be clear, accessible, enforceable, and justiciable.
- **Access to justice and remedies:** States are required to establish accountability mechanisms, including judicial, quasi-judicial, administrative, traditional, and other processes to enable women to access and obtain redress. Free legal aid should also be provided to those women who would otherwise be unable to seek justice and remedies. Judicial and administrative officers should be trained on women's marital property rights and their equal rights within the context of marriage, divorce, separation, and annulment of marriage.¹²

¹⁰ Ibid., §47

¹¹ African Commission on Human and Peoples Rights, African Commission on Human and Peoples Rights, supra 9, §49

¹² Ibid., §60

- **Awareness rising:** States should engage in awareness rising activities and encourage the transformation of discriminatory practices and customs related to art. 7(d) of the Maputo Protocol.
- **Capacity building and training:** States should also undertake measures to develop the capacities of stakeholders to advance substantive equality and understand that women's contributions are part of the property derived from marriage upon divorce or separation. General Comment No. 6 also recognizes the substantial contributions of civil society by highlighting that States should create favorable conditions for civil society to engage in activities that support the removal of the conditions and practices that impede the equal enjoyment of rights by women in and out of marriage.
- **Provision of adequate financial resources:** States should ensure the allocation of appropriate budgetary resources for the realizations of women's equal rights to property.
- **Reporting to the African Commission:** States have the obligation to periodically submit to the African Commission a report on the measures they have taken towards the full realization of the rights recognized on the African Charter. These reports must consider General Comment No. 6 and comply with the guidelines adopted by the African Commission for that purpose.

The new General Comment has become a landmark instrument for ensuring women's equitable right to marital property. It has been welcomed by feminists and women's rights advocates in the region and have set the foundation for advocacy strategies towards ending gender inequality across the continent. But how can civil society further engage with the African Commission to develop other relevant General Comment and push for women's rights in their respective countries?

Special Human Rights Mechanisms in Africa

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 General Comment No. 6.

Please visit the [website of the SRRWA](#) to learn more about her mandate!



5. How Can Civil Society Organizations Engage with the General Comment?

The ACHPR has a very robust relationship with Civil Society Organizations (CSOs). Art. 45 (1) of the African Charter requires the ACHPR to cooperate with other African and international institutions concerned with the promotion of and protection of human and peoples' rights. Since 1988, the ACHPR has been granting observer status to NGOs. In 1999, the Commission adopted a resolution on the criteria for granting observer the status to NGOs.

CSOs play a prominent role in the activities of the ACHPR. Primarily, they draw the attention of the Commission to violations of the Charter, bring communications on behalf of individuals, monitor States' compliance with the Charter, and help to increase awareness about the Commission's activities by organizing conferences, seminars, and other activities.

In this regard, CSOs can do the following to push for the implementation of General Comment No. 6 at the regional and international levels:

- CSOs with observer status from the ACHPR can **participate in the ACHPR's public sessions**, seek to make oral presentations, and bring the General Comment No. 6 to the attention of the government representatives present during each session.

- They can also **participate in the NGO Forum of the ACHPR** or hold side events during the ACHPR public sessions with other CSOs and relevant Special Rapporteurs of the ACHPR to engage the appropriate stakeholders and increase awareness on the implementation of General Comment No. 6.
- They can also **engage with the reporting procedures of the ACHPR** by submitting shadow reports on the implementation of General Comment No. 6 on a State Party and popularize the ACHPR's concluding observations in relation to General Comment No. 6.
- They can **engage with the Special Rapporteur on the Rights of Women in Africa (SRRWA)**. The ACHPR and its mechanisms remain open to information on human rights developments. The broad mandate of Special Rapporteurs thrive on the provision of institutional support of the ACHPR and information from CSOs. CSOs can therefore engage with the SRRWA, hold conferences, seminars, awareness raising programs to advance the implementation of General Comment No. 6.
- CSOs can **simplify, publish, and translate copies of General Comment No. 6** and disseminate this to differently targeted audience for effective implementation.

For CSOs to consider developing a new General Comment, it will be critical to consider the following steps.

- Identify the area of the Charter or Maputo Protocol that has a gap and will require further normative framework for clarification.
- Discuss the gap identified with the relevant Special Mechanism/Special Rapporteur of the ACHPR for a buy in.
- Hold a CSO consultative meeting or workshop to collect data and feedback on the subject and ensure a geographical representation of the region in this meeting to reflect the issues on the ground.
- Hold a drafting session in collaboration with all relevant stakeholder to reflect the issues on the gap on paper and present it to the ACHPR in its private session for consideration. Ensure that copies of the drafted document are in all the approved languages of the ACHPR.
- Receive inputs from all the Commissioners and refine your draft.
- Present this back to the ACHPR for publishing on their website to receive additional inputs from other CSOs and government representatives.

- Hold a validation session with relevant stakeholders to reflect the inputs collected after publishing the draft of the website.
- Orally present the final draft to the ACHPR for finalization and approval.

Finally, CSOs must note that this process can be cumbersome, meticulous, and long and winding. Since the General Comment will become a continental wide acceptable document, it will have to pass the test of time. In this regard, it requires a lot of painstaking work, allocation of adequate resources and wide consultative process. Nevertheless, the creation of a General Comment receives the support of the special mechanisms and/or rapporteurs which are often willing to support civil society in the process of doing so. Moreover, you should think about collaborating with other civil society to split the workload and ensure a more diverse and inclusive process.



6. Further Resources¹³

- African Commission on Human and Peoples' Rights: click [here](#).
- African Charter on Human and Peoples' Rights: click [here](#).
- Maputo Protocol: click [here](#).
- Text of the General Comment No. 6 on the Maputo Protocol: click [here](#).
- Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa - ACHPR/Res.361(LIX)2016: click [here](#).
- 262 Resolution on Women's Right to Land and Productive Resources - ACHPR/Res.262(LIV)2013: click [here](#).
- A guide to the African Human Rights System: click [here](#).
- Roadmap for civil society engagement at the ACHPR (Resource from ISHR): click [here](#).
- GI-ESCR: Women's access to land and productive resources: click [here](#).
- OHCHR report: Realizing women's right to land and other productive resources: click [here](#).

¹³ All links were last accessed 29 November 2021

About GI-ESCR

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international non-governmental human rights advocacy organization. Together with partners around the world, GI-ESCR works to end social, economic and gender injustice using a human rights approach.

About IGED-Africa

Initiative for Gender Equality and Development in Africa (IGED-Africa) is a Non-Governmental Organization that promotes gender equality, respect for human rights and women empowerment in Africa. It utilizes sustained advocacy to enhance regional engagements, policy dialogues peer to peer knowledge and experience sharing, practical and hands-on capacity building programmes, to transform minds, change stereotypes around gender roles and responsibilities and promote equality between men and women in Africa.

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