

Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent

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ABSTRACT: The first judgment of the African Court on Human and Peoples' Rights interpreting the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), *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 Mali*, sets an important precedent for women's human rights in Africa both through its explicit findings and through two key 'silences', or areas where the Court does not directly address Mali's arguments. Situated within a case concerning provisions of Mali's Persons and Family Code of 2011, these silences emphasise the applicability of women's human rights in diverse African socio-cultural contexts. This case commentary takes an interdisciplinary approach drawing on doctrinal legal research methodology and legal anthropology in order to situate the analysed case in a broader socio-cultural and historical context. Highlighting the significance of Family Code reform for women's status and attendant rights, the case discussion analyses the implications of the decision's silences. The first concerns Mali's argument that *force majeure* precludes legal wrongfulness and the second emerges from Mali's claim that it did not violate human rights but adapted the law to reflect 'social realities'. This case discussion contends that although elaboration of the Court's reasoning would have developed jurisprudence on *force majeure*, the Court properly refrained from directly addressing the latter argument, which rehashes debates about human rights universality versus cultural relativism. Nevertheless, the case serves as a powerful reminder of the need for further reflection on this enduring tension, and the case commentary accordingly makes recommendations for future research. Thus, even the Court's silences have potential to strengthen women's recourse for human rights violations in Africa because they implicitly reject the notion that either violent opposition to human rights norms or seemingly divergent socio-cultural realities justify derogation.

TITRE ET RÉSUMÉ EN FRANCAIS:

Des silences qui en disent long: l'effet de la décision de la Cour africaine dans l'affaire *APDF et IHRDA c. Mali* sur les droits des femmes en Afrique

RÉSUMÉ: Le premier arrêt de la Cour africaine des droits de l'homme et des peuples interprétant le Protocole de Maputo, l'affaire *Association pour le Progrès et la Défense des Droits des Femmes maliennes (APDF) et l'Institut des Droits de l'Homme et du Développement en Afrique (IHRDA) c. Mali* crée un précédent important pour les droits des femmes en Afrique à la fois grâce à ses constatations explicites et par

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deux « silences » clés, ou domaines dans lesquels la Cour n'aborde pas directement les arguments du Mali. Se trouvant dans une affaire concernant des dispositions du Code des personnes et de la famille du Mali de 2011, ces silences soulignent l'applicabilité des droits fondamentaux des femmes dans divers contextes socioculturels africains. Cette contribution adopte une approche interdisciplinaire s'appuyant sur l'approche juridique doctrinale et l'anthropologie juridique tout en situant l'affaire dans un contexte socioculturel et historique plus large. Après avoir souligné l'importance de la réforme du Code de la famille pour le statut et autres droits des femmes, la contribution analyse les conséquences attachées aux silences de la décision. Le premier concerne l'argument du Mali selon lequel un cas de force majeure exclut l'illicéité juridique et le second découle de l'affirmation du Mali selon laquelle il n'a pas violé les droits de l'homme, mais a adapté la loi aux « réalités sociales ». L'article postule qu'alors que le raisonnement de la Cour aurait pu développer la jurisprudence en matière de force majeure, la Cour s'est correctement abstenue de traiter directement de ce dernier argument, qui fait prendre un nouveau tournant aux débats sur l'universalité des droits de l'homme versus le relativisme culturel. Néanmoins, l'affaire rappelle de manière convaincante la nécessité de poursuivre la réflexion sur cette tension persistante et l'article propose en conséquence des recommandations pour les recherches futures. Ainsi, même les silences de la Cour pourraient renforcer le recours des femmes en matière de violations des droits humains en Afrique parce qu'ils rejettent implicitement la notion selon laquelle soit une opposition violente aux normes des droits de l'homme, soit des réalités socioculturelles apparemment divergentes justifient une dérogation.

KEY WORDS: African Court on Human and Peoples' Rights, derogation, *force majeure*, family law, Maputo Protocol, *APDFR and IHRDA v Mali*, women's rights, marriage

CONTENT:

1	Introduction.....	390
2	Background on family code reform in Mali and other African countries ..	392
3	Case summary	396
4	Two silences.....	397
4.1	Mali's argument that <i>force majeure</i> precludes legal wrongfulness.....	397
4.2	Mali's argument regarding adapting the law to 'socio-cultural realities'	405
5	Conclusion	412

1 INTRODUCTION

On 11 May 2018, the African Court on Human and Peoples' Rights (African Court or Court) issued its first decision interpreting the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in the case of *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 Mali* (the *APDF and IHRDA* case). This landmark decision held that Mali's Persons and Family Code (Family Code) of 2011¹ violated provisions of the Maputo Protocol, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on the Rights and Welfare of the Child (Children's Charter). Through this decision, which concerned sensitive issues about marriage and family life, the Court set an important precedent for women's human rights in Africa. However, it did this both through its explicit findings and through two key

1 Loi 2011-087 du 30 Décembre 2011 Portant Code des Personnes et de la Famille.

‘silences’, or junctures where the Court did not directly address the respondent state’s arguments. Linguists and other scholars posit that silence is not empty and neutral but has multiple meanings² and is closely bound with discourse.³ Thus, the silences in the case are communicative. While the article does not delve deeply into understanding the meanings of the silences as this would have necessitated direct engagement with the judges who drafted the decision, it briefly considers both what they might signal and whether the Court appropriately remained silent, while analysing in more detail some of the ideas that might alternatively have been directly articulated by the Court. Understanding these aspects of the decision as well as its significance requires going beyond the traditional confines of doctrinal legal research. As such, this case discussion takes an interdisciplinary approach that situates the case in a broader socio-cultural and historical context.

Following a brief background section on Family Code reform in Mali and other African countries and a brief summary of the *APDF and IHRDA* case, this commentary analyses the two major silences. The first concerns Mali’s argument that *force majeure* precluded legal wrongfulness, and the second emerges from Mali’s argument that far from violating human rights law, it simply adapted legislation to ‘social realities’.⁴ These silences have particular significance for women’s human rights because they pertain to derogation. Through its arguments, Mali sought to suspend some of its human rights obligations towards women based on protests that ensued after the National Assembly adopted the 2009 Family Code bill as well as Mali’s self-described efforts to ensure that the law remained in step with ‘social realities’. I argue that while the Court appropriately dismissed Mali’s *force majeure* argument, elaborating on its reasoning would have developed jurisprudence in this important area. Also, by only indirectly addressing Mali’s argument about ‘social realities’, the Court properly refrained from entering into the complex debate over universalism versus cultural relativism. Nevertheless, the case serves as a powerful reminder of the need for further academic and practical reflection on this tension, and accordingly make recommendations for future research. The Court’s response to these arguments had critical bearing on when states can justifiably limit women’s enjoyment of their human rights. While the Court did not directly respond to the arguments, it implicitly rejected them, thereby potentially strengthening women’s recourse for human rights violations.

2 See K Acheson ‘Silence as gesture: rethinking the nature of communicative silences’ (2008) 18 *Communication Theory* 535; M-L Achino-Loeb ‘Reflecting on silence and anthropology’ 30 March 2015 PoLAR Emergent Conversations <https://polarjournal.org/2015/03/30/emergent-conversations-part-2/> (accessed 5 July 2019).

3 M Foucault *The history of sexuality: Volume I: An introduction* trans R Hurley (1978).

4 *APDF & IHRDA v Mali*, (11 May 2018), Application 46/2016, para 67.

2 BACKGROUND ON FAMILY CODE REFORM IN MALI AND OTHER AFRICAN COUNTRIES

Since 2000, 23 French-speaking African countries have instituted Family Code reform in an effort to update legislation that is often rooted in the Napoleonic Code of 1804. New Family Codes have since been adopted in 11 of these countries,⁵ but reform is ongoing in 12 others.⁶ Although family law reform has been undertaken across the world since the onset of the twentieth century, it has often been fraught with contention, primarily due to the issues it raises concerning women's status and attendant rights as well as the influence of particular religious and cultural visions of the family. The process in Mali involved the adoption of two very different Bills by the National Assembly in the span of two years (2009 to 2011) and culminated in the enactment of the 2011 Family Code under consideration in the African Court case analysed here. While perhaps striking in its 'hyper-mediatization'⁷ and these divergent outcomes, Mali's experience is best understood within the broader context of family code reform in Francophone Africa.

In the period immediately after independence, many former French colonies fashioned their legislation after colonial texts.⁸ This meant that laws concerning the family were largely based on the Napoleonic Code, which placed married women under legal coverture.⁹ Article 213 of the Napoleonic Code, for example, stipulates: '[t]he husband owes protection to his wife, the wife obedience to her husband'.¹⁰ Other provisions in Chapters VI to VII of the Code provide that a husband chooses the place of residence (article 214) and must give consent for his wife to manage property (article 217). While a husband could divorce his wife based on adultery (article 229), she could only do so if he 'brought his concubine into their common residence' (article 230). Moreover, Title IX on 'Paternal power' grants the father exclusive control over children (article 373).

Seeking to eradicate these and other patriarchal provisions, women's organisations across Francophone Africa played a key role in

5 The Codes were adopted as follows: Mauritania (2001), Djibouti (2002), Morocco (2004), Benin (2004), Comoros (2005), Algeria (2005), Madagascar (legislation on marriage 2007), Mali (2011), Togo (2012), Democratic Republic of the Congo (2016), and Rwanda (2016).

6 Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Republic of Congo, Côte d'Ivoire, Gabon, Guinea, Niger, Senegal, and Tunisia.

7 O Koné 'La controverse autour du code des personnes et de la famille au Mali: enjeux et stratégies des acteurs' unpublished PhD thesis, Université de Montréal, 2015 2.

8 Koné (n 7) 14.

9 A Tunc 'Husband and wife under French law: past, present, future' (1956) 104 *University of Pennsylvania Law Review* 1064 at 1068; RB Rose 'Feminism, women and the French Revolution' (1995) 21 *Historical Reflections / Réflexions Historiques* 187 at 193-4.

10 *The Code Napoleon; or the French civil code* trans Barrister of the Inner Temple (1824).

reform efforts. Such efforts played out differently in various countries, but all featured concerns about the role of customary and religious norms and practices. In Chad¹¹ and Niger,¹² for example, draft legislation was received with strong disapproval, particularly from Islamic organisations who claimed that it failed to reflect Islamic tenets. In February 2011 hundreds of Muslim demonstrators in Niger publicly burned a copy of the draft code.¹³ To date, neither country has adopted a new family code.¹⁴ However, there are also counterexamples. In Benin, a provision on polygamy in the 2002 bill adopted by the National Assembly was invalidated by the Constitutional Court for contradicting constitutional gender equality principles.¹⁵ Also, the provisions promoting gender equality in Morocco's *Moudawana* or Family Code of 2004 place it 'among the most progressive in the Muslim world'.¹⁶

In Mali, the reform process formally began in 1998 as part of the PRODEJ¹⁷ project aimed at improving the functioning of the judiciary, with financial support from a range of partners including the World Bank, the United Nations Children's Fund, France, Canada, and the European Union.¹⁸ Gaining momentum from the growth of international feminism in the 1990s, the advent of multiparty elections in Mali, and support from Mali's donors, women's and other non-governmental organisations (NGOs) successfully called for reform of 1962 Code of Marriage and Guardianship and other legislation governing the family.¹⁹ The election in 1992 of President (Dr) Alpha Oumar Konaré whose government had 'a decidedly secularist and pro-Western orientation'²⁰ further contributed to this success, as did the deep personal commitment First Lady Adame Ba Konaré, a renowned historian, had to advancing women's human rights.²¹

- 11 Haut-Commissariat des Nations unies aux droits de l'homme 'Déclaration de fin de mission au Tchad du Groupe de Travail du Conseil des droits de l'homme sur la question de la discrimination à l'égard des femmes dans la législation et dans la pratique' 14 décembre 2017 <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=22534&LangID=F> (accessed 7 July 2019).
- 12 Gabonéco 'Niger: Des centaines de Musulmans brûlent publiquement le projet de code de la famille, qu'ils qualifient de Satanique' 22 février 2011 <http://www.gabonéco.com/niger-des-centaines-de-musulmans-brulent-publiquement-le-projet-de-code-de-la.html> (accessed 25 July 2019).
- 13 As above.
- 14 Haut-Commissariat (n 11); Koné (n 7) 15.
- 15 M Hallward-Driemeier & T Hasan *Empowering women: Legal rights and economic opportunities in Africa* (2013) 93.
- 16 M N'Diaye *La réforme du droit de la famille: Une comparaison Sénégal-Maroc* (2016) 18 (my translation).
- 17 Programme décennal de développement de la justice.
- 18 Justice Mali, 'Rapport de la Table Ronde sur le PRODEJ' <http://justice.mali.org/table%20ronde.htm> (accessed 25 July 2019).
- 19 Loi 62-17 AN-RM du 3 Février 1962 portant Code du mariage et de la tutelle; B Soares 'Family law reform in Mali: Contentious debates and elusive outcomes' in M Badran (ed) *Gender and Islam in Africa: rights, sexuality, and law* (2011) 269-271 & 275-276; Koné (n 7) 20-21.
- 20 DE Schulz 'Political factions, ideological fictions: the controversy over family law reform in democratic Mali' (2003) 10 *Islamic Law and Society* 132 at 137.
- 21 Soares (n 19) 275.

From 1998, the government partnered with NGOs and international donors to organise public education campaigns²² and invited members of the public to share their views on the Family Code project at lively regional and national fora.²³ Over time, government officials and NGOs led the process while Islamic organisations were largely relegated to the background.²⁴ During consultations in late 2000, Muslims criticised the process as an attack on Islamic values by Western imperialism.²⁵ This opposition was significant given that over 90% of Mali's population practises Islam.²⁶ Nevertheless, by 2001, the Ministry for the Advancement of Women, Children and Families, MPFEF,²⁷ designated a committee of experts to draft the Family Code Bill.

In May 2002, right at the end of Konaré's second and final term, the draft was submitted to the Council of Ministers.²⁸ However, due to the ensuing wave of criticism, they did not present it to the National Assembly.²⁹ Following Amadou Toumani Touré's election as president in June 2002, the text languished in limbo for a few years, until the Ministry of Justice was charged with taking it up again.³⁰ Finally, in 2009, the National Assembly was presented with a revised version reminiscent of the 2002 text,³¹ which it passed by a large majority on 3 August 2009. Among other things, the text: recognised secular but not religious marriage, raised the marriage age to 18 for girls; removed the clause requiring a wife's obedience to her husband, provided for equal inheritance for men and women, granted natural children inheritance rights, and empowered women to be heads of the household upon divorce or their husband's death.³²

Rejecting this 2009 Bill as an aberration, Muslim groups organised a series of protests, with some individuals threatening to use violence if the president signed it into law.³³ The High Islamic Council, an organisation established by Konaré's administration in 2002 to promote the interests of the Muslim population, convened hundreds of

22 Soares (n 19) 276; Koné (n 7) 28.

23 As above; R De Jorio 'Between dialogue and contestation: gender, Islam, and the challenges of a Malian public sphere' (2009) 15 *The Journal of the Royal Anthropological Institute* S95 at S99.

24 Schulz (n 20) 160.

25 n 20, 133.

26 World Population Review 'Mali Population' 1 August 2019 <http://worldpopulationreview.com/countries/mali-population/> (accessed 13 August 2019).

27 Ministère de la promotion de la femme, de l'enfant, et de la famille.

28 Koné (n 7) 30.

29 As above.

30 Soares (n 19) 277; Koné (n 7) 30.

31 Soares (n 19) 285.

32 Mali, Defence on the Merits, *APDF & IHRDA* (24 November 2016) folio page 000541 at 000538; De Jorio (n 23) S98.

33 The New Humanitarian 'Threats of violence greet new family code' 11 August 2009 <http://www.thenewhumanitarian.org/report/85676/mali-threats-violence-greet-new-family-code> (accessed 26 July 2019); IRIN 'Mali: Back to the drawing board for new family code' 1 September 2009 <https://www.refworld.org/docid/4aa0c1941a.html> (accessed 26 July 2019).

Muslim clergy and village leaders in protest at Bamako's largest mosque on 9 August 2009³⁴ and then about 50,000 people in a meeting at a Bamako stadium on 22 August.³⁵ Other protests were organised across the country.³⁶ During these protests, the Secretary of the High Islamic Council, is reported to have said:³⁷

This code is a shame, treason [for Muslims] ... We are not against the spirit of the code, but we want a code appropriate for Mali that is adapted to its societal values. We will fight with all our resources so that this code is not promulgated or enacted.

Moreover, he criticised donors' role, stating, 'We do not want a code imported from donors, notably the European Union, which conditions its aid on certain social reforms, including the adoption of this code'.³⁸

In late August 2009, Touré consulted with members of the National Assembly, representatives of various state institutions, and heads of Muslim groups.³⁹ He subsequently announced a second reading of the Bill in a national address on 26 August in which he said (my translation):⁴⁰

Finally, it is necessary to remember that the Code of Personal status and the Family is special, because it governs three key domains: faith, tradition, and intimate life ... The repeated failures in the process of rereading the aforementioned Code sufficiently prove that changes in society cannot be decreed, because it is delicate and difficult.

Thereafter, Islamic organisations were invited to play a more active role in the revision of the Bill.⁴¹ When the new Code was promulgated on 30 December 2011,⁴² *Jeune Afrique* claimed it had 'the Islamists' benediction'.⁴³ However, a group of Malian civil society organisations viewed things differently, telling journalists that (my translation), 'Under pressure from Islamists, several articles guaranteeing women

34 The New Humanitarian (n 33).

35 Islam Pluriel 'Code de la famille contesté au Mali: le Président débute des consultations' 26 August 2009 <http://islam-pluriel.net/code-de-la-famille-con-teste-au-mali-le-president-debute-des-consultations/> (accessed 25 July 2019).

36 Koné (n 7) 36.

37 The New Humanitarian (n 33).

38 As above.

39 Islam Pluriel (n 35).

40 Il faut enfin retenir que ce Code des Personnes et de la Famille est particulier, parce que régissant trois domaines clés: La Foi, La Tradition, Et la Vie intime ... Les échecs répétés dans le cadre de la relecture dudit Code prouvent à suffisance que les changements de société ne se décrètent pas, car délicats et difficiles.

Ouestaf 'Discours du président malien annonçant le renvoi "en deuxième lecture" du nouveau code de la famille' (Texte intégral) 27 August 2009 <https://ouestaf.com/discours-du-president-malien-annoncant-le-renvoi-en-deuxieme-lecture-du-nouveau-code-de-la-famille-texte-integral/> (accessed 26 July 2019).

41 Koné (n 7) 196.

42 APDF & IHRDA (n 4) para 7.

43 B Ahmed 'Mali: un nouveau code de famille, avec la bénédiction des islamistes' 5 December 2011 <https://www.jeuneafrique.com/178253/politique/mali-un-nouveau-code-de-la-famille-avec-la-b-n-diction-des-islamistes/> (accessed 26 July 2019).

and children's rights were removed'.⁴⁴ The representative of one women's association decried the Code as having 'set [Mali] back 50 years'.⁴⁵

Unfortunately, the African Court's decision did little to settle the polarised debates. While a group of civil society organisations including the APDF released a press statement celebrating the judgment,⁴⁶ the Collective of Muslim Associations strongly condemned it and vowed to continue to fight efforts to impose a Code 'made in Europe'.⁴⁷ Political unrest that has been ongoing in Mali since 2012 presents an additional challenge to the government initiating further Family Code reform.⁴⁸ Nevertheless, the *APDF and IHRDA* case remains significant not just for Mali, but for the whole African continent.

3 CASE SUMMARY

In July 2016, the Malian APDF and a pan-African IHRDA jointly submitted an application to the African Court challenging provisions of the 2011 Malian Family Code. The organisations alleged that the Code violated the Maputo Protocol, CEDAW, and Children's Charter – all of which were ratified by Mali. More specifically, the applicants asserted that the Family Code violated the minimum marriage age and the right of consent to marriage for women and girls; inheritance rights for women, girls, and natural⁴⁹ children; and Mali's obligation to eliminate customs and practices that are harmful for women and children.

Rejecting Mali's arguments against jurisdiction and admissibility, the Court heard the case and unanimously held that the respondent state had violated the aforementioned instruments. First, the Court found that the Family Code did not comply with the female minimum age of marriage of 18, in keeping with article 6(b) of the Maputo Protocol and articles 2, 4(1), and 21 of the Children's Charter. As such, the Court held that Mali not only violated the marriage age provisions, but also violated the right to non-discrimination. Second, agreeing with

44 'Sous la pression des islamistes, plusieurs articles garantissant les droits des femmes et des enfants ont été supprimés.' ST Diarra 'Les femmes indignées par le nouveau Code de la famille' Inter Press Service News Agency 19 December 2011 <http://ipsnews.net/francais/2011/12/19/droits-mali-les-femmes-indignees-par-le-nouveau-code-de-la-famille/> (accessed 25 July 2019).

45 ST Diarra, 'Women's rights in Mali "set back 50 years" by new "Family Code" law' *The Guardian* 1 May 2012 <https://www.theguardian.com/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 24 July 2019).

46 AK Diakité 'Jugement de la Cour Africaine condamnant le Mali' 11 May 2018 <http://www.etatcivil.pw/jugement-de-la-cour-africaine-condamnant-le-mali/> (accessed 26 June 2019).

47 L'Indicateur du Renouveau 'Cour africaine des droits de l'homme: L'APDF obtient la révision du Code de la Famille, le Collectif des associations musulmanes riposte' 1 June 2018 <https://www.maliweb.net/societe/cour-africaine-des-droits-de-lhomme-l-apdf-obtient-la-revision-du-code-de-la-famille-le-collectif-des-associations-musulmanes-riposte-2760068.html> (accessed 26 June 2019).

48 See, e.g., International Crisis Group 'Mali' <https://www.crisisgroup.org/africa/sahel/mali> (accessed 13 August 2019).

49 This is used to denote children born to parents who are not legally married.

the applicants, the Court held that the differing provisions applicable to religious ministers and civil registry officials within the Family Code left women and girls at risk of being married without their consent in violation of article 6(a) of the Maputo Protocol and article 16(1)(b) of CEDAW. Third, the Court held that the disparate provisions of religious and customary law regarding inheritance also violated article 21(1) of the Maputo Protocol as well as articles 3 and 4 of the Children's Charter. Finally, the Court held that through its adoption of the 2011 Family Code and failure to address early marriage and inheritance issues, Mali failed in its obligations to eradicate harmful practices or traditions, in violation of articles 2(2) of the Maputo Protocol, 1(3) and 21 of the Children's Charter, and 5(a) of CEDAW. Based on these determinations, the Court ordered Mali to bring its Code in line with its human rights obligations; address the violations; provide 'information, teaching, education and sensitisation' as required under article 25 of the Charter; and submit a report within two years of the judgment.

4 TWO SILENCES

The Court's explicit findings must be considered along with its silence regarding two arguments advanced by Mali. The commentary contends that while the Court should have responded to Mali's argument regarding *force majeure*, it appropriately declined to engage with Mali's argument about the law reflecting social realities. The latter argument continued the debate about the universality of human rights versus cultural relativism which, though deeply relevant, was beyond the scope of the decision.

Through both silences, Mali sought to justify derogation from women's human rights norms. Regarding *force majeure*, it sought to temporarily suspend certain rights based on the 2009 protests. However, through its cultural relativist argument, Mali seemed to seek a more indefinite suspension based on the alleged need to keep the law in line with social realities. The silences and their potential implications are considered in detail below.

4.1 Mali's argument that *force majeure* precludes legal wrongfulness

In response to the alleged violation of the minimum marriage age, Mali contended that the Family Code Bill adopted by the National Assembly on 3 August 2009 observed the state's human rights obligations but 'could not be promulgated' due to *force majeure*:⁵⁰

... a massive protest movement from Islamist circles against the Code halted the process ... But it is not just the pressure from Islamic organizations. Mali was faced with serious threat of social divide, the nation being torn apart and outbreak of violence, the outcome of which could be fatal for peace, harmony and social

cohesion. The mobilization of religious forces reached such a level that no act of resistance could contain it.

Consequently, the government involved Islamic organisations in a prolonged reform process resulting in the promulgation of the 2011 Family Code.⁵¹

Through its invocation of *force majeure*, Mali sought to justify its non-compliance with various provisions of the Maputo Protocol, CEDAW, and the Children's Charter. Although the Court did not address this defence, it agreed with the applicants who reiterated Mali's obligation to comply with these ratified instruments.⁵² The Court's silence regarding *force majeure* can only reasonably be interpreted as implicit dismissal of Mali's argument. The dismissal is supported by relevant sources of international law, but nevertheless presents a missed opportunity for the Court to further develop jurisprudence on derogation from human rights norms in the African context.

4.1.1 Brief background on *force majeure*

Force majeure has historically been recognised as a 'general principle of law'⁵³ with roots in Roman law and the maxim *ad impossibilia nemo tenetur*⁵⁴ or 'nobody is held to the impossible.'⁵⁵ At the international level, *force majeure* was codified in the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).⁵⁶ The fifth Special Rapporteur for the draft articles, James Crawford describes the principle as a 'shield against an otherwise well-founded claim for the breach of an international obligation'.⁵⁷ In other words, *force majeure* operates as a temporary justification, excuse, or defence for what would otherwise be considered an internationally wrongful act.⁵⁸

4.1.2 Elements of *force majeure* and relevant decisions

Article 23(1) of the ILC Articles provides:

51 *APDF & IHRDA* (n 4) para 63.

52 n 4, para 68.

53 'Force Majeure' and 'Fortuitous Event' as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine, International Law Commission Secretariat (27 June 1977) UN Doc A/CN.4/315 (1977) 61.

54 S Szurek 'Circumstances precluding wrongfulness in the ILC articles on state responsibility: *force majeure*' in J Crawford *et al* (eds) *The law of international responsibility* (2010) 375.

55 AX Fellmeth & M Horwitz *Guide to Latin in international law* (2011) <https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-113> (accessed 15 July 2019).

56 Responsibility of States for Internationally Wrongful Acts, General Assembly (28 January 2002) UN Doc A/RES/56/83 (2002).

57 'Draft articles on responsibility of states for internationally wrongful acts' 2001 *Yearbook of the International Law Commission* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26 at 71.

58 Survey (n 53) 67; Draft articles (n 57).

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

Force majeure may be a result of both natural and man-made situations.⁵⁹ However, it will not be recognised where: (1) doing so would violate a peremptory norm,⁶⁰ *jus cogens*; (2) the state invoking it has played a role in creating *force majeure* ‘either alone or in combination with other factors’;⁶¹ and (3) ‘[t]he State has assumed the risk of that situation occurring’.⁶² Moreover, article 27(a) provides a limited duration for a *force majeure* plea. As soon as the extraordinary situation ends, the justification can no longer apply.

There is a high burden of proof placed on the state invoking the defence and a low rate of success.⁶³ Federica Paddeu suggests that

[e]ven before this narrow codification, tribunals were sceptical of claims of *force majeure* and have, consequently, treated the plea with suspicion ... In view of its current stringent requirements, a plea of force majeure will be upheld only very rarely.⁶⁴

Even if the plea is successful, under article 27(b) of the ILC Articles, the invoking state might not be relieved from a duty to pay compensation for ‘material loss’ resulting from its act or omission.

Paddeu’s assertion is supported by international case-law. Pleas of economic impossibility of performance are generally rejected because they fail to meet the material impossibility element of *force majeure*.⁶⁵ Even beyond economic considerations, in the *Rainbow Warrior Affair*, the Tribunal dismissed France’s argument that *force majeure* (specifically, sickness and pregnancy) excused its failure to ensure that two French security agents who had bombed a civilian boat in Auckland Harbour remained on a remote island for three years as stipulated in its agreement with New Zealand.⁶⁶ Outside the international arbitral context, in *European Commission v Italian Republic*, the European Court of Justice held that Italy’s failure to properly manage waste in the Campania region could not be excused by *force majeure*, which Italy argued resulted from ‘criminal activity’ in the region, public contractors’ non-performance of their obligations, and local protest

59 Survey (n 53) 66.

60 ILC art 26, which reads:

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

61 ILC art 23(2)(a).

62 ILC art 23(2)(b).

63 See MN Shaw *International law* (2008) 796; C Binder ‘Stability and change in times of fragmentation: the limits of *pacta sunt servanda* revisited’ (2012) 25 *Leiden Journal of International Law* 909 at 917.

64 F Paddeu ‘A genealogy of force majeure in international law’ (2012) 82 *British Handbook of International Law* 381 at 494.

65 Draft articles (n 57) 76; Szurek (n 54) 479-480.

66 (30 April 1990) RIAA Vol. XX 215 at 253.

against setting up landfills.⁶⁷ The European Court of Human Rights later took notice of this determination in a case alleging that this waste mismanagement in Naples and other towns violated the European Convention on Human Rights (European Convention).⁶⁸ Only the decisions of the Iran-US Claims Tribunal seem to contradict this general trend of unsuccessful *force majeure* pleas.⁶⁹ There, the plea was often accepted with regard to the Iranian Revolution.⁷⁰

4.1.3 Derogation

In the African human rights context, an additional consideration must be made regarding *force majeure*, namely, the African Charter's lack of a derogation clause. This is unique, as other human rights instruments including the International Covenant on Civil and Political Rights (ICCPR),⁷¹ American Convention on Human Rights,⁷² and European Convention⁷³ contain derogation clauses while also delineating rights from which no derogation is allowed. Such clauses allow the state to temporarily suspend the exercise of certain rights during a public emergency while nonetheless adhering to various reporting and monitoring requirements.⁷⁴ Derogation does not provide states with a *carte blanche* to ignore human rights; rather, as Laurent Sermet contends, it must satisfy the conditions of 'necessity, proportionality, inviolability and temporality'.⁷⁵

In its individual communications, the African Commission on Human and Peoples' Rights (the Commission) has interpreted the lack of a derogation clause to mean that derogation from human rights obligations is not permitted even during emergencies.⁷⁶ In *Commission Nationale des Droits de l'Homme et des Libertés v Chad (Commission Nationale)*, the Commission held:⁷⁷

The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

67 ECJ (4 March 2010) para 80.

68 *Case of Di Sarno and Others v Italy* ECHR (10 April 2012) para 111.

69 Binder (n 63) 920. She references GH Aldrich *The jurisprudence of the Iran-United States Claims Tribunal* (1996).

70 As above.

71 See article 4(1).

72 See article 27(1).

73 See article 15(1).

74 Binder (n 63) 927, 930.

75 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: a critical discussion' (2007) 7 *African Human Rights Journal* 142 at 150.

76 C Heyns 'The African regional human rights system: in need of reform?' (2001) 1 *African Human Rights Law Journal* 155 at 161-162; MA Tolera 'Absence of a derogation Clause under the African Charter and the Position of the African Commission' (2014) 4 *Bahir Dar University Journal of Law* 229 at 250-256.

77 (2000) AHRLR 66 (ACHPR 1995) para 21.

The Commission has since reiterated this position in several communications including *Media Rights Agenda v Nigeria*,⁷⁸ *Amnesty International and Others v Sudan*⁷⁹ (*Amnesty International*), *Article 19 v Eritrea*,⁸⁰ and *Sudan Human Rights Organisation and Another v Sudan*.⁸¹ However, Frans Viljoen posits that the Commission's argument was more nuanced in *Constitutional Rights Project and Others v Nigeria*,⁸² where it treated article 27(2) of the Charter as a derogation clause even though it is generally understood to be a limitations clause.⁸³ This would justify derogation 'with due regard to the rights of others, collective security, morality and common interest'.⁸⁴ Rejecting such conflation of limitation and derogation, Fatsah Ougurgouz argues that the Charter's missing derogation clause means that general international law must prevail.⁸⁵ If this is not already sufficiently perplexing, Melkamu Aboma Tolera contends that the Commission articulates a different position in state reports where it 'tends to regulate the behaviour of state parties during a declared state of emergency'.⁸⁶

Clearly, the interpretation of the absence of a derogation clause within the African Charter is unsettled. Some scholarship regards it as a 'flaw' or 'defect' that – in stark contradiction to the ICCPR and most African constitutions – puts human rights in jeopardy through its unrealistic expectation that states' human rights obligations must be fully observed even during emergency situations.⁸⁷ Others celebrate the omission as an innovation in human rights⁸⁸ or, at a minimum, appropriate recognition of the potential for abuse of such a clause in the African context⁸⁹ and an opportunity to further advance human rights.⁹⁰

What, then, does this mean for a plea of *force majeure*? Unless article 27(2) is taken as a substitute derogation clause, the African Commission's interpretation seems to suggest that all rights within the Charter are non-derogable. Consequently, even *force majeure* would not justify derogation.

78 (2000) AHRLR 262 (ACHPR 2000) para 73.

79 (2000) AHRLR 297 (ACHPR 1999) para 42.

80 (2007) AHRLR 73 (ACHPR 2007) para 87.

81 (2009) AHRLR 153 (ACHPR 2009) paras 165-167.

82 (2000) AHRLR 227 (ACHPR 1999) para 41.

83 *International human rights law in Africa* (2012) 334; see also Heyns (n 76) 161.

84 Charter, art 27(2).

85 *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* trans Hal Sutcliffe (2003) 434-437.

86 Tolera (n 76) 258.

87 See Heyns (n 76) 161-162; Tolera (n 76) 263-269.

88 AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law Democracy and Development* 79.

89 Sermet (n 75) 161; Viljoen (n 83) 334.

90 Sermet (n 75) 161.

4.1.4 Analysis of Mali's claim

As indicated above, Mali contended that *force majeure* prevented the promulgation of the 2009 Family Code Bill which was subsequently submitted for a second reading 'under pressure and for fear of social divide'.⁹¹ Although Mali did not elaborate on its plea of *force majeure*, further analysis is warranted to determine whether the Court properly rejected the plea.

Can Mali invoke force majeure to derogate from its African human rights obligations?

The applicants alleged violations of the Maputo Protocol, CEDAW, and Children's Charter, which all lack derogation clauses. Relying on the Commission's communications could render further analysis moot, as this absence could be interpreted as prohibiting derogation from any of the obligations elaborated in these instruments, even during emergency situations. The applicants advanced this argument while referring to the *Commission Nationale*⁹² and *Amnesty International*⁹³ communications before the African Commission to argue that the protests could not justify derogation from human rights obligations.⁹⁴ However, under its contentious jurisdiction, the Court could establish a basis for derogation.⁹⁵

Did Mali's act conform with jus cogens?

Article 26 of the ILC articles suggests that the analysis must start with compliance with peremptory norms because an act that violates such norms cannot be justified even by circumstances precluding wrongfulness. Peremptory norms include: 'the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.⁹⁶

Even if it were found to violate human rights, Mali's passage of the 2011 Family Code did not violate peremptory norms. Though an appropriate candidate for *jus cogens*,⁹⁷ gender equality is not recognised as such.⁹⁸

91 n 32, 000533.

92 n 77.

93 n 79.

94 APDF & IHRDA Réplique à la réponse de la République du Mali (1 Février 2017) 000511 at 000508.

95 Heyns (n 76) 162; Tolera (n 76) 278-280.

96 Draft articles (n 57) 85.

97 L Askari 'Girls' rights under international law: an argument for establishing gender equality as a *jus cogens*' (1998) 8 *South California Review of Law and Women's Studies* 3.

98 H Charlesworth & C Chinkin 'The gender of *jus cogens*' (1993) 15 *Human Rights Quarterly* 63 at 70.

Did the protests against the Family Code constitute an 'irresistible force' or 'unforeseen event' beyond Mali's control?

Force majeure requires state conduct that is 'involuntary or at least involves no element of free choice'.⁹⁹ As Paddeu elaborates, '... the situation of *force majeure* nullifies the freedom of the state to comply with its international obligation: the choice of performance is taken from it'.¹⁰⁰ This is the key feature that distinguishes *force majeure* from distress and necessity.¹⁰¹

Mali would likely face some difficulty proving these elements. The irresistibility requirement means 'the State concerned has no real possibility of escaping its effects'.¹⁰² As Paddeu indicates, the classic example of an irresistible force is 'a natural force, which dragged or forced a vessel to enter a foreign port'.¹⁰³ Situations like this meet the requirement of 'a constraint which the State was unable to avoid or oppose by its own means'.¹⁰⁴

Although *Autopista Concesionada de Venezuela v Bolivarian Republic of Venezuela*¹⁰⁵ (the *Aucoven* arbitration) has limited relevance because it was primarily governed by Venezuelan law,¹⁰⁶ the arbitration similarly involved protests that Venezuela characterised as *force majeure*. Venezuela argued that these protests had prevented it from raising highway tolls as stipulated in its agreement with *Aucoven*.¹⁰⁷ Venezuela nevertheless conceded that 'the civil protest was not irresistible in the sense that it could not have been mastered by the use of force'.¹⁰⁸ Likewise, Mali would have to demonstrate that it lacked the means to prevent or stop the protests.

Alternatively, Mali might have tried to argue that the protests were 'unforeseen.' However, Giulia Pecorella points out the difficulty of such an argument in light of the respondent state's characterisation of the resistance to the 2009 reforms as reflective of its 'socio-cultural

99 Draft articles (n 57) 76.

100 Paddeu (n 64) 466.

101 Draft articles (n 57) 76.

102 As above.

103 Paddeu (n 64) 405.

104 Draft articles (n 57) 76.

105 ICSID Case No ARB/00/5, Award (23 September 2003).

106 n 105, para 105.

107 n 105, paras 32-39.

108 n 105, para 124.

realities'.¹⁰⁹ Moreover, as discussed above, Islamic groups had voiced their opposition to the reforms as early as 2000.

Did the protests make it materially impossible for Mali to perform its obligations?

Impossibility may result from natural or human activity¹¹⁰ but has a high threshold: '*Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.¹¹¹ Mali would again face difficulty because, as the tribunal held in *Rainbow Warrior*,

the test of [*force majeure*'s] applicability is of absolute and material impossibility, and ... a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.¹¹²

While the protests against the 2009 Family Code bill clearly made it 'more difficult' and 'burdensome' for Mali to respect its human rights obligations, it would need additional evidence to support a claim of material impossibility.

Were the protests attributable to Mali's conduct?

Under the ILC articles, *force majeure* cannot apply where the state assumed the risk of the situation or where it is complicit in bringing it about.¹¹³ Mali did not assume the risk. Although there is no requirement that such an assumption be in writing, it must be 'clear',¹¹⁴ which is not the case here. Regarding complicity, *force majeure* does not 'cover situations brought about by the neglect or default of the State concerned'.¹¹⁵

The applicants argued that protests against the Code were evidence that Mali failed to fulfil its obligations to change socio-cultural norms and practices to the benefit of women and children through education and other measures under article 2(2) of the Maputo Protocol and 1(3)

109 'A commentary on the African Court's decision in the case APDF and IHRDA v Mali: why socio-cultural endemic factors of a society could never support arguments based on *force majeure*' International Law Blog 14 January 2019 <https://internationallaw.blog/2019/01/14/a-commentary-on-the-african-courts-decision-in-the-case-apdf-and-ihrda-v-republic-of-mali-why-socio-cultural-endemic-factors-of-a-society-could-never-support-arguments-based-on-force-majeure/> (accessed 20 July 2019).

110 The Draft articles provide the following examples: 'stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought', 'loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State' (n 57 & 76).

111 As above.

112 n 66, para 77.

113 See Draft articles (n 57) 78.

114 'Second Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' 1999 *Yearbook* UN Doc A/CN.4498 and Add. 1-4 3 at 67.

115 Draft articles (n 57) 76-77.

of the Children's Charter.¹¹⁶ This could be taken as 'neglect' contributing to the situation and, thereby, bar a *force majeure* plea.

Another consideration: timeliness

As discussed above, article 26 places a time limit on *force majeure* pleas. This was emphasised in *European Commission v Italy* where the Court found as follows:¹¹⁷

Moreover, where it is possible to attribute an act to *force majeure*, the effects of that attribution can only last a certain time, namely the time which is in fact needed in order for an administration exercising a normal degree of diligence to put an end to the crisis which has arisen for reasons outside its control.

Protests over the proposed Family Code bill erupted in 2009 and the review process continued until the Family Code was adopted in 2011. Assuming Mali met the elements for a *force majeure* plea, which is questionable in light of the above, this plea might have succeeded while the crisis was ongoing but was unlikely to be tenable until 26 July 2016, when APDF and IHRDA filed the application.

4.1.5 Assessment of the Court's implicit rejection of Mali's *force majeure* argument

Mali's plea of *force majeure* faced many hurdles, with the key one being whether *force majeure* qualifies as an excuse for derogation under the human rights instruments in question. Although the Court appropriately dismissed the plea, elaboration of its reasoning would have been beneficial for the development of jurisprudence in this important but unsettled area concerning derogation from human rights obligations. Moreover, it would have provided additional clarity on whether there are any women's human rights obligations from which no derogation is permitted.

4.2 Mali's argument regarding adapting the law to 'socio-cultural realities'

The second key silence in this case emerges in Mali's defence to the alleged violation of the minimum marriage age. Mali asserted that there was no such violation; rather, the law was adjusted to reflect 'socio-cultural realities'. Mali informed the Court:¹¹⁸

... there is no point in passing legislation which will never be applied or hardly applied. The law must be in harmony with socio-cultural realities. There is no point in creating a gap between the two ... Therefore, the issue is not that of a violation of international obligations or the perpetuation of practices that are 'to be discouraged', but an adaptation of the said commitment to social realities.

116 Réplique (n 94) 000508.

117 *European Commission* (n 67) para 48.

118 Defence on the Merits (n 32) 000536-000535.

The Court only indirectly responded to this assertion through reference to state obligations under the Maputo Protocol and Children's Charter to take action towards eradicating harmful practices and customs as well as to put in place measures to ensure a minimum marriage age of 18.¹¹⁹ Later, in its finding on '[t]he alleged violation of the obligation to eliminate practices or traditions harmful towards women and children', the Court alluded to article 2(2) of the Protocol and similar provisions in CEDAW and the Children's Charter¹²⁰ under which states must

modify the social and cultural patterns of conduct of women and men through public education, information, education 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.

Thus, while Mali sought to keep the law in step with contemporary 'socio-cultural realities', the Court emphasised its obligation to take steps towards changing such realities in order to advance the rights of women and children.

As described earlier, Mali's position echoed the one articulated by opponents of the 2009 Bill who criticised it for imposing non-Islamic and non-Malian values on Mali's people. The former president of the High Islamic Council, Imam Mahmoud Dicko, decried the reforms as 'socio-cultural mimicry [*mimétisme socioculturel*] that drains the reference points for our [Muslim] identity'.¹²¹ Similarly, in a documentary on the Family Code which aired on Al Jazeera in 2010, Hadja Safiatou Dembele, the president of the National Union of Muslim Women's Associations, said, 'Muslims are not against the Code. What we want is a Code that is adaptable to our customs, traditions and religion.'¹²²

Although this position was not articulated as such, it can be interpreted as an argument for cultural relativism. The respondent state, and individuals referenced above, were claiming that the human rights in question in the Family Code reform process did not apply universally because socio-cultural particularities in Mali – including religion – meant that a different set of norms took precedence. Thus, while Mali's argument cannot be considered a traditional legal defence, it situated the controversy within one of the most polarising debates in the human rights field. Some scholars described the debate as 'overdrawn'¹²³ and in her 2005 book, Fareda Banda wrote that she was 'not sure that there is much more to be said that has not already been

119 *APDF v IHRDA* (n 4) paras 73-75.

120 Under art 21(1) of the Children's Charter, state parties must 'take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child'.

121 Soares (n 19) 279.

122 R Stewart 'Family Code' Witness, Al Jazeera 12 Nov 2010 <https://www.aljazeera.com/programmes/witness/2010/09/201095141841631119.html> (accessed 6 August 2019).

123 UF Dahre 'Searching for middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights' (2017) 21 *International Journal of Human Rights* 611 at 612.

written on the matter'.¹²⁴ However, Mali's invocation of this debate attests to its continued relevance.

4.2.1 The great human rights' debate: universality versus cultural relativism

The debate over whether or not cultural relativism forecloses the universality of human rights is important because, as Mark Goodale suggests, the debate is really about the legitimacy of human rights.¹²⁵ Interestingly, although the 1993 Vienna World Conference on Human Rights sought to promote human rights across the globe, the Vienna Declaration and Programme of Action adopted at the conference highlighted the tension between universality and cultural relativism. Paragraph 5 of the Declaration states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

This tension was even more strongly articulated by the American Anthropological Association (AAA)'s statement on human rights¹²⁶ submitted by the AAA's Executive Board in June 1947 to the UN Commission on Human Rights (UN Commission),¹²⁷ which was drafting the Universal Declaration on Human Rights (Universal Declaration) at the time. The statement rejected the Universal Declaration as a document that imperially 'imposed'¹²⁸ Western values in the face of empirical evidence of the diversity of moral values across the globe, all of which deserved respect. Moreover, the statement criticised the Universal Declaration's focus on individuals without taking into account the significance of social groups.

A shift in the discipline and, perhaps most importantly, anthropologists' commitment to supporting indigenous groups, contributed to the publication of a new statement adopted by the AAA's membership in June 1999.¹²⁹ Although the statement still emphasised individual's and group's 'generic right to realize their capacity for culture',¹³⁰ it embraced human rights principles as reflected in the Universal Declaration and other instruments, while leaving space for a

124 F Banda *Women, law and human rights: an African perspective* (2005) 247.

125 M Goodale 'The myth of universality: the UNESCO "Philosophers' Committee" and the making of human rights' (2018) 43 *Law and Social Inquiry* 596 at 598.

126 American Anthropological Association '1947 Statement on human rights' 24 June 1947 <http://humanrights.americananthro.org/1947-statement-on-human-rights/> (accessed 7 August 2019).

127 As above.

128 As above

129 American Anthropological Association '1999 Statement on human rights' June 1999 <http://humanrights.americananthro.org/1999-statement-on-human-rights/> (accessed 7 August 2019).

130 As above.

vision of human rights that transcended them. Unlike the 1947 Statement which essentially signalled anthropology's disengagement with human rights, this new statement urged anthropologists to contribute to the study of the field.¹³¹

4.2.2 Reservations as a cultural relativist tool

Although reservations are a key modality through which states 'negotiate' the tension between universality and cultural relativism,¹³² Mali did not opt for this route. By entering reservations to treaties, states 'exclude or modify' the application of certain treaty provisions,¹³³ as long as the reservations meet conditions elaborated in the treaty or, where relevant, in article 19 of the Vienna Convention.¹³⁴ Some reservations can be read as the rejection of universal applicability of a treaty provision and insistence that certain domestic particularities be taken into consideration. Hence, Universal Rights Groups characterises reservations as 'an invaluable barometer of the universality of human rights'.¹³⁵

The Maputo Protocol and Children's Charter lack specific provisions on reservations, which are consequently governed by the Vienna Convention. Echoing the Vienna Convention, article 28(2) of CEDAW provides that '[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted'. Observing these conditions, Mali might have placed reservations on some provisions in order to assert socio-culturally based prerogatives.

However, Mali ratified the Maputo Protocol,¹³⁶ CEDAW,¹³⁷ and

131 As above.

132 C Powell 'Introduction: locating culture, identity, and human rights symposium in celebration of the fiftieth anniversary of the Universal Declaration of Human Rights: introduction' (1998) 30 *Columbia Human Rights Law Review* 201 at 217.

133 Vienna Convention, art 2(1)(d); ILC 'Guide on practice on reservations to treaties' (2011) *Yearbook of the International Law Commission* Part 2 1.1(1).

134 It reads: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

135 B Çali & M Montoya 'The march of universality? Religion-based reservations to the core UN treaties and what they tell us about human rights and universality in the 21st century' Universal Rights Group May 2017 <https://www.universal-rights.org/urg-policy-reports/march-universality-religion-based-reservations-core-un-human-rights-treaties-tell-us-human-rights-religion-universality-21st-century/> (accessed 5 July 2019) 13.

136 L Asuagbor 'Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 18 March 2016 <https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed 7 August 2019).

137 UN Women 'Reservations to CEDAW' <https://www.un.org/womenwatch/daw/cedaw/reservations.htm> (accessed 7 August 2019).

Children's Charter¹³⁸ without any reservations. This is interesting in light of the fact that CEDAW, and particularly its article 16 on marriage and the family, has the largest number of reservations based on religion among all the core human rights treaties.¹³⁹ Instead of using reservations to carve out exceptions, Mali employed a cultural relativist argument in its defense at the African Court.

4.2.3 Searching for 'middle ground'

Unfortunately, reservations do not represent a solution to the challenge of establishing the universality of human rights. This debate continued even during anthropologists' 'exile'¹⁴⁰ from it. Issuing what might be taken as a call to action, Ronald Cohen wrote in 1989:¹⁴¹

Given the urgency of such issues, it is at best irrelevant, or worse even mischievous, to assert and defend simplistic polarities of relativism versus universal moral imperatives. What is desperately needed—and anthropology should be central to this quest—is a search for some middle ground.

Although even a cursory description of the key efforts to reconcile universalism and cultural relativism is beyond the scope of this article, it will highlight three of the more pragmatic efforts to go beyond this binary.

Perhaps the most well-known efforts pertaining to Islam and human rights have been undertaken by Abdullahi An-Na'im who begins with a commitment to the universality of human rights within a project seeking to establish their 'cultural legitimacy', particularly in Islamic contexts.¹⁴² According to An-Na'im, once rights are 'in conformity with recognized principles or accepted rules and standards of a given culture',¹⁴³ they will be respected and no longer viewed as foreign impositions.¹⁴⁴ He thus draws on the work of Alison Dundes Renteln who emphasises that moral diversity does not foreclose the possibility of cross-cultural universality and thereby calls for the use of empirical studies to 'validate' human rights.¹⁴⁵ Along the same lines, An-Na'im advocates for a 'cross-cultural approach'¹⁴⁶ in which, guided by 'the universal principle of reciprocity'¹⁴⁷ scholars, human rights

138 African Committee of Experts on the Rights and Welfare of the Child 'Reservations' <https://www.acerwc.africa/reservations/> (accessed 7 August 2019).

139 Çali & Montoya (n 134) 19 & 21. This must be put into context of CEDAW's 'near-universal ratification' (at 18).

140 Goodale (n 125) 487.

141 R Cohen 'Human rights and cultural relativism: the need for a new approach'(1989) 91 *American Anthropologist* 1014 at 1016.

142 AA An-Na'im 'Problems of universal cultural legitimacy for human rights' in An-Na'im *Muslims and global justice* (2011) 65 at 66.

143 An-Na'im (n 142) 69.

144 An-Na'im (n 142) 66.

145 *International human rights: universalism versus relativism* (1990) 88.

146 An-Na'im (n 142) 90.

147 'According to this principle, human rights are those that a person would claim for herself or himself and must therefore be conceded to all other human beings' An-Na'im (n 142) 95.

advocates, and others identify understandings of human rights, specifically focused on inherent human dignity and integrity, within and across particular cultural contexts which then instantiate universality.¹⁴⁸

Under controversial circumstances described by Mark Goodale, the United Nations Educational, Scientific and Cultural Organisation actually sought to undertake such a study in 1947 and 1948 in order to inform the drafting of the Universal Declaration.¹⁴⁹ Although the scale and impact of its survey have since been exaggerated,¹⁵⁰ this effort shared Renteln and An-Na'im's aspiration towards demonstrating the universality of human rights across the globe. Aside from the feasibility of such a large-scale project, one might question, as Goodale does, whether concepts like dignity and values lend themselves well to empirical study.¹⁵¹

Concerned about approaches that simplistically vilify culture for its detrimental impact on African women's human rights, Celestine Nyamu-Musembi and Sylvia Tamale conceptualise culture as a resource that should be mobilised in order to carve out space between universalism and cultural relativism. Nyamu-Musembi challenges the view of culture as a 'fence'¹⁵² blocking gender equality and highlights opportunities to use it as a 'pathway'¹⁵³ towards gender equality by harnessing its inherent dynamism to challenge discriminatory practices and leverage practices that advance women's human rights.¹⁵⁴ Similarly, Tamale urges recognition of the 'emancipatory potential' of culture from a critical human rights perspective.¹⁵⁵ In her view, women's human rights advocates must 'surface the positive, egalitarian aspects of African culture and use it to our advantage'.¹⁵⁶

Based on ethnographic research on gender violence, Sally Engle Merry introduced the idea of 'vernacularization' or translation of international human rights norms and practices in local contexts.¹⁵⁷ Viewing international human rights law itself as a 'cultural system',¹⁵⁸ Merry posits that particularly where gender issues are concerned, women's rights activists often play the role of translators who render

148 As above.

149 Goodale (n 125).

150 See Human Rights Comments and Interpretations; a symposium edited by Unesco, UNESCO (25 July 1948), UNESCO/PHS/3(rev.) (1948); Goodale (n 125) 611-614.

151 Goodale (n 125) 614-615.

152 Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in A An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 126 at 137.

153 n 152, 132.

154 n 152, 144.

155 S Tamale 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 47 at 48 & 65.

156 n 155, 64-65.

157 SE Merry *Human rights and gender violence: translating international law into local justice* (2006).

158 n 157, 16.

international human rights norms into language that is meaningful in the places where they work¹⁵⁹ much in the same way that a language translator renders a foreign or at least unfamiliar language into the vernacular, or local, language. In this way, they form a ‘bridge’¹⁶⁰ between universalism and cultural relativism. However, as she and Peggy Levitt note in a more recent publication, this process carries the risk that the meaning of even core human rights principles may be radically transformed, such that they are no longer recognisable.¹⁶¹

4.2.4 Lessons for Mali from the middle ground theorists

In *APDF and IHRDA*, the respondent state argued that so-called universal human rights norms on the minimum marriage age should not be applied in Mali in part because a different set of social, cultural, and religious values, beliefs, and practices applied which should – and arguably could – not be upended by international human rights law. The main lesson from the middle ground theorists is that one should not preclude the possibility of a reconciliation between the ‘Malian’ values perceived as under attack on the one hand and human rights on the other.

But what are these values? Mali’s cultural relativist argument rejected the universality of human rights and conceptualised culture as ‘a static, homogenous, and bounded entity defined by its specific “traits”’.¹⁶² This conceptualisation is one that anthropologists abandoned long ago ‘in favor of an understanding of culture as historically produced, globally inter-connected and, internally contested and marked with ambiguous boundaries of identity and practice’.¹⁶³ This suggests that there is still a possibility for human rights to have meaning and resonance in the current Malian context.

The middle ground theorists also caution human rights proponents against an uncritical understanding of culture. ‘[H]uman rights zealots’,¹⁶⁴ as Makau Mutua calls them, perpetuate the colonial civilising mission. The main difference is that now certain cultural beliefs and practices must be abandoned in order to embrace an idealised human rights modernity.¹⁶⁵ As Mutua contends, this fits into a ‘savages-victims-saviors (SVS) construction’¹⁶⁶ in which non-

159 Merry (n 157) 216.

160 SE Merry ‘The vernacularization of women’s human rights’ in S Hopgood *et al* (eds) *Human rights futures* (2017) 214.

161 n 160, 236.

162 A-BS Preis ‘Human rights as cultural practice: an anthropological critique’ (1996) 18 *Human Rights Quarterly* 286 at 289.

163 SE Merry ‘Changing rights, changing culture’ in JK Cowan *et al* (eds) *Culture and rights: anthropological perspectives* (2001) 31 at 41.

164 M Mutua ‘Savages, victims, and saviors: the metaphor of human rights’ (2001) 42 *Harvard International Law Journal* 201 at 218.

165 See Merry (n 157) 13; JL Comaroff & J Comaroff *Of revelation and revolution: Volume 2: the dialectics of modernity on a South African frontier* (1997).

166 Mutua (n 164) 201.

Western peoples are depicted as victims living in savage contexts and in need of Western saviours. The perspective must also be criticised

because it adopts an evolutionary understanding of culture which anthropologists have also abandoned.¹⁶⁷ Taken to its extreme, it could be viewed as cultural nihilism¹⁶⁸ and thus engenders strong opposition like the fear of loss of Malian and Islamic culture and identity, however undefined, expressed by opponents of the 2009 Bill. One might also question whether opponents were also rejecting the SVS construction.

However, it would be disingenuous to claim that most Malians simply had outdated understandings of culture. The fact that particular understandings of culture were shared by so many across the country or, at a minimum, strategically mobilised to support or defeat the bill, merits further study. The anthropologist's task, then is to contextualize these understandings, thereby not simply studying "culture" but studying more closely, the cultural production of the concept of "culture" within various social arenas.¹⁶⁹

The African Court appropriately declined to wade into the debate over universality versus cultural relativism, instead simply reminding Mali of its obligations to use a range of measures to promote gender equality and children's well-being. Nevertheless, scholars and activists should take the Court's relative silence as an invitation for further research. This research should continue to grapple with the debate over universality and cultural relativism not only from a theoretical perspective, but by undertaking ethnographic research in places like Mali to better understand this tension and how or even whether it can be overcome. Although many may have a vision of human rights as 'the last utopia',¹⁷⁰ such research must still remain critical of human rights as a project not only because of its origins, still uncertain claims of universality, and tendency towards the SVS construction,¹⁷¹ but also to avoid foreclosing the possibility of 'more promising mass-based movements for social justice'.¹⁷²

5 CONCLUSION

APDF and IHRDA is an important case that not only concerns women's human rights, but addressed what are generally perceived as sensitive issues regarding marriage and the family. By holding that Mali's 2011 Family Code violated human rights law, the African Court promoted gender equality within the family and beyond. Although the Court was largely silent regarding Mali's *force majeure* argument and cultural relativism claims, these silences still have potential to strengthen women's recourse for human rights violations in Africa because they implicitly rejected the notion that violent opposition to human rights

167 Merry (n 157) 13.

168 BK Kombo 'The policing of intimate partnerships in Yaoundé, Cameroon' unpublished PhD dissertation, Yale University, 2010 194.

169 Kombo (n 168) 95-96.

170 S Moyn *The last utopia: human rights in history* (2012).

171 Mutua (n 164) 201.

172 S Hopgood *et al* 'Introduction: human rights past, present, and future' in S Hopgood *et al* (n 160) 22.

norms or seemingly divergent socio-cultural realities justify derogation from human rights.

Perhaps the silences simultaneously serve as a marker of the possibilities and limits of human rights adjudication. Situating the case in its socio-cultural and historical context brings to light the complex dynamics at play. Such dynamics help explain why Mali advanced its *force majeure* and cultural relativist arguments. Taken collectively, the diverse sources that have informed this article demonstrate that the Family Code debate in Mali was not just a confrontation between 'Islamists' and women's rights advocates, but much more complex contestation over the legitimacy of the significantly donor-dependent Malian secular state, democratic participation in the reform process, the role of religion and culture in regulating the family, and various understandings of culture and social change all enmeshed with questions about women's human rights. Thus, the article contends that the silences also invite further interdisciplinary research. In the context of current instability in Mali, the future of the Family Code remains unsure. Nevertheless, it is clear that a positive future will require more dialogue on the meanings of culture and human rights in order to chart pathways towards gender equality.